

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Owner-Operator Independent Driver
Association, Inc., a Missouri non-profit
entity; and Stephen K. House, a natural
person,

Civil No. 09-1116 (DWF/LIB)

Plaintiffs,

v.

**ORDER FOR DECLARATORY
RELIEF, INJUNCTION, AND
ENTRY OF JUDGMENT**

Mark Dunaski, Ken Urquhart, James Ullmer,
Doug Thooft, Christopher Norton, and John
Doe, all personally, individually, and in their
official capacities,

Defendants.

Albert T. Goins, Sr., Esq., Goins Law Offices, Ltd., and Daniel E. Cohen, Esq., Joyce E. Mayers, Esq., Paul D. Cullen, Jr., Esq., and Paul D. Cullen, Sr., Esq., The Cullen Law Firm, counsel for Plaintiffs.

Marsha Eldot Devine, and Thomas C. Vasaly, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for Defendants.

This matter came before the Court for a trial without a jury on September 13, 14, 15, 16, 20, and 21, 2010. Based upon the presentations of the parties, including the testimony and exhibits that were submitted during the trial, the post-trial submissions, and the entire record before the Court, the Court filed Findings of Fact, Conclusions of Law, Order and Memorandum on January 28, 2011 ("January 28, 2011 Order"). The Court filed Amended Findings of Fact, Conclusions of Law, Order and Memorandum on April 27, 2011 ("April 27, 2011 Order").

In this lawsuit, Plaintiffs Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) and Stephen K. House, a commercial vehicle driver, challenged a fatigue enforcement program initiated by Defendants, who are officers and officials of the Minnesota State Patrol (“MSP”). Plaintiffs alleged six counts against Defendants under 42 U.S.C. § 1983 for violations of the United States Constitution under the Fourteenth Amendment and the Fourth Amendment. Subsequent to the Court filing its April 27, 2011 Order, the parties met with Magistrate Judge Leo I. Brisbois to discuss the remaining issues of prospective injunctive and declaratory relief. While the parties agreed that an order should be entered addressing declaratory relief, an injunction, and entry of judgment, they were unable to agree on the provisions of such an order.

Based on the evidence received at trial, the presentations and submissions of all parties, along with all papers on file and proceedings herein, and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

ORDER

1. The Court’s January 28, 2011 Findings of Fact, Conclusions of Law, Order and Memorandum filed on January 28, 2011 (“January 28, 2011 Order”) (Doc. No. [196]) is hereby incorporated herein and is attached as Exhibit A.

2. The Court’s Amended Findings of Fact, Conclusions of Law, Order and Memorandum filed on April 27, 2011 (“April 27, 2011 Order”) (Doc. No. [216]) is incorporated herein and is attached hereto as Exhibit B.

3. With respect to Count IV of the Second Amended Complaint, entitled Warrantless Search and Seizure, the Court hereby **CONCLUDES AND DECLARES** as follows:

a. On May 19, 2008, when Defendants James Ullmer and Christopher Norton conducted an inspection of Plaintiff Stephen K. House as described in the Court's January 28, 2011 Order, said Defendants did not have a reasonable articulable suspicion that House was too impaired due to fatigue to safely operate his motor vehicle. The continued duration of the detention, as well as the broad scope of questions by Defendants Ullmer and Norton, constituted a seizure in violation of House's Fourth Amendment right against an unreasonable seizure.

b. The MSP's commercial vehicle enforcement program in place on May 10, 2008, with respect to commercial vehicle drivers who were too impaired due to fatigue to safely operate their vehicles did not properly and adequately limit the inspecting officers' discretion.

c. The MSP's current procedures and protocols encompassed in General Orders 10-25-002 (Determination of Commercial Vehicle Impairment Due to Illness and/or Fatigue Related Enforcement), 10-70-020 (Uniform Driver/Vehicle Out of Service); and 10-25-010 (Commercial Vehicle Driver and Equipment Inspections, North American Standard Inspection), copies of which are attached hereto as Exhibits C, D, and E,

respectively, are constitutionally adequate so long as they are followed by properly trained personnel, provided that, consistent with paragraph 57 of the April 27, 2011 Order, as noted above, the training continues to address the limitations and restrictions of CVIs and troopers who conduct NAST inspections when impairment due to illness, fatigue, or other causes is at issue.

