UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., a Missouri non-profit entity, and STEPHEN K. HOUSE, natural person, Plaintiffs, v. MARK DUNASKI, KEN URQUHART, CHRISTOPHER NORTON, JAMES ULLMER, DOUG THOOFT and JOHN DOES 1, Personally, Individually, and in their Official Capacities, Defendants.	Civil File No. 09-cv-1116 (DWF/RLE) **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER TO SHOW CAUSE** **ORAL ARGUMENT REQUESTED**

PRELIMINARY STATEMENT

Plaintiffs' Motion for an Order to Show Cause is necessitated by the Defendants' adoption and/or use of an out-of-service criteria ("OOSC") recently promulgated by the Commercial Vehicle Safety Alliance ("CVSA") which is in direct contravention of the Fourth Amendment to the U.S. Constitution, as well as this Court's September 21, 2011 declaratory judgment and injunctive order ("Final Order"). This Court's Final Order mandates that: "a driver will not be ordered out of service for fatigue or illness ***unless there is probable cause*** to believe that the driver, due to fatigue or illness, is unsafe to drive because there is an imminent risk to public safety." *See* Doc. 229; *reported at OOIDA v. Dunaski*, 812 F.Supp.2d 994, 997 (D. Minn 2011) (emphasis added). Effective April 1, 2012, the CVSA amended its OOSC to mandate the issuance of an out-of service

order – not on a determination of "*probable cause*" – but upon the basis of "*reasonable articulable suspicion.*" The recently amended version of CVSA's OOSC for fatigue provides:

> **FATIGUE**
>
> When so fatigued that the driver of a commercial vehicle should not continue the trip *based on reasonable articulable suspicion* (392.3). Declare the driver out-of-service until no longer fatigued.

See Declaration of Douglas Morris at Exhibit 3 (hereinafter "Morris Declaration") (emphasis added).

By statute, Minnesota has "incorporated" CVSA's OOSC, by reference into state law. Doc. No. 196, *citing* M.S.A. § 221.605, subd. 3. Defendants' "General Order No. 10-25-002" requires that "out-of-service orders must be issued consistent with the North American Standard Out-of-Service Criteria as developed by the Federal Motor Carrier Safety Administration (FMCSA) in conjunction with the Commercial Vehicle Safety Alliance (CVSA)." *See* Declaration of Paul D. Cullen, Jr. at Exhibit A (hereinafter "Cullen Jr. Declaration"). The Defendants are obliged to follow that General Order pursuant to the Court's Final Order (Doc. No. 229). For these reasons, there currently is an inherent and irreconcilable conflict between the Defendants' statutory obligations, and their obligations to comply with the Court's Final Order. In addition, the State of Minnesota has entered into a formal Memorandum of Understanding ("MOU") with CVSA pursuant to which Defendants are contractually obliged to implement OOSC promulgated by CVSA. *See* Cullen, Jr. Declaration, Exhibit B at STATE011505 "Statement of Uniformity and Reciprocity." The Defendants' adoption or use of the

CVSA's April 1, 2012, criteria contravenes this Court's Final Order awarding injunctive relief in this proceeding as well as the Fourth Amendment. Further, the record is abundantly clear that CVSA is a person "in active concert or participation with" Defendants in this proceeding. It is, therefore, bound by the terms of the injunction issued by the Court pursuant to Fed. R. Civ. P. 65 (d)(2). This Court should issue an order to Defendants and to CVSA requiring them to appear and show cause why they should not be held in contempt for violating this Court's Final Order in this proceeding.

BACKGROUND

The Court set forth the background of this case in its January 28, 2011, Findings of Fact, Conclusions of Law, Order and Memorandum (Doc. No. 196), *reported at OOIDA v. Dunaski*, 763 F. Supp. 2d 1068; and in its September 21, 2011 Final Order for Declaratory Relief, Injunction, and Entry of Judgment (Doc. No. 229), *reported at OOIDA v. Dunaski,* 812 F. Supp. 2d 994. Plaintiffs submit the following summary of the Court's findings as relevant to their motion.

A. Nature of the Case

Plaintiffs Stephen K. House, and the Owner Operator Independent Drivers Association, Inc. ("OOIDA"), acting in a representative capacity, brought this action under 42 U.S.C. § 1983 against the Defendants, who are officers and officials of the Minnesota State Patrol ("MSP"), alleging that the MSP's practices in placing House, and other commercial truckers, out-of-service for operating their equipment while "fatigued," violated the Fourth Amendment.

