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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA

10 LAVON GODFREY and GARY GILBERT, on) Case No. RG08379099
11 behalf of themselves and all others similarly)
12 situated,) PLAINTIFFS' OPPOSITION TO
13 Plaintiffs,) DEFENDANT'S MOTION TO STRIKE
14 v.) PORTIONS OF PLAINTIFFS' SECOND
15 OAKLAND PORT SERVICES CORP. d/b/a) AMENDED COMPLAINT
16 AB TRUCKING, and DOES 1 through 20,)
17 inclusive,) Date: December 3, 2010
18 Defendants.) Time: 10:00 a.m.
19) Dept: 20
20) Judge: Robert B. Freedman
21)
22)
23)
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25)
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18 I. INTRODUCTION

19 Plaintiffs filed this wage and hour lawsuit on March 28, 2008. Plaintiffs filed a class
20 certification motion on December 15, 2009, which was subsequently modified and refiled.

21 Plaintiffs' most recent motion for class certification will be heard December 3, 2010 by this Court.

22 Plaintiffs filed their Second Amended Complaint ("SAC") after discussion with opposing
23 counsel and the Court regarding the pending motion for class certification.

24 On August 24, 2010, Plaintiffs sent Defendant a true and correct copy of the SAC it
25 intended to file.¹ (See Declaration of Lisl R. Duncan in support of Plaintiffs' opposition to
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27

¹ This correspondence was sent by email (inadvertently to the incorrect email address) and via overnight mail to the correct address.

1 Defendant's motion to strike portions of Plaintiffs' SAC ["Duncan Decl.,"] at ¶ 2, Exh. B (Exhibit 2
2 to the Declaration of Lisl R. Duncan in support of Plaintiffs' ex parte application for an order
3 shortening time).) Defendant responded that it would not agree that Plaintiffs could file a SAC by
4 stipulation. (Duncan Decl. at ¶ 4.)

5 As a result, following the procedure suggested by the Court in the hearing of August 20,
6 2010, on September 16, 2010, Plaintiffs filed an ex parte application for an order shortening time
7 and leave to file a SAC. (*Id.* at ¶ 5.) Plaintiffs served Defendant with its ex parte application and
8 supporting documents on September 16, 2010 at 2:49 p.m. via PDF and email. (*Id.* at ¶ 6, Exh. A.)
9 This application included a true and correct copy of the SAC Plaintiffs intended to file (identical in
10 form to that previously submitted to Defendant on August 24, 2010). (*Id.* at ¶ 5.)

11 Both parties appeared before the Court on September 17, 2010. (*Id.* at ¶ 7.) Defendant
12 opposed Plaintiffs' application. The Court granted Defendant time to file an opposition. (*Id.* at ¶
13 8.) However, later on September 17, 2010 the parties entered into a stipulation whereby Defendant
14 agreed to the filing of the SAC. (*Id.* at ¶ 9; see also Exhibit B to Aboudi Decl. and ¶ 4.)

15 The Court approved the stipulation and the SAC was filed on September 20, 2010.
16 (Duncan Decl. at ¶ 10.) The SAC was filed with the Court, but because of the parties' stipulation,
17 the Court did not file any of the documents Plaintiffs submitted with their ex parte application,
18 including the notice of motion for leave to amend or memorandum in support thereof. (*Id.* at ¶ 11.)
19 As a result, the notice of motion to which Defendant refers in its motion to strike, is not on file
20 with the Court.²

21 In keeping with the Court's order of October 7, 2010, Plaintiffs refiled their class
22 certification motion on October 29, 2010, which is scheduled to be heard December 3, 2010 as
23 referenced above. (*Id.* at ¶ 12.)

24 //

25
26 ² Plaintiffs attach a copy of this notice of motion, which was included in Plaintiffs' ex parte application, for the Court's
27 convenience to Duncan Decl. filed herewith as Exhibit B. Plaintiffs submitted a courtesy copy of this same notice to
28 the Court as an attachment to their ex parte application for an order shortening time and leave to amend the complaint,
however, this notice of motion is irrelevant as Defendant stipulated to the filing of the SAC, which Plaintiffs address in
detail below.