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.

Notably, none of these procedures, limitations, or restrictions were in place on May 10, 2008.

4. With respect to Count IV of the Second Amended Complaint, entitled Warrantless Search and Seizure, the Court hereby **ENJOINS** Defendants as follows:

a. Defendants shall not violate the Fourth Amendment rights of Plaintiff Stephen K. House and the members of Plaintiff Owner-Operator Independent Drivers Association, Inc., in the manner described in the Court's January 28, 2011 Order.

b. Defendants shall not rescind or modify so as to reduce the procedures established by General Order 10-25-002, a copy of which is attached hereto as Exhibit C, and shall ensure that the MSP's commercial vehicle inspectors and troopers follow the practices and procedures in said General Order when conducting inspections of commercial vehicle drivers to determine whether they are too impaired due to fatigue to safely operate their commercial vehicles, unless the Court, for good cause shown by Defendants, modifies those requirements established by General Order 10-25-002.

c. Defendants shall ensure that commercial vehicle inspectors and troopers who conduct fatigue inspections are properly and adequately

trained to follow the practices and procedures in General Order 10-25-002 when conducting inspections of commercial vehicle drivers to determine whether they are too impaired due to fatigue to safely operate their commercial motor vehicles. The MSP's October 2010 training program contained constitutionally adequate training materials. (*See the Court's Memorandum below.*)

d. Defendants shall rescind the determination that Plaintiff Stephen K. House was impaired due to fatigue on May 10, 2008, shall rescind the related out-of-service order issued to him on that date, shall correct the entries in the FMCSA's SafetyNet and DataQs systems accordingly, and shall notify House of its actions.

e. The MSP shall rescind all determinations in inspection reports during the period April 1, 2008 to September 30, 2010 that drivers were impaired due to fatigue within the meaning of 49 C.F.R. § 392.2, shall rescind all related out-of-service orders, shall correct the entries in the FMCSA's SafetyNet and DataQs systems accordingly, and shall notify the drivers of its actions, provided, however, that (1) if an out-of-service order is based on a ground in addition to fatigue, the MSP shall rescind only the termination that the driver was fatigued and not the out-of service order and (2) if the driver was criminally convicted for driving while impaired due to

fatigue or was involved in a motor vehicle crash, the MSP shall not rescind any out-of-service order arising from the same matter.

f. The Court shall retain continuing jurisdiction of this matter for a period of two years from the date of this Order.

5. All of Plaintiffs' claims against Defendant Ken Urquhart in his personal, individual, and official capacities, consistent with the Court's April 27, 2011 Order are **DISMISSED WITH PREJUDICE**, as he did not have personal involvement in the matters in Plaintiffs' second amended complaint. (*See* discussion in the Court's September 7, 2010 Memorandum Opinion and Order (Doc. No. [165]) at 19-21.)

6. All of Plaintiffs' claims against the Defendant referred to in Plaintiffs' second amended complaint as John Doe shall be **DISMISSED WITH PREJUDICE** because Plaintiffs did not identify this person.

7. The MSP shall publish this Order, including Exhibits A-E, with General Order 10-25-002 attached: (1) in a conspicuous location and with a conspicuous link on the MSP's website; (2) at all permanent office locations where officers and personnel assigned to the Commercial Vehicle Section of the MSP (District 4700) conduct business on a regular basis; (3) by e-mailing a copy to each employee and new employee who is assigned duties within the Commercial Vehicle Enforcement Section (District 4700) of the MSP; and (4) in conspicuous locations accessible to drivers at each permanent place within the State of Minnesota where North American Standard Level 1, 2, or 3 inspections are conducted.