Following a full trial to the Court on the merits, this Court concluded that the Defendants had violated House's Fourth Amendment rights in the following ways. First, the Court found that although Defendants were authorized to temporarily detain House on May 10, 2008, for a routine North American Standard Level III inspection ("NAST"), their subsequent investigation and questioning tactics were improper. *Dunaski*, 763 F. Supp. 2d at 1079. Such questioning covered various topics listed on a "Fatigue Inspection Checklist" routinely used by the MSP, and included, *inter alia*, what House's neck size was; whether he had Playboy magazines in his truck; how often he went to the restroom at night; whether he had a cell phone; and whether he slept with one or two eyes open. *Id*. at 1076. The Court found that in doing so, Defendants continued the detention of House longer than reasonably required or related to the circumstances that justified his detention for the NAST inspection. *Id*. at 1079. The Court concluded that Defendants did not have any reasonable articulable suspicion that House was impaired, and the continued duration of the detention, as well as the broad scope of questions by the Defendants, constituted a seizure in violation of his Fourth Amendment right against an unreasonable seizure. *Id*.

In its Final Order dated September 21, 2011, awarding declaratory judgment and injunctive relief, the Court ruled that the Defendants were to comply with the following procedures during inspections:

> • First, during a NAST inspection, Troopers and CVIs are to observe drivers for signs of impairment due to illness, fatigue, or other causes, but they ***cannot expand*** the driver portion of the inspection to determine impairment unless they have a ***reasonable articulable suspicion*** that the

driver may be impaired.

- Second, the questions used to determine impairment must be reasonably related to whether the driver can safely operate the vehicle at the time. Untruthful or misleading statements to the driver are no longer permitted. Drivers are to be told the purpose of the questions if they inquire, and they are not required to answer questions.

- Third, a driver ***will not be ordered out of service*** for fatigue or illness unless there is ***probable cause*** to believe that the driver, due to fatigue or illness, is unsafe to drive because there is an ***imminent risk to public safety***. When the driver is placed out of service, he is also to be given a citation.

- Fourth, the Fatigue Inspection Checklist is no longer to be used to record observations during a driver inspection. Instead, documentation must be specific enough to show that the requirements in the General Orders have been met.

Dunaski, 812 F. Supp. 2d at 997. The Order specified that the Court retained jurisdiction for two years. *Id*. at 998.

B. Relevant Statutory and Regulatory Background

The Court concluded that Minnesota State Troopers have authority to enforce the FMCSRs that relate to interstate motor carriers and drivers as set forth in Minn.Stat. § 221.605, subd. 1, and referred to in Minn.Stat. § 169.025, which includes the issuance of citations and out-of-service orders ("OOS Orders") pursuant to Minn.Stat. § 221.605, subds. 1 and 2, and the North American Uniform Out–of–Service Criteria ("OOSC") referred to in Minn.Stat. § 221.605, subd. 3. *See* Minn.Stat. § 221.605, subds. 2 and 3; Minn.Stat. § 299D.03, subd. 1(b)(13). *Dunaski,* 763 F. Supp. 2d at 1072, 1080.

The CVSA is an organization comprised of local, state, provincial, territorial, and federal motor vehicle safety officials and industry representatives from the United States,

Canada, and Mexico. *Id*. at 1072-73. The CVSA has developed OOSC used in connection with the issuance of OOS Orders. *Id.* All states participating in the Federal Motor Carrier Safety Administrations (FMCSA's) Motor Carrier Safety Assistance Program ("MCSAP") (including Minnesota) have agreed that their inspectors will use the OOSC to carry out their safety enforcement functions specifically with respect to the issuance of OOS Orders. *Id*. *See also* Cullen, Jr. Declaration at Exhibit B (MOU and CVSA Bylaws).

Minnesota Statute sections 299D.03 and 299D.06 (Supp.2009) clarify the Minnesota State Patrol's authority to issue OOS Orders as set forth in the OOSC for violations of the FMCSRs. *Id.* at 1073. Specifically, the Minnesota State Patrol enforces 49 C.F.R. § 392.3 with respect to interstate commercial motor vehicle drivers based on the OOSC and applicable statutory authority as in Minn.Stat. § 221.605, Minn.Stat. § 299D.06, Minn.Stat. § 299.03, and other applicable federal and statutory laws, rules, and regulations. *Id*. CVSA's OOSC were adopted into Minnesota law by Minn.Stat. § 221.605, subd. 3 (1988). *Id*. That statute provides:

> **Subd. 3. Out-of-service criteria adopted by reference.** The North American Uniform Driver, Vehicle, and Hazardous Materials Out-Of-Service Criteria developed and adopted by the Federal Highway Administration and the Commercial Vehicle Safety Alliance are adopted in Minnesota.