1 Defendant now seeks to delay resolution on the pending class certification motion by
2 bringing its motion to strike portions of Plaintiffs' SAC.

3 **II. ARGUMENT**

4 **A. DEFENDANT'S MOTION IS MOOT**

5 Defendant's motion to strike is based entirely on the argument that Plaintiffs' SAC goes
6 beyond the notice given in Plaintiffs' notice of motion.³

7 **1. Defendant stipulated to the filing of the SAC**

8 Defendant stipulated to the filing of the SAC. (See Joint Stipulation filed with the Court on
9 September 17, 2010; see also Exhibits B and C to the Declaration of Jay Ian Aboudi in support of
10 Defendant's motion to strike ["Aboudi Decl."].) As a result, Defendant agreed to the filing of the
11 form of the SAC. Defendant may not now argue that Plaintiffs somehow failed to provide notice
12 of the language of the SAC, when it agreed to the filing of that exact language. Defendant may
13 have the opportunity to demur to the SAC (which it has done), but Defendant absolutely waived
14 its ability to bring a motion to strike on the grounds of notice. The Court need not reach the
15 substance of Defendant's allegations because Defendant's stipulation waives its ability to seek to
16 strike portions of the SAC based on its allegations of improper notice.

17 **2. The documentation to which Defendant cites is not before the Court as a result**
18 **of the parties' stipulation**

19 Defendant's motion to strike is furthermore illogical because the notice of motion with
20 which it finds fault is not a document on file with the Court. Defendant does not supply the Court
21 with a copy of the notice to which it refers. This dilemma only further illustrates why Defendant
22 has waived its ability to file a motion to strike on these grounds.

23 **B. EVEN IF DEFENDANT'S MOTION COULD BE CONSIDERED, IT MUST FAIL**

24 **1. Defendant received proper notice**

25 Even if Defendant had not stipulated to the filing of the SAC, its motion fails because
26

27 ³ Defendant's organization of its supporting papers makes it somewhat difficult to locate this argument. However,
28 Plaintiffs find this argument in Defendant's Memorandum of Points and Authorities, with further analysis and
argument in the Declaration of Jay Ian Aboudi.

1 Defendant in fact received proper notice.

2 Defendant received notice of the substance of the amendments to the complaint. On
3 December 31, 2008, Plaintiffs' attorney sent a letter to Defendant stating, "Mr. Gilbert has told us
4 that he has been working for your client without being paid at all which is a violation of the state
5 minimum wage law." (See Duncan Decl. at ¶ 13, Exh. B (Exhibit A to the Declaration of Lisl R.
6 Duncan in support of the motion for leave to amend the complaint).) Defendant was also aware of
7 the allegation that its unpaid trainees should be paid for the hours they worked for Defendant
8 because this issue came up throughout the discovery process, and was an issue raised not only by
9 Plaintiffs, but by Defendant as well. (See Duncan Decl. at ¶¶ 14, 15, 17.) The parties similarly
10 discussed the allegation that Defendant failed to pay its drivers overtime wages throughout the
11 discovery process. (See Duncan Decl. at ¶¶ 15, 16, 18.)

12 The parties have been involved in the class certification process since December 15, 2009.
13 (*Id.* at ¶ 20.) The SAC conforms the complaint to the classes described in the motion for class
14 certification. Defendant has been on notice of the modifications that were made to the SAC,
15 entirely made to streamline the language of the complaint with the class certification motion
16 (drafted after discovery), for nearly a year.

17 Moreover, Defendant received a copy of the SAC itself on or around August 24, 2010.
18 (See Duncan Decl. at ¶ 2.) Defendant then received the notice of motion and, again, a copy of the
19 SAC on September 16, 2010 attached to Plaintiffs' ex parte application. (*Id.* at ¶ 5-6.) Defendant
20 had a full day to review the SAC, and it still agreed to stipulate to the filing of the SAC.

