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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, and DOES 1 through 20, inclusive,

Defendants.

Case No. RG08379099

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

Date: October 28, 2011
Time: 2:00 p.m.
Dept.: 20
Judge: Hon. Robert B. Freedman
Reservation Number: R-1204995

I. INTRODUCTION

The Court is asked at this stage to determine whether there are any triable issues of fact surrounding Plaintiffs' allegations on meal periods, rest periods, and standardized deductions for meal periods. Although Defendant claims Plaintiffs' facts are in dispute, the only admissible evidence relied on, the depositions of two opt-out class members, does not support a dispute of the facts.[1] In opposition to Plaintiffs' motion for summary adjudication, AB Trucking attempts to show that starting in 2009, five years *after* the beginning of the class period, it implemented meal and rest period policies. Even if it did, which is questionable, unsupported by admissible

[1] Of course, as these individuals excluded themselves from the class, their experience is not relevant to a determination regarding the class, or the rest of the drivers.

evidence and negated or excluded by AB's lack of discovery responses, the change in policy would affect only the question of damages, not liability.

There are no triable issues of material fact regarding meal periods, rest periods, and the failure to pay all wages owed because of standard deductions from hours worked. Plaintiffs are entitled to summary adjudication on the second and sixth causes of action.

II. ARGUMENT

Plaintiffs must produce evidence that would require a reasonable trier of fact to find any underlying material fact *more likely than not*. (See e.g., *Buss v. Superior Court* (1997) 16 Cal.4th 35, 53-54 [so holding under Evid. Code, §§ 115 & 500, as to the quantum and placement of the burden of proof, respectively]; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) Plaintiffs met this burden in their moving papers. Defendant's opposition fails to "set forth specific facts showing that there is a genuine issue for trial," by producing "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." If the evidence is "merely colorable" or is "not significantly probative," summary judgment shall be granted. (*Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1286 ("*Hunter*") [disapproved on other grounds by *Aguilar*, *supra*, 25 Cal.4th at 854 fn. 23].)

A. DEFENDANT'S OPPOSITION FAILS TO APPLY THE APPROPRIATE LEGAL STANDARD

As Plaintiffs' discuss in detail below, Defendant's opposition focuses on meal and rest period legal standards, rather than on producing evidence of facts in dispute. Defendant presents no admissible evidence instead presenting information that is "merely colorable" and often contradictory to previously provided testimony.[2]

Raising issues regarding time periods within the statutory period constitutes an admission, and does not create a dispute. For the first time, Defendant alleges it has made changes to its operations since the filing of this lawsuit with regard to meal and rest periods. First, Defendant

[2] To address inadmissible evidence offered by Defendant's opposition, Plaintiffs filed concurrently with this reply objections to and, in the alternative, a motion to strike the Declaration of William Aboudi in support of Defendant's opposition to Plaintiffs' motion for summary adjudication ("Aboudi Decl."). The burden of production in opposing a motion for summary adjudication is not satisfied by declarations containing inadmissible evidence, including hearsay and conclusions. (See *Overland Plumbing, Inc. v. Transamerica Ins. Co.* (1981) 119 Cal.App. 3d 476, 483.)

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states that beginning April 21, 2009,[3] AB started providing a place for employee drivers to record their meal periods each shift. (Defendant's separate statement of undisputed material facts in opposition to Plaintiffs' motion for summary adjudication ("Opp.") ¶¶ 13, 14.) This statement does not dispute Plaintiffs' separate statement of undisputed facts in support of motion for summary adjudication ("SUF") ¶¶ 13 and 14, but rather admits "during the relevant period," albeit allegedly only from March 28, 2004 until April 21, 2009, AB did not record meal periods and has no records of meal periods in violation of the Wage Order. Likewise, Defendant argues that beginning April 21, 2009, it maintained records showing rest periods taken by employee drivers, though this too does not create a dispute of fact. (Opp. ¶ 18.) Defendant also alleges that "beginning November 27, 2009 a written policy on rest periods was provided to employee drivers." (Opp. ¶ 16.) Again, this information does nothing to dispute the fact that "during" the relevant time period, no written policy existed at AB and no written policy on rest periods was provided to employee drivers.[4] (SUF ¶ 16.) At best, it closes the liability period at November 27, 2009, but it does not create a triable issue of material fact on liability – it becomes an issue of damages.