8. The Plaintiffs are directed to file a bill of costs and a motion for attorney fees, if any, within ninety (90) days of the entry of this Order. In the event that any party pursues an appeal, all briefing on the subject of costs and attorney fees will be deferred pending resolution of the appeal. The parties may file any motions relating to such costs and attorney fees within thirty (30) days after the resolution of all appellate proceedings.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 21, 2011

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

MEMORANDUM

The challenge to the MSP, consistent with the decision of this Court, is to see to it that its General Orders that substantially changed the protocol for the determination of commercial vehicle impairment due to illness and/or fatigue are followed and the steps enforced in the General Order of May 10, 2010, as updated on August 24, 2010, as noted in the findings of fact, above, at paragraph 3 and in paragraph 57 of the Court's April 27, 2011 Order. These are procedures, limitations, and restrictions that were not in place on May 10, 2008.¹ In the Court's view, current procedures as established by these General Orders satisfy constitutional due process requirements. Consequently, Plaintiffs are not entitled to any additional prospective relief in count two because neither the Plaintiffs nor

¹ The General Order makes a significant distinction between a "routine" inspection and an "expanded inspection for impairment."

the members of OOIDA are likely to suffer constitutional injury, given the procedures established since May 10, 2008, provided that that the MSP continues to provide proper training and follow the dictates of their own General Orders.

Unfortunately, as noted at the last hearing in this matter on July 15, 2011, there appear to be misguided attempts to give some type of elementary education in the ascertainment of fatigue. However, that does not mean that the protocol established by the MSP since May 10, 2008, is actionable constitutionally. The training must address the totality of the circumstances, consistent with the restrictions and limitations the General Orders require. Lest we forget, during Plaintiff Stephen K. House's detention back on May 10, 2008, the questions he was asked included, but were not limited to, such subjects as neck size, whether he had Playboy magazines in his truck, how many times he opened his eyes at night when his wife was driving, whether he had a television and books in his sleeper berth, and the adequacy of the size of the sleeper berth. Such inquiries have little to do with the determination of fatigue, except in rare circumstances, and rarely, if ever, will be outcome determinative of the ascertainment of fatigue.²

² The purported training criteria set forth in a PowerPoint slide captioned "Medical Conditions," includes, but is not limited to, snoring, allergies, prescriptions, over-the-counter medications, illness, sleep apnea, CPAP machine, restless leg syndrome, acid reflux, dental pain, sleep walking, and chronic pain conditions. In addition, a PowerPoint slide that is entitled "Sleep Distractions" has under its caption, cellphone, pets in vehicle, TV in sleeper berth, DVD player, computer, and magazines. These inquiries contained in PowerPoint slides, even if not prohibited constitutionally, will rarely, if ever, establish a reasonable suspicion or probable cause, and will be viewed by the commercial truck driver and the public as unprofessional and misguided inquiries that properly trained troopers or CVIs simply would not make.

If the protocol established by the MSP since May 10, 2008, and the four investigative steps established by the General Order are indeed followed, the constitutional rights of commercial drivers will be honored and the highways will be a safer place for all citizens. Conversely, if state troopers or CVIs use the so-called medical condition and sleep distraction criteria in their evaluation of fatigue and other illness issues, the MSP is destined to be involved in more litigation.

Conversely, the Court respectfully rejects the Plaintiffs' assertions that the Court should require an expert witness threshold in establishing training procedures for state troopers and CVIs. Such an expert witness threshold in the field is not constitutionally required. Moreover, the Court is unaware of any such expert witness approach or threshold being utilized by any law enforcement agency in the field vis-à-vis addressing evidentiary issues at trial. The Court continues to stand by its statements made in its April 27, 2011 Order.

The Court hopes the parties choose to work together, in the context of this Order and the Court's decision, to establish a procedure that can serve as an example for the rest of the country and, in so doing, make the highways a safer place for all concerned, be it commercial truck drivers or the public. A consistent and uniform protocol would not only serve both the Plaintiffs' and the Defendants' interests, but it would serve the interest of public safety.

D.W.F.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Owner-Operator Independent Driver
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**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER AND MEMORANDUM**

Mark Dunaski, Ken Urquhart, James
Ullmer, Doug Thooft, Christopher
Norton, and John Doe, all personally,
individually, and in their official
capacities,

Defendants.

Albert T. Goins, Sr., Esq., Goins Law Offices, Ltd., and Daniel E. Cohen, Esq., Joyce E. Mayers, Esq., Paul D. Cullen, Jr., Esq., and Paul D. Cullen, Sr., Esq., counsel for Plaintiffs.