21 Defendant was on notice of both the substantive modifications and the form of those
22 modifications.

23 **2. Plaintiffs' notice of motion sufficiently stated the grounds upon which the**
24 **motion was to be made**

25 Defendant's concerns with Plaintiffs' notice of motion are unfounded by any legal
26 precedent or commonly accepted understanding of the terms used. Defendant attempts to persuade
27 the Court that the term "amend" does not also include the idea of "adding." Defendant argues:
28 "The notice of motion and motion ... stated ... that ¶ 10 of the first amended complaint ("FAC")

1 was being “amended.” Actually, however, the SAC that plaintiffs filed not only amended language
2 in that paragraph but also added two wholly new alleged violations.” (Declaration of Jay Ian
3 Aboudi in support of Defendant’s motion to strike at ¶ 6 [citations omitted].) Plaintiffs find it
4 difficult to understand how adding allegations is not also amending the FAC. Notably, Defendant
5 cites no authority for its interpretation of the term “amend.”

6 Similarly, Defendant claims Plaintiffs’ notice of motion was “completely silent” on adding
7 two new subclasses, however, Defendant admits Plaintiffs stated in the notice they were amending
8 the paragraphs covering Class Allegations, including the paragraphs referencing subclasses:
9 “plaintiffs make no mention whatsoever of the fact that their SAC adds two other new subclasses
10 (they refer only to having supposedly “amended” paragraphs 36-38).” (Aboudi Decl. at ¶ 8.) The
11 “two new subclasses” are detailed in paragraph 37 of the SAC.

12 Defendant’s allegation regarding overtime is simply inaccurate, “plaintiffs assert that the
13 overtime allegations are nothing new ... however, they were not alleged in any prior pleading.”
14 (Aboudi Decl. at ¶ 6.) It is accurate that Plaintiffs’ SAC creates a specific cause of action for
15 overtime wages, however, the concept of the failure to pay for all hours worked, *including*
16 overtime wages, was plead in the FAC. For example, Plaintiffs’ FAC states:

17 ¶ 60: Labor Code § 1194 provides for a private right of action to recover
18 wages for hours worked but not compensated. It states, in pertinent part:

19 [A]ny employee receiving less than the legal minimum wage or
20 the legal overtime compensation applicable to the employee is
21 entitled to recover in a civil action the unpaid balance of the
22 full amount of this minimum wage or *overtime* compensation,
23 including interest thereon, reasonable attorney’s fees, and costs
24 of suit.

25 ¶ 61: Plaintiffs seek to recover compensation for time worked but not paid,
26 attorneys’ fees and costs under Labor Code § 1194.

27 ¶ 66: Plaintiffs seek to recover all unpaid *overtime* wages, penalties, and
28 interest due to her and all others similarly situated.

(See FAC [emphasis added].)

29 Rule of Court 3.764 explicitly provides that any party may move to certify a class,
30 determine and certify subclasses, and/or amend or modify an order certifying a class. (Cal. Rule of

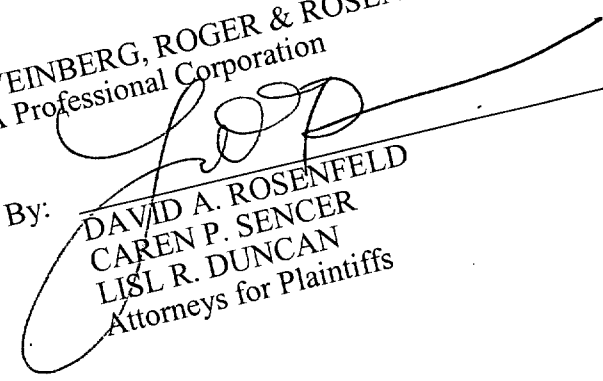
1 Court 3.764(a); see also *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 134.) The Rule
2 clearly contemplates that the class(es) may be defined or refined from classes alleged in a
3 complaint. Plaintiffs do not now assert a different class claim than what has been pled and
4 litigated. Rather, the Complaint, the FAC and the SAC have always alleged wage and hour
5 violations applicable to a class of employees and former employees.
6 As a result, the substance of Defendant's arguments fail to establish grounds upon which a
7 motion to strike could be sustained.

8
9
10 **III. CONCLUSION**

11 For the reasons set forth in this opposition, and those which may be offered to the Court at
12 the time of oral argument on this matter, Plaintiffs request that this Court deny Defendant's motion
13 to strike in its entirety

14 Dated: November 18, 2010

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