



8896405

REC'D

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

DAVID A. ROSENFELD, Bar No. 058163  
CAREN P. SENCER, Bar No. 233488  
LISL R. DUNCAN, Bar No. 261875  
WEINBERG, ROGER & ROSENFELD  
A Professional Corporation  
1001 Marina Village Parkway, Suite 200  
Alameda, California 94501-1091  
Telephone 510.337.1001  
Fax 510.337.1023

Attorneys for Plaintiffs  
LAVON GODFREY and GARY GILBERT

**FILED**  
ALAMEDA COUNTY  
2010 NOV 19 PM 12:56  
CLERK OF THE SUPERIOR COURT  
BY H. Lee  
DEPUTY

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

LAVON GODFREY and GARY GILBERT, on ) Case No. RG08379099  
behalf of themselves and all others similarly )  
situated, ) PLAINTIFFS' RESPONSE TO  
 ) DEFENDANT'S DEMURRER TO  
12 Plaintiffs, ) PLAINTIFFS' SECOND AMENDED  
 ) COMPLAINT  
13 v. )  
 ) Date: December 3, 2010  
14 OAKLAND PORT SERVICES CORP. d/b/a ) Time: 10:00 a.m.  
AB TRUCKING, and DOES 1 through 20, ) Dept: 20  
15 inclusive, ) Judge: Robert B. Freedman  
16 Defendants. )

**I. INTRODUCTION**

Plaintiffs filed this wage and hour lawsuit on March 28, 2008. Plaintiffs filed a class certification motion on December 15, 2009, which was subsequently modified and refiled. Plaintiffs' most recent motion for class certification will be heard December 3, 2010 by this Court.

Plaintiffs filed their Second Amended Complaint ("SAC") after discussion with opposing counsel and the Court regarding the pending motion for class certification. Defendant ultimately stipulated to the filing of the SAC. The Court granted leave to amend the complaint and the SAC was filed on September 20, 2010.

Plaintiffs were provided a timeline by which the Court expected to see the refiled motion for class certification. In keeping with the Court's order of October 7, 2010, Plaintiffs refiled their

1 class certification motion on October 29, 2010, which will be heard December 3, 2010 as  
2 referenced above.

3 Defendant now seeks to delay resolution on the class certification motion by bringing its  
4 demurrer to the SAC. However, Defendant's demurrer must fail because a demurrer is used to test  
5 the sufficiency of improper pleadings, not to challenge the applicability of class certification.

## 6 II. ARGUMENT

### 7 A. A DEMURRER DOES NOT TEST THE EVIDENCE OR THE FACTS

8 California Code of Civil Procedure ("CCP") section 452 provides:

9 In the construction of a pleading, for the purpose of determining its effect,  
10 its allegations must be liberally construed, with a view to substantial justice  
between the parties.

11 A complaint is good against a general demurrer if, upon consideration of all the facts stated, it  
12 appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that  
13 the facts may not be clearly stated, or may be intermingled with a statement of other facts  
14 irrelevant to the cause of action shown, or, although the plaintiff may demand relief to which he is  
15 not entitled under the facts alleged. (*Holmes v. Oakland* (1968) 260 Cal.App.2d 378; see also  
16 *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal. App. 3d 116, 122.) The complaint  
17 survives a demurrer "so long as it states facts disclosing some right to relief." (*Longshore v.*  
18 *County of Ventura* (1979) 25 Cal.3d 14, 22 ["*Longshore*"].)