1. **Defendant's Opposition Fails to "Set Forth Specific Facts Showing That There is a Genuine Issue for Trial" as to the Sixth and Second Causes of Action**

a) **There Is No Genuine Issue of Material Fact Regarding the Claim Defendant Failed to Provide Employee Drivers with Meal Periods**

The Court of Appeal in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 ["*Cicairos*"], held that employers have an affirmative obligation to see that their employees are relieved of all duty for their meal periods, not merely to adopt a policy on paper and assume that meal periods were taken. (*Id.* at pp. 962-963.) The employer's omissions in that case—its failure to record, schedule, and monitor meal periods—failed to satisfy such obligation. (*Ibid.*) Plaintiffs' theory of recovery on the meal period claim is not simply that AB prohibited meal periods, but that it failed in its affirmative duty to monitor, schedule, record, *or take other reasonable steps* to ensure that drivers were relieved of duty during their meal periods.

[3] This lawsuit was filed on March 28, 2008. The statutory period extends back to March 28, 2004.

[4] Plaintiffs note that the Defendant claims it began maintaining records showing "rest periods taken," seven months *prior* to the time it created a written policy on rest periods that was provided to employee drivers.

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AB failed to inform employee drivers that they are entitled and required to take a 30-minute off-duty meal break no later than five hours after beginning their shifts. (SUF ¶ 10.) Defendant produced no admissible evidence to dispute SUF ¶ 10. During the relevant period, no written policy on meal periods existed at AB and no written policy on meal periods was provided to employee drivers. (SUF ¶ 11.) Defendant responds to this fact by describing AB's so-called "verbal" policy; this is irrelevant and does not dispute SUF ¶ 11. Defendant also states, "A Department of Transportation book was issued to each employee driver and that book defines the meal break." (Opp. ¶ 11.) First, this statement contradicts previous testimony given by Mr. Aboudi:

> Q: Does the company have a written policy on meal periods?
> A: No.

(SUF ¶ 11.) Second, the Department of Transportation ("DOT") book referenced is not presented with Defendant's opposition for the Court, nor Plaintiffs', review.[5] The "evidence" Defendant cites gives no specific facts, as required, that reflect any information about this book being "issued" to each employee driver or that it "defines the meal break." Defendant produced no admissible evidence to dispute the fact that employee drivers were not provided 30-minute, off-duty meal periods within every five hours worked. (SUF ¶ 12.) In fact, federal DOT regulation has no meal break requirement and limits its rest break requirement to combating driver fatigue. Under DOT regulations, a driver is "on duty" whenever he is in or responsible for his vehicle—such as eating lunch or waiting in line—so "eating" is not the equivalent of a "meal period." (See, e.g. *Federal Motor Carrier Safety Administration,* 49 C.F.C. 395.2.)

With only federal district court decisions and uncitable California decisions to rely upon, Defendant essentially asks the Court to reverse the Court of Appeals' ruling in *Cicairos* and find that California law only requires that employers make meal periods available.[6] AB's position must be rejected because it is not supported by substantive legal authority and ignores the

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[5] Defendant produced a "Federal Motor Carrier Safety Regulations Pocketbook ©2005" (bate stamp numbers OPS 000003-000330) and a "California Commercial Driver Handbook 2007" (bate stamp numbers OPS 000331-000473) in discovery. A non-exhaustive review by Plaintiffs' counsel of these 470 pages done in preparation for drafting this reply did not reveal any reference to meal and/or rest periods.

[6] Apparently, as AB interprets this standard, no employer may be held liable who does not force employees to forego breaks.