The OOSC are developed by the CVSA every year. *Dunaski,* 763 F. Supp. 2d at 1072-73. In 2008, the OOSC applicable to Mr. House provided that drivers who were ill or fatigued shall be put out of service, stating simply as follows:

5. **SICKNESS OR FATIGUE**

When so impaired that the driver should not continue the trip. (392.3) Place driver out-of-service until no longer impaired.

See Morris Declaration, Exhibit 4. On April 1, 2012, the CVSA amended its Out-of-Service Criteria to allow the issuance of an out-of service order based upon a determination of "*reasonable articulable suspicion*," as follows:

FATIGUE

When so fatigued that the driver of a commercial vehicle should not continue the trip *based on reasonable articulable suspicion* (392.3). Declare the driver out-of-service until no longer fatigued.

See Morris Declaration, Exhibit 3 (emphasis added). At the time House was placed out-of service, the Minnesota State Patrol determined that the out of service period should be ten hours. *Dunaski*, 763 F. Supp. 2d 1068 at 1073-74. Effective April 1, 2010, the CVSA's OOSC required fatigued drivers to be put out of service for ten hours. *Id.* However, the recently amended OOSC ***deleted*** the ten hour provision, and reverted back to the prior language providing that the driver is to be placed "out-of-service until no longer fatigued." *See* Morris Declaration, Exhibit 3.

C. CVSA'S Memorandum of Understanding with Defendants

The MSP's "General Order No. 10-25-002" requires that "out-of-service orders must be issued consistent with the North American Standard Out-of-Service Criteria as developed by the Federal Motor Carrier Safety Administration (FMCSA) in conjunction with the Commercial Vehicle Safety Alliance (CVSA)." *See* Cullen, Jr. Declaration at Exhibit A (Doc 229-3).

On January 1, 2009, Ken Urquhart (former Captain, and currently Major in the MSP), executed a "Memorandum of Understanding" with the CVSA specifying, *inter alia,* as follows:

> In order to advance uniformity in the inspection and enforcement of commercial vehicle motor vehicle (sic) regulation, parties to this Memorandum of Understanding agree to adopt the following:
>
> - The CVSA inspection procedures decal application policies *and out-of-service criteria;*

See Cullen, Jr. Declaration at Exhibit B.

The CVSA currently identifies MSP Captain Tim Rogotzke as its "Lead Agency Contact[]" for the State of Minnesota. *See* Morris Declaration at Exhibit 5.

D. CVSA Had Knowledge of the Final Order When it Amended the OOSC for Fatigue

The Declaration of Douglas Morris, OOIDA's Director of Safety and Security Operations, establishes that CVSA's action in amending its OOSC for fatigue was in direct response to this Court's Final Order of September 21, 2011, copies of which were in general circulation at the CVSA meetings when the amendment was considered. Thus, CVSA had knowledge of this Court's Final Order, and was acting in concert or participation with Defendants, when it adopted the amendment to the OOSC for fatigue that became effective on April 1, 2012.

ARGUMENT

I. CVSA's Amended Fatigue Enforcement Criteria Contravene the Fourth Amendment and this Court's Final Order

The MSP's adoption of the CVSA's amended OOSC is in derogation of the cornerstone Fourth Amendment standards carefully laid out in this Court's Final Order, as follows:

> First – "during a NAST inspection, Troopers and CVIs are to observe drivers for signs of impairment due to illness, fatigue, or other causes, but ***they cannot expand the driver portion of the inspection to determine impairment unless they have a reasonable articulable suspicion*** that the driver may be impaired.
>
> Second – "***a driver will not be ordered out of service for fatigue or illness unless there is probable cause*** to believe that the driver, due to fatigue or illness, is unsafe to drive because there is an imminent risk to public safety. When the driver is placed out of service, he is also to be given a citation."

Dunaski, 812 F. Supp. 2d 994, 997. The April 1, 2012 CVSA criteria confuse these very different standards by allowing the MSP to place a driver out of service merely upon a finding of articulable suspicion, instead of the far more exacting standard of probable cause. The Courts have carefully differentiated the standards for: (1) conducting a regulatory inspection; (2) extending a regulatory inspection based upon reasonable articulable suspicion that a crime has been committed or may be taking place, and (3) making an arrest based upon probable cause that a suspect has committed a crime.