Marshal Eldot Devine, and Thomas C. Vasaly, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for Defendants.

This matter came before the Court for a trial without a jury on September 13, 14, 15, 16, 20, and 21, 2010. Based upon the presentations of the parties, including the testimony and exhibits submitted during the trial, the post-trial submissions, the entire record before the Court, and the procedural history of the matter, and the Court being otherwise duly advised in the premises, the Court hereby makes the following:

FINDINGS OF FACT

1. Plaintiff Owners-Operators Independent Drivers Association, Inc. (“OOIDA”), is a non-profit trade association organization of approximately 153,000 members. OOIDA’s President and Chief Executive Officer is James Johnston. OOIDA’s members are small business truckers, professional employee drivers, and small business drivers from across the country. OOIDA appears in a representative capacity seeking declaratory and injunctive relief on behalf of its members.

2. Plaintiff Steven K. House (“House”) is a commercial motor vehicle driver who hauls freight in interstate commerce. House has been a professional driver for 32 years, and he has driven between 3 and 3.5 million miles without a single accident. House is a driver for Eagle Trucking Enterprises, Inc. (“Eagle”), a company he established and for which he obtained federal motor carrier operating authority.

3. Defendant Mark Dunaski (“Colonel Dunaski”) is the Chief of the Minnesota State Patrol. He holds the rank of Colonel.

4. Defendant Ken Urquhart (“Major Urquhart”) is employed by the Minnesota State Patrol and provides oversight to the Patrol’s Commercial Vehicle Section and State Capital Complex Section. He holds the rank of Major in the Minnesota State Patrol. At all times relevant to the allegations in the Plaintiffs’ Second Amended Complaint, Major Urquhart held the rank of Captain and was the former Commander of the Commercial Vehicle Section of the State Patrol.

5. Defendant Doug Thooft (“Lieutenant Thooft”) is employed by the Minnesota State Patrol. He holds the rank of Lieutenant and oversees commercial vehicle activities in the southeast portion of the State.

6. Defendant James Ullmer (“Ullmer”) is employed by the Minnesota State Patrol and holds the position of Commercial Vehicle Inspector II.

7. Defendant Christopher Norton (“Norton”) is employed by the Minnesota State Patrol. He holds the position of Commercial Vehicle Inspector II.

8. Commercial Vehicle Inspectors (“CVIs”) are not peace officers. State Troopers are sworn, licensed peace officers. The Minnesota State Patrol, which is a division of the Minnesota Department of Public Safety, enforces laws and regulations to promote and ensure the safe use of Minnesota roads and highways. Minn. Stat. § 299D.03, subds. 1(b)(1) and (2) (2008).

9. The Commercial Vehicle Enforcement Section, sometimes referred to as District 4700, is a division of the Minnesota State Patrol. It operates state-wide and enforces laws and regulations that relate to the operation of commercial motor vehicles and drivers.

10. The Minnesota State Patrol’s Commercial Vehicle Enforcement Section collaborates with various members of the commercial motor carrier industry in Minnesota. Although the Commercial Vehicle Enforcement Section asserts that it coordinates with the Federal Motor Carrier Safety Administration (“the FMCSA”) and with other state and local agencies, the Court saw little proof of that during the trial.

Whether the coordination was initiated by the Commercial Vehicle Enforcement Section or the FMCSA, the public interest and the interest of public safety would be better served by meaningful coordination and collaboration between the FMCSA, the Commercial Vehicle Enforcement Section, and other state and local agencies. It would also promote uniformity and consistency from one state to another, which would, in turn, serve the public interest and the interest of public safety, and provide additional notice to similarly-situated plaintiff truck drivers across the country.

11. The Motor Carrier Safety Assistance Program (“the MCSAP”) is a nationwide grant program facilitated by the United States Department of Transportation (“USDOT”) to further vehicle safety in partnership with the states by providing grant resources to those states. There are five elements to the MCSAP: (1) driver/vehicle inspections; (2) traffic enforcement; (3) compliance reviews; (4) public education and awareness; and (5) data collection. 49 C.F.R. § 350.109. The first element—driver/vehicle inspections—is the issue that was tried before the Court.