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language of the Wage Order and the California Supreme Court's recent decision, *Martinez v. Combs* (2010) 49 Cal.4th 35, 69 ["*the basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist*"].

Aside from relying on this Court's *Cicairos* decision, Plaintiffs asserted that the standard articulated in *Cicairos* derives from the mandatory language of the Wage Order, which states that

> ***[n]o employer shall employ*** any person for work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

(Wage Order 9(11)(D) (emphasis added).) This mandatory language imposes on California employers a duty to provide their employees with a 30-minute meal period for shifts over five hours, a requirement also codified in Labor Code section 512. In 2000, the Legislature reinforced such duty by establishing employer liability through Labor Code section 226.7, which codified the Wage Order's compliance standard. As violation of the Wage Order's meal period requirements is the trigger for liability under section 226.7, analysis of the meal period claim hinges on precisely what the Wage Order requires.

The meaning of the term "employ" found in the Wage Order is critical to the analysis of the appropriate standard governing employer meal period obligation. The Supreme Court's *Martinez* decision takes a close look at the language of the wage orders, which define "employ" as "engage, suffer, or permit to work" (see, e.g., Wage Order, § 2(E)) and explained that this definition is derived from the language of early 20th century statutes prohibiting child labor, where the language meant "that [the proprietor shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." (*Martinez, supra*, 49 Cal.4th at p. 58.) Under *Martinez,* the "[n]o employer shall employ" language in the meal period provisions of the Wage Order thus means "no employer shall fail to prevent or fail to hinder work from occurring" without a meal period. (*Id.* at p. 69.) The Supreme Court's reading of the Wage Order language directly affirms the Court of Appeals' interpretation of the meal period standard in *Cicairos*.

Not surprisingly, the only authority AB can offer to rebut Plaintiffs' textual argument on the appropriate meal period standard are federal trial court decisions that fail to engage in any

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analysis of the language of the Wage Order upon which section 226.7 liability is based.[7] (See Lab. Code § 226.7, subd. (b) [requiring extra compensation "[i]f an employer fails to provide an employee a meal period ***in accordance with the applicable wage order of the Industrial Welfare Commission***"], emphasis added.) This is true for each of the principal cases relied upon by AB, including *Brown v. Federal Express Corporation* (C.D. Cal. 2008) 249 F.R.D. 580, 585 [ignoring definitions in the wage order and relying instead on Merriam Webster's College Dictionary]; *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1088 [concluding without analysis that "making employers ensurers of meal breaks—would be impossible to implement," but failing to discuss the requirements and definitions in the Wage Order]; and *Kenny v. Supercuts, Inc.* (N.D. Cal. 2008) 252 F.R.D. 641, 644-646 [affirming *Brown* and *White* without any analysis of the Wage Order language].[8] Because the federal district court decisions in *Brown, Kenney,* and *White* are not based on any meaningful analysis of the mandatory language of the Wage Order upon which Section 226.7 liability is based, these cases are not a sound basis upon which to determine the appropriate standard governing employer obligations under California's meal period laws.

Defendant misinterprets Plaintiffs' presentation of evidence of AB's lack of a written meal and/or rest period policy. The plain language of the statute and the Wage Order create an obligation for an employer. When the employer fails to take even minimal steps to create a written policy that explains to workers their right to meal and rest periods, this is substantial evidence that the employer did not meet this obligation; this is the case under the standard as defined by the Court of Appeal in *Cicairos*, *and even* under the standard as defined by other courts in disagreement with the *Cicairos* "ensure" standard. (See, e.g., *Brown*, *supra*; *White*, *supra*; *Kenny*, *supra.*) When, as here, the lack of any written policy combines with no admissible

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[7] *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, an unpublished decision, is set for oral argument before the California Supreme Court on November 8, 2011. A decision in *Brinker* prior to the trial date set in this matter, November 29, 2011, is unlikely.