A. Standards for Regulatory Inspections

As relevant here, even though the MSP may be authorized to detain a driver briefly for a routine NAST Level 3 inspection, it may not conduct an investigation

beyond that which was "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). "The scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer,* 460 U.S. 491, 500 (1983). This means that the Fourth Amendment intrusion "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id.* An investigative detention must remain within the scope of the traffic stop to be reasonable. *United States v. Barahona,* 990 F.2d 412, 416 (8th Cir.1993).

B. Standards for Expanded Detentions Based on Articulable Suspicion

Once a permissible regulatory inspection has been completed, a law enforcement officer may no longer detain the driver. *United States v. Fisher,* 364 F.3d 970, 973 (8th Cir. 2004) ("An investigative stop must be limited in scope and manner to satisfy the requirements of *Terry.*"). The detention can only be extended upon the basis of reasonable articulable suspicion. "Reasonable suspicion requires 'that the [officers'] suspicion be based upon particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime has been committed.'" *United States v. Smith*, 648 F. 3d 654, 658 (8th Cir. 2011). This requires that the officer's suspicion be based upon "'particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant [ ] suspicion that a crime [is] being committed.'" *United States v. Beck,* 140 F.3d 1129, 1136 (8th Cir. 1998). *See also United States v. Jones*, 269 F. 3d 919, 929 (8th Cir. 2001)("Trooper DeWitt's detention of Jones past the point necessary to complete his traffic stop investigation exceeded the scope of a lawfully initiated traffic stop. The extended investigative

detention was unsupported by a reasonable, articulable suspicion that criminal activity was afoot and therefore violated Jones's Fourth Amendment right to be free from unreasonable seizure.").

In applying these principles to the facts presented in this case, the Court found that the Defendants' continued detention of House was impermissible:

> Although Defendants were authorized to temporarily detain House on May 10, 2008, for a routine Level III Inspection, Defendants were not entitled to conduct the scope of investigation and questioning that they did. In doing so, Defendants continued the detention of House beyond what was reasonably related to the circumstances that justified House's detention at the beginning of the weigh station stop. Defendants did not have a reasonable articulable suspicion that House was impaired ….

Dunaski, 763 F. Supp. 2d 1068 at 1079.

C. Standards for Arrests Based Upon Probable Cause

Where an officer exceeds the permissible scope of *Terry,* the investigatory detention is transformed into an arrest. *Peterson v. City of Plymouth, Minn.,* 945 F.2d 1416, 1419 (8th Cir.1991). A *Terry* stop that becomes an arrest must be supported by probable cause. *Smith,* 648 F.3d 654, 659. "Probable cause to make a warrantless arrest exists when police officers have trustworthy information that would lead a prudent person to believe that the suspect has committed a crime." *United States v. Sherrill,* 27 F.3d 344, 347 (8th Cir.1994). This Court's September 21, 2011 Order mandated that:

> [A] driver will not be ordered out of service for fatigue or illness ***unless there is probable cause*** to believe that the driver, due to fatigue or illness, ***is unsafe to drive because there is an imminent risk to public safety.***

Dunaski, 812 F. Supp. 2d 994 at 997.

D. The Amended CVSA Criteria are Unconstitutional

Based on the forgoing authorities, the amended CVSA standard allowing law enforcement officials to place drivers out-of-service on the basis of "reasonable articulable suspicion" is unconstitutional on its face. The reasonable suspicion standard is applicable only to the ***expansion*** of a NAST inspection – ***not to the issuance of an out-of-service order.*** As this Court's September 21, 2011 Order clearly specifies, officers "***cannot expand*** the driver portion of the inspection to determine impairment unless they have a reasonable articulable suspicion that the driver may be impaired." *Id*., 812 F. Supp. 2d at 997. In contrast, the Court's Order further specifies: "a driver will not be ordered out of service for fatigue or illness ***unless there is probable cause*** to believe that the driver, due to fatigue or illness, is unsafe to drive because there is an imminent risk to public safety." *Id*. For these reasons, the MSP's adoption or use of the CVSA's amended fatigue criteria violates the Fourth Amendment, as well as this Court's Final Order.

CVSA's OOSC were adopted into Minnesota law by Minn.Stat. § 221.605, subd. 3 (1988). *Dunaski,* 763 F. Supp. 2d at 1073. That statute provides:

> **Subd. 3. Out-of-service criteria adopted by reference.** The North American Uniform Driver, Vehicle, and Hazardous Materials Out-Of-Service Criteria developed and adopted by the Federal Highway Administration and the Commercial Vehicle Safety Alliance are adopted in Minnesota.