Pursuant to the MCSAP, individual states are the primary enforcers of the highway safety regulations at roadside inspections. In return for their acceptance of the MCSAP grants, a state assumes responsibility for enforcing the Federal Motor Carrier Safety Regulations (“the FMCSR”) or other compatible state rules. 49 C.F.R. § 350.201; *see also Nat’l Tank Carriers v. Fed. Highway Admin. of the U.S. Dept. of Transp.*, 170 F.3d 203, 204-06 (D.C. Cir. 1999) (discussing the history of the MCSAP). Minnesota has participated in the MCSAP since approximately 1984.

12. 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).

13. The FMCSR requires carriers and drivers to be familiar with and to comply with the FMCSR, 49 C.F.R. §§ 390.11 and 392.1. Section 392 of the FMCSR requires carriers and drivers to operate their vehicles in accordance with the laws, ordinances, and regulations of the jurisdiction in which a vehicle is being operated unless the FMCSR impose a higher standard of care than the applicable jurisdiction. 49 C.F.R. § 392.2.

Relevant to the events of May 10, 2008, is 49 C.F.R. § 392.3, which is entitled, “Ill or Fatigued Driver” and provides, in relevant part as follows:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver’s ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

14. CVIs, such as Ullmer and Norton, rely on the FMCSR and on the OOSC that is referenced in Minn. Stat. § 221.605, subd. 1, in carrying out their duties and responsibilities. But CVIs like Ullmer and Norton, until recent training that the Court will reference below (*see* Findings of Fact ¶¶ 57 and 60), receive no such training about

such concepts as “reasonable articulable suspicion,” “probable cause,” and under what circumstances *Miranda* warnings are required. *Miranda v. Arizona*, 384 U.S. 436 (1966). The authority of CVIs and the limitations on this authority are derived primarily from statutory and applicable case law, rules, and regulations, and Minnesota State Patrol policies that are generally carried out in General Orders and District memos. *See, e.g.*, Minn. Stat. § 299D.06; Minn. Stat. § 221.605.

15. The Commercial Motor Vehicle Safety Alliance (“the CVSA”) is an international not-for-profit private organization comprised of local, state, provincial, territorial, and federal motor vehicle safety officials and industry representatives from the United States, Canada, and Mexico. The CVSA’s mission is “to promote commercial motor vehicle safety and security by providing leadership to enforcement, industry and policy makers,” with the goal of “uniformity, compatibility and reciprocity of commercial vehicle inspections, and enforcement activities throughout North America by individuals dedicated to highway safety and security.” <http://www.cvsa.org>. The CVSA has developed a North American Standard Training and Inspections (“NAST”) criteria. Specially-trained instructors in each jurisdiction are authorized to conduct NAST inspections. As part of the inspection criteria, the CVSA has developed the OOSC for the issuance of OOS Orders. All states participating in the MCSAP have agreed that their inspectors will use the OOSC to carry out their functions under the FMCSR, specifically with respect to the issuance of OOS Orders. *Nat’l Tank Carriers*, 170 F.3d at 205. Specifically, the FMCSR defines an OOS Order as:

a declaration by an authorized enforcement officer of a Federal, State, Canadian, Mexican, or local jurisdiction that a driver, a commercial motor vehicle, or a motor carrier operation, is out-of-service pursuant to §§ 386.72, 392.5, 392.9a, 395.13, 396.9, or compatible laws, or the North American Standard Out-of-Service Criteria.

49 C.F.R. § 390.5. Pursuant to the FMCSR, an authorized officer may issue an OOS Order for a violation of the OOSC. Ullmer and Norton were both NAST-certified inspectors on May 10, 2008.

16. Since 1988, the State of Minnesota has enforced the FMCSR with respect to interstate commercial vehicles and their drivers under the authority of Minn. Stat. § 221.605 (2008 & Supp. 2009); Minn. Stat. § 169.025; 1988 Minn. Laws, ch. 544, §§ 1 and 25. The statute provides in part:

(a) Interstate carriers and private carriers engaged in interstate commerce shall comply with the federal motor carrier regulations in code of Federal Regulations title 49, parts 40, 382, 383, 387, and 390 through 398, *which are incorporated by reference*, and with the rules of the commissioner concerning inspections, vehicle and driver out-of-service restrictions and requirements, and vehicle, driver, and equipment checklists.