[8] Like *Brown, Kenny,* and *White,* none of the other cases relied upon by AB involve decisions where the courts engaged in any meaningful analysis of the meal period provisions in the wage orders. (See *Salazar v. Avis Budget Group, Inc.* (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 51620, **6-13; *Gabriella v. Wells Fargo Financial, Inc.* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 63118, *10; *Perez v. Safet-Kleen Systems, Inc.* (N.D. Cal. 2008) 253 F.R.D. 508, **7-16.)

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evidence—only an interested party's inadmissible conclusions—of any actual compliance with the requirements of California law regarding meal periods, there is no material dispute of fact that employee drivers did not receive meal periods in accordance with applicable law. (See SUF ¶ 12.)

When an employee eats while in line at the Port of Oakland or while the engine is running, she is not "relieved of all duty." (See *Cicairos*, *supra*, 133 Cal.App.4th at pp. 962-963.) When an employer creates these conditions, either because it neglects to properly run its business by finding suitable ways to deal with well-known circumstances (lines at the Port), or because of the number of work assignments a driver is assigned in a shift, the employer has "forced" the employee to forgo her meal period. (See *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1104 ("*Kenneth Cole*").) Certainly, no meal period has been "provided." [9]

Defendant argues that because the Department of Industrial Relations, DLSE, has withdrawn the opinion letter referred to by the court in *Cicairos* in reversing the trial court's decision on the employer's motion for summary judgment, the logic of the *Cicairos* court is somehow delegitimized. To the contrary, the Department of Industrial Relations is a political entity subject to the sway of political winds. It is the judiciary's interpretation of a statute that governs:

> While the DLSE's construction of a statute is entitled to consideration and respect, it is not binding and it is ultimately for the judiciary to interpret this statute. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8.) Additionally, when an agency's construction " 'flatly contradicts' " its original interpretation, it is not entitled to "significant deference." (*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1278.)

(*Kenneth Cole*, *supra*, 40 Cal.4th 1094 at 1106.) Defendant cites *Kenneth Cole* throughout its opposition, yet appears to miss the above precedent. The DLSE has changed its stance on this

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[9] Defendant tries to excuse its Labor Code violations by arguing it is well-known that the conditions complained of by Plaintiffs are "uniformly applicable to all drivers driving for all trucking companies that use the Port of Oakland." (Opp. at p. 16:7-12.) First, this is an admission of liability by AB. Second, if this problem is well-known then it is Defendant's responsibility as an employer to address the problem. Other trucking companies routinely address these types of issues by getting a substitute to sit in for another driver when he or she goes on break, or the Labor Code provides an alternative for an employer if the nature of the work in question is truly continuous: an employee may sign a waiver agreeing in writing to forgo the meal period and be paid instead. There is no evidence of any waivers here. It is not Plaintiffs' responsibility to think of creative ways AB might comply with the law. AB chose to be an employer in California. It is AB's responsibility.

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issue. (Compare, DLSE Opinion Letter cited in *Cicairos* with the memorandum provided by Defendant in its request for judicial notice.)

Ms. Jovi Aboudi, the person most qualified to testify on the subject of payroll, testified (see Plaintiffs' MPA at p. 12 and SUF ¶ 15), that AB automatically deducted one hour from each employee driver's shift reported-time for a meal period. Outrageously, AB's computer system was set up to automatically deduct one hour of pay for a meal period each day (and a manual entry and *override* was required if a correction to this auto-deduction needed to be made) though AB did not record drivers' meal periods. The timecards produced by Defendant show that when employee drivers worked 9 hours, for instance, their timecards reflected they would be paid for 8. (See SUF ¶ 15; see, e.g., *Jaimez*, *supra*, at p. 1303-1304 [certifying a class of drivers subject to automatic time deduction].) These facts remain undisputed.