Further, the MSP's "General Order No. 10-25-002" requires that "out-of-service orders must be issued consistent with the North American Standard Out-of-Service Criteria as developed by the Federal Motor Carrier Safety Administration (FMCSA) in

conjunction with the Commercial Vehicle Safety Alliance (CVSA)." *See* Cullen Jr. Declaration at Exhibit A (Doc. 229-3). In the "Memorandum of Understanding" between Minnesota and the CVSA, it is further agreed that:

> In order to advance uniformity in the inspection and enforcement of commercial vehicle motor vehicle (sic) regulation, parties to this Memorandum of Understanding agree to adopt the following:
>
> - The CVSA inspection procedures decal application policies *and out-of-service criteria;*

See Cullen Jr. Declaration at Exhibit B. While these statutes and policies may authorize the general adoption and use of constitutional CVSA criteria - they ***are not effective to authorize the use of unconstitutional*** criteria such as the fatigue criteria presented here. Accordingly, the MSP should be enjoined from using those unconstitutional criteria in its enforcement activities.

II. CVSA Is Bound by this Court's Final Order

A. The Court is Authorized to Order Injunctive Relief Against CVSA Pursuant to Fed. R. Civ. P. 65(d)

This Court has plenary jurisdiction and authority to order injunctive relief against CVSA pursuant to Fed.R.Civ.P. 65(d) which specifies that an injunction is binding not only on the parties, but also on "those persons in active concert or participation with them who receive actual notice of the order."[1] *Independent Federation of Flight Attendants v.*

[1] Fed.R.Civ.P. 65(d) provides for the form and scope of injunctive relief as follows:
> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, ***and upon those persons in active concert or participation with them who***

Cooper, 134 F.3d 917, 920 (8th Cir.1998). Accordingly the Eighth Circuit has held that "[u]nder Rule 65(d), ***a nonparty with actual notice may be held in contempt*** where the nonparty aids or abets a named party in concerted violation of a court order." *Id.* (emphasis added). The Eighth Circuit explained, "the 'essence' of this rule 'is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.'" *Id.*, *citing Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). *Accord Chicago Truck Drivers, Helpers and Warehouse Workers v. Brotherhood Labor Leasing,* 230 F. Supp. 2d 963, 969 (E.D. Mo. 2002); *Titan Partners LLC v. USA Tax and Ins. Services, Inc.,* 2011 WL 940723 *2 (E.D. Mo. March 16, 2011).

In *Bonus of America, Inc. v. Angel Falls Services, L.L.C*., 2010 WL 2734218 *6 (D. Minn. July 6, 2010)(Doty, J.), the court ruled:

> A preliminary injunction also binds persons who receive actual notice of the order through personal service ***or otherwise*** and who are "in active concert or participation with" the parties and their "officers, agents, servants, employees, and attorneys." Fed.R.Civ.P. 65(d)(2). Rule 65(d)(2) prevents enjoined parties from "nullify[ing] a decree by carrying out prohibited acts through aiders and abettors." *Thompson v. Freeman,* 648 F. 2d 1144, 1147 (8th Cir. 1981) (citation omitted). (emphasis added.)

It is axiomatic that federal courts have the inherent authority to enforce their injunctions. *Sisneros v. Nix*, 884 F. Supp. 1313, 1350 (S.D. Iowa 1995), *citing Parker v. Ryan,* 960 F.2d 543, 546 (5th Cir.1992); *Waffenschmidt v. MacKay,* 763 F.2d 711, 716 (5th Cir.1985), *cert. denied,* 474 U.S. 1056 (1986); *Pasco Int'l (London) Ltd. v.*

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receive actual notice of the order by personal service or otherwise.

Stenograph Corp., 637 F.2d 496, 501 (7th Cir. 1980) (non-parties are potentially subject to contempt for any violations of an injunction of which they have actual notice). An injunction "not only binds the ... defendant but also those identified with [the defendant] in interest, in "privity" with [the defendant], represented by [the defendant] or subject to [the defendant's] control." *Sisneros,* 884 F. Supp. at 1350-51, *quoting Parker,* 960 F.2d at 546 (quoting *Waffenschmidt,* 763 F.2d at 717, in turn quoting *Regal Knitwear,* 324 U.S. at 14). Thus, the federal courts have jurisdiction over a non-party to enforce the court's injunction if: (1) the non-party knew about the injunction against the defendant, and (2) acted as the defendant's agent or aided and abetted the defendant for the purpose of advancing his interest. *Sisneros,* 884 F. Supp. at 1351, *citing Parker,* 960 F.2d at 546; *United States v. Paccione,* 964 F.2d 1269, 1274 (2d Cir.1992).