Minn. Stat. § 221.605, subd. 1 (Supp. 2009) (emphasis added). The words “*which are incorporated by reference*” were added to the statute in 2009. *Id.* This statute is enforced by the Minnesota State Patrol and the Minnesota Department of Transportation. Moreover, a person in violation of the statute may receive a misdemeanor citation and/or be declared “out of service.” Minn. Stat. § 221.291 (2008 and Supp. 2009). In this case, there was no misdemeanor citation issued for House on May 10, 2008.

17. 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 FMCSR.

18. 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. The OOSC were adopted by Minn. Stat. § 221.605, subd. 3 (1988). The OOSC are developed by the CVSA every year. This not-for-profit organization is comprised of representatives from state and local governments, the FMCSA, and the trucking industry. In 2008, the OOSC provided that drivers who were ill or fatigued shall be put out of service. At that time, the Minnesota State Patrol determined that the out of service period should be ten hours. Effective April 1, 2010, the CVSA's OOSC require fatigued drivers to be put out of service for ten hours.

19. Level I and Level II Inspections tend to primarily address commercial vehicles while Level III Inspections focus more on the driver. The Level III Inspection process includes observing the driver; reviewing his or her commercial driver's license, medical card, log books, and shipping documents; and interviewing the driver.

20. Therefore, as part of a Level II Inspection, NAST Inspectors observe commercial vehicle drivers for signs of impairment due to not only fatigue, illness, or other reasons; interview drivers; and review the OOSC to determine the appropriate

action. The OOSC authorizes the inspector to put a driver out of service who is fatigued or ill.

21. There is little dispute that since the mid-1990s, as part of the requirement for accepting the MCSAP funding, the Commercial Vehicle Enforcement Section of the Minnesota State Patrol has had the goal to develop and implement programs to reduce the number of serious and fatal accidents on Minnesota roads and highways that are caused by or may involve commercial motor vehicles and their drivers.

Consequently, in 2000, the Commercial Motor Vehicle Enforcement Section made a decision to focus on fatigue impairment, seatbelt violations, and other traffic violations (collectively, "FIST"). This was, in substantial part, accomplished by conducting periodic Level III Inspections that included what are known as FIST Saturations at weigh stations in certain locations at roadside.

22. The Level III Inspection procedure states, in pertinent part, under "Step 3, Greet and Prepare the Driver" that the Inspector should "observe the driver's overall condition for illness, fatigue, or signs of impairment." Unfortunately, there is no further reference or definition for fatigue or illness in the remainder of the document. *See* Pltfs' Trial Exh. 7; Defs' Trial Exh. 1.

23. Prior to May 10, 2008, the date that House was issued the OOS Order for his fatigue, Commercial Motor Vehicle Drivers had no notice of the Defendants' fatigue inspection procedures.

24. With respect to the events of May 10, 2008, there is no evidence, direct or circumstantial, that the observations made or recorded by Norton and Ullmer during their asserted fatigue inspection of House supported a reasonable or articulable suspicion that House was too ill or fatigued to drive a commercial motor vehicle safely.

25. For at least seven years prior to May 10, 2008, Denise Nichols (“Nichols”) was a Commercial Vehicle Safety Education Officer. In that capacity, Nichols had the responsibility for training on issues related to fatigue. Nichols gave Norton a fatigue training class prior to May 10, 2008.

26. During Nichols’ 17 years with the Minnesota State Patrol, she conducted between 2,000 and 2,500 commercial motor vehicle driver inspections and never once placed a driver out of service for fatigue.

Of more interest to the Court and circumstantial confirmation that there was a serious lack of training on the issues of fatigue and illness, despite the best intentions of the Minnesota State Patrol, Norton placed House out of service for fatigue within five months after being hired by the Minnesota State Patrol and within 48 hours after attending the Minnesota State Patrol’s fatigue training class. In fact, he placed four out of the six drivers that he first inspected out of service for fatigue.