Regardless of whether a *Cicairos* or some other interpretation of the meal period obligation is applied, Defendant's opposition produced no "specific evidence, through affidavits or admissible discovery material, to show that the dispute [over meal periods] exists." (See *Hunter*, *supra*, 37 Cal.App.4th at p. 1286.) Defendant offered one unsupported legal conclusion in the Aboudi Decl.: "Employee drivers were provided with one hour lunch breaks." Defendant produces no additional evidence. Mr. Aboudi's statement lacks foundation, lacks personal knowledge, is an improper legal conclusion and is a statement offered by a biased, interested witness. This evidence is not even "merely colorable," let alone "significantly probative." (*Id.*)

It is undisputed that employee drivers were not provided 30-minute, off-duty meal periods within every five hours worked. As stated by AB, "What plaintiffs complain about is something that is uniformly applicable to all drivers driving for all trucking companies that use the Port of Oakland." (Opp. MPA at p. 16:8-11.) Even after making this admission, Defendant then attempts to take a contradictory position that it, out of all the Port employers, and without a written policy, nor any records, somehow managed to provide every driver a meal period every day. Defendant's position becomes even less tenable upon analysis of its opposition. Defendant shows a fundamental lack of understanding of what it means to take a meal period. Under California law, a meal period is not about eating—it is about thirty minutes of uninterrupted free

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time. Whether enjoyable or not, eating a sandwich in the cab of a truck while waiting in line can never meet the meal period standard. What remains is a question reserved for the damages stage of trial, *how many* meal periods were missed?

b) There Is No Genuine Issue of Material Fact Regarding the Claim Defendant Failed to Provide Employee Drivers with Rest Periods

Again, the opposing party must show that some "material fact" is in controversy and it is not enough simply to raise some issue as to the credibility of the moving party's declarations. (See CCP § 437c(e).) Unsupported attacks on Plaintiff Godfrey's credibility are all Defendant offers in its hollow attempt to dispute the SUFs regarding rest periods. (Opp. ¶ 16; SUF ¶¶ 16-18.) Godfrey's testimony supports SUF ¶ 16, that employee drivers did not receive rest periods as required by law. Neither Mr. Blythe, nor Mr. Navarro's[10] testimony cited by AB states that for *every single four-hour period they worked* for AB, they received a 10-minute, off-duty paid rest period. Confusingly, and for the first time despite numerous rounds of discovery requests, AB now claims it started recording meal periods and then seven months later issued a rest break policy. Neither timecards showing rest breaks nor the policy have been provided. The information provided by Mr. Blythe and Mr. Navarro, essentially that they received *many* "breaks," goes to the question of damages. The record provided the Court unequivocally shows that AB's management avoided direct questions about "authorizing" and "permitting" rest breaks for its employee drivers. No triable issue of material fact exists as to SUF ¶ 16.

c) There is No Triable Issue of Material Fact with Respect to Whether Defendant Failed to Pay for All Hours Worked by Drivers

Defendant argues, "As concerns pay for hours worked, employee drivers took their one-hour meal period unless they notified AB Trucking otherwise." (Opp. at p. 16:19-22.) None of the supporting references, however, make any reference whatsoever to employee drivers "notifying" AB when they did not receive meal periods nor to any circumstances that could lead AB to draw such a conclusion. Defendant cites testimony from a driver who says that he understood AB's meal period policy to be "eat when you can." (Blythe Depo. at 27:1-5.)[11] As

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[10] Mr. Blythe and Mr. Navarro are "opt-outs" of the class.

[11] The next portion of Mr. Blythe's testimony refers to "rest" breaks, not meal periods, during the time he was a trainee and later as a driver. (Blythe Depo. at 28:20-24; 29:16-25.)

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discussed above, eating does not necessarily denote a meal or rest period. The other driver cited testifed that he was told about "precautions," and that "if we are tired, well, then we should rest." This statement most likely refers to standard DOT protocol of resting for fatigue. This driver likewise makes no mention of notifying AB of anything and is referring only to rest periods, not meal periods. (Navarro Depo. at 25:7-15, 26:7-25.) In both *Cicairos* and *Jamiez*, Courts of Appeal cautioned trucking employers that assuming meal periods have All employee drivers suffered an hour deduction from hours worked each day based on AB's assumption that a one hour meal period was taken. Employee drivers actually worked the hour and, as a result, they have not been compensated for one hour worked per day. (SUF ¶ 20.) The undisputed facts show that Defendant failed to pay employee drivers for all hours they worked.