The Court's authority is extensive, including the power to hold non-parties in contempt:

> We agree that a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well established law." [citation omitted]. A court may bind non-parties to the terms of an injunction or restraining order to preserve its ability to render a judgment in a case over which it has jurisdiction. *See Vuitton et Fils S.A. v. Carousel Handbags,* 592 F.2d 126, 129 n. 6 (2d Cir.1979).

Paccione, 964 F.2d at 1274–75. *See also Pasco Int'l (London) Ltd.,* 637 F.2d at 501(non-parties are potentially subject to contempt for any violations of an injunction of which they have actual notice).

The court's power to enforce an injunction against non-parties under Fed.R.Civ.P. 65(d) extends to those who act "in active concert or participation" with defendants even

though the non-parties "were independently motivated." *Sisneros,* 884 F. Supp. at 1351, *quoting New York State Nat'l Organization for Women v. Terry,* 961 F.2d 390, 397 (2d Cir.1992), *vacated on other grounds,* 507 U.S. 901(1993). "Federal courts have routinely relied on Rule 65(d) in civil rights cases to sanction non-parties for violation of an injunction." *Sisneros,* 884 F. Supp. at 1351, *citing Roe v. Operation Rescue,* 919 F.2d 857, 872 (3d Cir.1990) (non-party found in contempt for knowingly violating TRO enjoining parties from interfering with abortion clinic activities); *United States v. Hall,* 472 F.2d 261 (5th Cir.1972) (non-parties sanctioned for interference with school desegregation order).

B. CVSA Acts In Active Concert or Participation with Defendants

As demonstrated above, CVSA acts in active concert or participation with Defendants by virtue of: (1) Minnesota statutory provisions: (2) MSP formal policies under its General Order; and, (3) the CVSA/MSP MOU agreement, as follows:

> (1) Minnesota Statutes require the MSP to follow the CVSA's "North American Uniform Out of Service Criteria" ("NAST"), *see* Minn.Stat. § 221.605, subd. 3 (1988); see also Minn. Stat. §§299 D.03 and 299 D.061;
>
> (2) the MSP's "General Order No. 10-25-002" requires that "out-of-service orders must be issued consistent with the North American Standard Out-of-Service Criteria." The Court's current injunction requires the Defendants to adhere to the General Order; and,
>
> (3) the MOU between CVSA and the MSP pursuant to which the CVSA required the MSP to "adopt … the CVSA inspection procedures decal application policies *and out-of-service criteria* as a condition of its membership."

C. CVSA Acted With Knowledge of this Court's Final Order

The Declaration of Douglas Morris filed in support of this motion establishes

beyond doubt that CVSA acted with full knowledge of this Court's Final Order when it amended the OOSC governing fatigue. Mr. Morris is OOIDA's Director of Safety and Security Operations. *Id*. at ¶ 1. Included within Mr. Morris' numerous duties at OOIDA is representation of the association at meetings of the CVSA.[2] *Id.* Mr. Morris's accompanying Declaration provides a remarkable picture revealing that CVSA knew about the Court's rulings, but nonetheless proceeded in the promulgation of criteria which violate the Fourth Amendment and the Court's Final Order. Mr. Morris' Declaration recounts the following chronology as relevant to this motion.

- From April 12 to 14**,** 2011, Mr. Morris attended the national meeting of CVSA in Chicago, Illinois. *Id*. at ¶ 3.

- This Court's January 28, 2011 ruling involving OOIDA and Stephen House was a topic of conversation among the attendees at this meeting. *Id*. at ¶ 4. Numerous CVSA officials, including CVSA President Steve Dowling, and Executive Director Steve Keppler, each had a copy of this Court's January 28, 2011 Order, and each demonstrated an awareness of its contents. *Id.*

- For this meeting, OOIDA submitted three "Submission of Issue/Request for Action" items to CVSA in regards to OOSC for illness or fatigue violations of 49 C.F.R. § 392.3. *Id*. at ¶ 5. OOIDA's requests were essentially that CVSA remove the requirement to place drivers out of service for illness or fatigue until CVSA was prepared to establish a definition of fatigue and indentify clinically sound methods of detection and measurement of illness and fatigue by officers in the field. *Id.* Those are attached to the Morris Declaration as Exhibit 1.