27. On May 10, 2008, House was operating his truck and arrived at the Red River Weigh Station (“the RWS”) in Clay County, Minnesota, at approximately 8:15 p.m.

28. At that time, House was accompanied by his wife, Jeanette L. House, who also holds a Commercial Driver’s License (“CVL”) and operates, when necessary, as a

co-driver. On that date, Jeanette House and her adult son were accompanying House when they pulled in to the RWS.

29. On May 10, 2008, the Minnesota State Patrol was conducting a FIST Saturation at the RWS.

30. Even though House had been through the RWS numerous times before, he had never seen that many trucks parked in the parking area with Minnesota State Troopers parked in front of them with emergency lights flashing, along with additional cars and police officers in the scale area. In fact, both House and Jeanette House testified that they had never seen an inspection like this in all of their years of experience, in substantial part, because of the number of trucks stopped, the number of law enforcement vehicles with lights flashing, and the number of inspectors who seemed to be moving from vehicle to vehicle. House was directed to go through what is known as the by-pass lane. However, when he did so, Norton jumped onto the side of his cab and yelled in a loud voice at him. At that point, two other officers directed House to back down his truck and return to the scale.

31. After House's truck was weighed, he provided the officer his log book, valid registration, and CVL.

32. House's record of duty set forth in his log book was current, accurate, and consistent with Minnesota state law and federal law. Moreover, at the time House arrived at the RWS, he was operating within the allotted time for driver on duty status established by the hours of service ("HOS") regulations.

33. After the officers reviewed House's documents and log book, he was not issued a citation for violating any HOS regulations. The officers also did not issue a citation to House or an OOS Order for violating any log book regulation.

34. After House presented his credentials and documentation to Norton, House was told that he should go into the building and answer some questions. House parked his truck and went to the building, as instructed.

35. There is no dispute that none of the Defendants at any time informed House of the purpose of their questions or that they were engaged in a saturation exercise specifically intended to identify fatigued drivers that could result in an OOS Order. In fact, the officers minimized the importance of the questions and even suggested, consistent with Plaintiffs' Exhibit 84, there was no "big issue" in question, that the officers just wanted to ask a few questions which they described would be in the nature of a survey. Consistent with Plaintiffs' Exhibit 84, those questions were designed to be deceptive. Even if the questioning itself, at that early stage, did not constitute a constitutional violation, the planned deception was unprofessional at best.

In fact, as established by Plaintiffs' Exhibit 84, which is a memo and directive from Lt. Steve Lubbart with the Minnesota State Patrol that was issued to all District 47 100 Motor Vehicle Inspectors, Lt. Lubbart directed: "I ask that you do not tell the drivers that you need to fill out a checklist (worksheet), that you are taking a survey or any other statements that you use to reference the report. The report is for you to use to document what you observe, statements made by the driver, notes for you to reference to about the

event and as a guide to gather the various indicators from the different areas on the report.” That is precisely what Defendants did.

36. Jeanette House also went into the scale house for the purpose of using the restroom. She had not been directed there by the officers. However, while in the scale house, Ullmer approached her and asked her what her husband’s neck size was. He then assured her that nothing bad was going to happen and that there were not going to be any tickets or citations.

Again, even assuming the exchange between Ullmer and Jeanette House was not unconstitutional in any way, it was unprofessional and deceptive. This is especially relevant to the notice issue before the Court because the Minnesota State Patrol stated that one of the significant reasons to proceed with fatigue evaluation and testing was to provide a deterrent to the public, especially truck drivers, so that every driver knew they could be tested and evaluated on the issue of fatigue. However, if there was no notice of the fatigue testing protocol, there could be no possible deterrent effect for the public, especially truck drivers.

37. The first question asked by Norton of House was his neck size. House responded that he did not know his neck size.

38. Then, Ullmer specifically asked House if had Playboy magazines in his truck. Again, even assuming that such a specific inquiry is not unconstitutional in any manner, there is no evidence in the record, direct or circumstantial, as to the relevance of such a question and why it would be asked to evaluate fatigue and illness.