2. <u>Additional Miscellaneous Arguments Made in Defendant's Opposition Do Not Create a Triable Issue of Material Fact</u>

Defendant's opposition raises additional, fragmentary issues, many of which are irrelevant and none of which are supported by admissible evidence. Plaintiffs attempt to succinctly address these below.

As to SUF ¶ 2, it is undisputed that employee drivers worked "shifts for Defendant." Defendant presents only irrelevant and inapplicable information about "independent contractors" and "work volume."

Defendant's response and evidence does not contradict the fact that employee drivers for AB reported to the "same" small group of supervisors. (SUF ¶ 3.) Regardless of the identity of the individuals who held the supervisory job titles in this small group, employee drivers reported to these same job titles.[12] (W. Aboudi Depo. at 17:14-16.) Employee drivers were undisputedly under the control and direction of William Aboudi. (SUF ¶ 4.) The small group of supervisors described included William Aboudi, and all others in the group were beholden to William Aboudi. (See W. Aboudi Depo. at 14:14-15:17.)

Employee drivers used the same timecard "system." Meaning, employee drivers utilized whatever time-keeping system was required of them by management. Defendant admits

[12] For instance, employee drivers were dispatched by a dispatcher, in other words, "reported to" the dispatcher, regardless of whether that person was physically located in Vallejo or in Oakland. In any event, drivers' primary form of communication with dispatch was over a radio.

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"employee drivers used time sheets." If AB changed the format of the timecard over the course of the statutory period, this did not affect any employee driver individually; all drivers simply began using the new format. The reasons Defendant may have implemented a timecard system are entirely irrelevant. (See Opp. ¶ 5.) The same is true of the payroll processing system. (SUF ¶ 6.)

It is undisputed that it could take as many as 8 hours to get through the terminal. (SUF ¶ 7.) It is irrelevant that Mr. Aboudi now states in his most recent declaration that he can only recall one time he personally witnessed an 8-hour wait.

Defendant admits there is no dispute as to the fact that employee drivers who left their place in the queue while in line at the Port of Oakland would lose their place in the line: "Any drivers who work for AB who leave the line and thus lose their place in the line are situated similarly to those of all other companies whose drivers leave the line and thus lose their place in the line." (See Opp. ¶ 8.) It is undisputed that there was no area for an employee driver to legally and safely pull the truck over while waiting to enter the Port of Oakland. For instance, Mr. Navarro's deposition testimony reflects that, when asked *where* he pulls over to take a break while in line at the Port, he pulls into an illegal area: "the lines are right next to the emergency lanes." (Opp. ¶ 9.)

III. CONCLUSION

There is no issue of material fact as to whether Defendant violated Labor Code §§ 226.7, 512, 1182.2, 1194 and IWC Wage Order 9. The evidence establishes employee drivers worked during meal and rest periods, and were not paid an additional hour's worth of pay for this time. All employee drivers suffered an hour deduction from hours worked each day, based on AB's assumption that a one hour meal period was taken and its subsequent automatic deduction, and were not compensated for all hours worked. Plaintiffs are entitled to summary adjudication as to Plaintiffs' sixth and second causes of action as a matter of law.

Dated: October 21, 2011

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PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On October 21, 2011, I served upon the following parties in this action:

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copies of the document(s) described as:

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

[ ] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[X] **BY OVERNIGHT DELIVERY SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and placed the same for collection by Overnight Delivery Service by following the ordinary business practices of Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery Service correspondence, said practice being that in the ordinary course of business, Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service offices for next day delivery the same day as Overnight Delivery Service correspondence is placed for collection.

[ ] **BY E-MAIL** I caused to be transmitted each document listed herein via the e-mail address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on October 21, 2011.

Jennifer Koffler

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