- OOIDA's proposals were brought forward at the Driver/Traffic Committee. *Id*. at ¶ 6. After the review of OOIDA's proposals by the committee members, a motion was made by the Vice Chair that

[2] Prior to joining OOIDA's staff, Mr. Morris was employed by the Maryland State Police for 26 years. *Id.* at ¶ 2.

CVSA retain legal advice on the matter as the Requests for Action appeared to be "lawyered up." *Id.* That motion was passed. *Id.*

- The Driver/Traffic Committee assembled on another day during the Chicago conference to discuss OOIDA's requests for action further. *Id*. at ¶ 7. During that meeting, the law enforcement members agreed to form an ad-hoc committee to study these issues further. *Id*.

- From September 26-28, shortly after this Court issued its September 21, 2011, Final Order, Mr. Morris attended another CVSA national conference in Austin, Texas. *Id*. at ¶ 8. Many of the members of the CVSA had received a copy of the Court's Order, and Mr. Morris observed copies of the order being distributed at the Executive Committee meeting. *Id*. A copy of the Court's Order was also given to the CVSA presiding President Steve Dowling. *Id.* Mr. Morris also observed that copies had been given to members of the executive board. *Id.*

- OOIDA's Requests for Action were raised at the September Driver/Traffic Committee meeting meeting, and the attendees were informed that the Executive Committee would be handling the issue and OOIDA's requests were tabled. *Id*. at ¶ 9.

- At the Executive Committee meeting during that same September 2011 Conference, Mr. Morris and other OOIDA employees were permitted to attend, but were not invited to participate in the discussion of OOIDA's requests. *Id*. at ¶ 10. OOIDA has no vote on CVSA's executive committee. *Id.* The Executive Committee took no vote on OOIDA's Requests for Action. *Id*. A vote was taken on another proposed change to the language of the section of the Out-of-Service Criteria for illness and fatigue, but that proposal failed. *Id.* OOIDA was not given a copy of that proposal.

- At no time during these 2011 meetings, nor at any other time, was it apparent to Douglas Morris that CVSA had sought the advice of legal counsel on the issue of its out-of-service criteria for ill or fatigued drivers. *Id*. at ¶ 11.

- In mid-December 2011, Mr. Morris learned from another CVSA member that CVSA had mailed out a ballot and taken a vote on proposed changes to the Out-of-Service Criteria for violations of 49

C.F.R. § 392.3 for illness or fatigue. *Id.* at ¶ 12. OOIDA is not a voting member of CVSA and, therefore, did not receive a ballot to vote on changes to the OOSC. *Id*. The only parties who have a vote on changes to the CVSA OOSC are members from state motor carrier safety enforcement organizations**.** ***Id.***

- This CVSA ballot proposed that an enforcement official have reasonable articulable suspicion before putting a driver out-of-service for a violation of § 392.3. *Id*. at ¶ 13. Attached as Exhibit 2 to the Morris Declaration is a copy of the ballot provision related to fatigue and the cover memorandum to the entire ballot.

- The cover memorandum to the ballot is dated November 10, 2011. *Id*. at ¶ 14. That memorandum instructs voters to return their ballot to CVSA by November 25, 2011. *Id*. On February 15, 2012, Mr. Morris received an email from Collin Mooney, Executive Deputy Director at CVSA, informing him of the impending changes to the OOSC. *Id*. This was the first time he received any official communication from a CVSA official on such a change to the OOSC. *Id*.

D. <u>This Court Has Personal Jurisdiction Over CVSA</u>

As an initial matter, CVSA is subject to personal jurisdiction in this Court on the basis of its integral cooperation with the MSP in promulgating its OOSC in Minnesota. *See generally K-Tel International, Inc. v. Tristar Products, Inc.*, 169 F. Supp. 2d 1033, 1039 (D. Minn. 2001)(Frank, J.)(discussing due process criteria for exercise of personal jurisdiction). Moreover, the Court's jurisdiction over CVSA is plainly established by CVSA's promulgation of criteria which contravene this Court's Final Order. *Waffenschmidt,* 763 F.2d 711, 714 ("[n]onparties who reside outside the territorial jurisdiction of a district court may be subject to that court's [personal] jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order. This is so despite the absence of other contacts with the forum.").

Finally, Plaintiffs have personally served CVSA with notice of their motion, the motion and supporting memorandum, and proposed order as follows. First, Plaintiffs have served CVSA's Registered Agent in the District of Columbia, Richard P. Shweitzer, Esq., who agreed to accept service for CVSA, by United States Postal Service, Certified Mail, Return Receipt Requested. *See* Cullen Jr. Declaration at ¶¶ 3-4, Exhibits C-D. Second, Plaintiffs have served CVSA, by United States Postal Service, Certified Mail, Return Receipt Requested, at its headquarters, located at 6303 Ivy Lane, Suite 310, Greenbelt, Maryland 20770-6319. *Id.*

E. Standard for Contempt

The Court's power to find contempt of its orders is a "necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *Gompers v. Buck's Stove and Range Co.,* 271 U.S. 418, 450 (1911). "One of the overarching goals of a court's contempt power is to ensure that litigants do not anoint themselves with the power to adjudge the validity of orders to which they are subject." *Chicago Truck Drivers v. Brotherhood Labor Leasing,* 207 F.3d 500, 504 (8th Cir. 2000), citing *United States v. United Mine Workers,* 330 U.S. 258, 290 n. 56 (1947). Civil contempt may be employed to coerce compliance with a court order or to compensate the complainant for losses sustained. *Chicago Truck Drivers,* 207 F.3d at 505; *United States v. Open Access Technology Intern., Inc.,* 527 F. Supp. 2d 910, 912 (D. Minn. 2007). "Thus, 'the court has broad discretion to design a remedy that will bring about compliance.'" *Id., citing Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys.,* 369 F.3d 645, 657 (2d Cir.2004).

As discussed in detail above, Rule 65(d), Fed. R. Civ. P. provides that an order of injunction binds not only parties to the action, but also "those persons in active concert or participation with them who receive actual notice of the order." *Id.* In a civil contempt proceeding, the moving party must prove, by clear and convincing evidence, that the person allegedly in contempt violated the court's order. *Chicago Truck Drivers,* 207 F.3d at 505; *Open Access Technology Intern., Inc.,* 527 F. Supp. 2d at 912. "However, the moving party does not need to show that the violation of the court's order was willful." *Faegre & Benson, LLP v. Purdy*, 367 F.Supp.2d 1238, 1243 (D.Minn.2005). Once the moving party has met its burden, the burden shifts to the nonmoving party to show inability to comply. *Chicago Truck Drivers,* 207 F.3d at 505. To demonstrate inability to comply, nonmoving parties must establish: "(1) that they were unable to comply, explaining why categorically and in detail, (2) that their inability to comply was not self-induced, and (3) that they made, in good faith all reasonable efforts to comply." *United States v. Santee Sioux Tribe of Neb.,* 254 F.3d 728, 736 (8th Cir.2001); *Open Access Technology Intern., Inc.,* 527 F. Supp. 2d at 912. Plaintiffs have satisfied their burden of establishing the propriety of this Court's issuance of an order to show cause why Defendants and CVSA should not be held in contempt:

- As established by the Declaration of Douglas Morris, CVSA had actual notice of this Court's Final Order.

- CVSA has amended its OOSC to mandate the issuance of an out-of-service order on the basis of "reasonable articulable suspicion," when this Court's Final Order unambiguously enjoins the issuance of an out-of-service order in the absence of "probable cause" to believe that the driver due to illness or fatigue poses an imminent risk to public safety. The standard mandated

by the OOSC criteria is in direct contravention of the Fourth Amendment and this Court's Final Order.

- CVSA has acted in concert with Defendants through the CVSA Memorandum of Understanding by requiring that Defendants agree to adopt the OOSC into State law; and in fact, Defendants have adopted the OOSC into State law.

This Court should issue an order requiring Defendants and CVSA to appear and to demonstrate to the Court "in detail" the measures taken to bring themselves into compliance with the Final Order; or to demonstrate the circumstances which make it impossible, in good faith, for them to comply. *Santee Sioux Tribe of Neb.,* 254 F.3d 728, 736.

By this motion, the Plaintiffs are not seeking ***to punish*** the Defendants or CVSA for contempt. Plaintiffs simply seek the Court's specific instruction to these parties ***to conform*** their actions to the Constitution of the United States and the Court's current order; that the MSP be ordered to disregard the OOSC for fatigue; and that CVSA remove the provisions from its OOSC which are in contravention of the Fourth Amendment and this Court's Final Order.

CONCLUSION

For the foregoing reasons, the Court should issue an Order to Show Cause to Defendants and CVSA requiring them to appear and defend why they should not be held in contempt for violating this Court's Final Order dated September 21, 2011.

Respectfully submitted,

DATE: June 12, 2012

/s/ Daniel E. Cohen

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