19 A demurrer tests the pleading alone, and not the evidence or the facts alleged. (*City of*  
20 *Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) For  
21 that reason, the court takes as true the well-pleaded factual allegations of the complaint.  
22 (*Construction Protective Services, Inc. v. TIG Specialty Insur. Co.* (2002) 29 Cal.4th 189, 193  
23 ["*TIG*"].) The court gives the complaint a reasonable interpretation, reading it as a whole and its  
24 parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

25 Here, Defendant's demurrer does not address the ability of Plaintiffs to prevail on a  
26 particular cause of action or theory of recovery, but rather addresses the adequacy of class  
27 allegations. Defendant does not even make the allegation in its demurrer that Plaintiffs are not

1 entitled to “any judicial relief.” Defendant applies the incorrect standard. Regardless, the SAC  
2 provides well-plead factual allegations, including allegations that violations creating the eight  
3 causes of action plead occurred on a class wide basis. (See Section C, *infra*, for further detail on  
4 Plaintiffs’ specific allegations.)

5 Moreover, Plaintiffs have refiled their motion for class certification on more than one  
6 occasion fine tuning each motion based on additional information and in response to the Court’s  
7 request for clarification on certain issues. (See Declaration of Lisl R. Duncan in support of  
8 Plaintiffs’ opposition to Defendant’s motion to strike portions of Plaintiffs’ SAC filed concurrently  
9 [“Duncan Decl.”] at ¶ 20.) Plaintiffs filed their class certification motion on December 15, 2009  
10 and the hearing was postponed to allow for Defendant to take further discovery. This discovery  
11 was conducted. (*Id.*) Plaintiffs’ refiled the class certification motion on July 19, 2010 and the  
12 hearing was postponed to allow Plaintiffs to address procedural issues identified in the Court’s  
13 tentative ruling. (*Id.*)

14 The SAC is specifically amended to address the process that took place in this case from  
15 December 2009 through the date the SAC was filed. Plaintiffs refiled their class certification  
16 motion on October 29, 2010, which is scheduled to be heard December 3, 2010. As a result of this  
17 process, the SAC and this motion are closely tailored to each other and identically allege why  
18 Plaintiffs and the putative class members are entitled to judicial relief against Defendant.

19 **B. A DEMURRER IS INAPPROPRIATE TO TEST CLASS ALLEGATIONS**

20 Defendant bases its demurrer solely on arguments regarding class allegations, including  
21 Plaintiffs’ proposed class and subclasses, and the factors of commonality, typicality and adequacy.  
22 Legal precedent on the use of a demurrer to test class allegations found in a complaint is  
23 unambiguous. If there is a reasonable possibility Plaintiffs can plead a prima facie community of  
24 interest among class members, “the preferred course is to defer the decision on the propriety of the  
25 class action until an evidentiary hearing has been held on the appropriateness of class litigation.”  
26 (*Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 975 [“*Gutierrez*”]  
27 citing *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 988.) “Judicial

1 policy in California has long discouraged trial courts from determining class sufficiency at the  
2 pleading stage and directed that this issue be determined by a motion for class certification. ‘In  
3 order to effect this judicial policy, the California Supreme Court has mandated that a candidate  
4 complaint for class action consideration, if possible, be allowed to survive the pleadings stages of  
5 litigation.’” (*Id.* at p. 976 citing *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009)  
6 172 Cal.App.4th 1494, 1510 citations omitted [“*Tarkington*”].)

7 Notably, Defendant’s demurrer cites federal precedent almost entirely.<sup>1</sup> It is difficult to  
8 understand why Defendant relies upon federal law almost exclusively, and Defendant offers no  
9 explanation. “The law governing California class actions is comprised of a mixture of federal and  
10 state law: California law controls if it exists. Otherwise, “[i]n the absence of California authority,  
11 California courts may look to the Federal Rules of Civil Procedure (FRCP) and to the federal cases  
12 interpreting them [citation].” [Citation.]” (*Ticconi v. Blue Shield of California Life & Health Ins.*  
13 *Co.* (2008) 160 Cal.App.4th 528, 546.)” (*In re BCBG Overtime Cases* (2008) 163 Cal.App.4th  
14 1293, 1298.) Although federal law is used to supplement California law regarding class actions,  
15 California law controls when it exists. (*Id.*) There is expressly controlling California law on the  
16 issues Defendant raises in its demurrer. CCP section 382 governs the questions regarding  
17 commonality, typicality and adequacy raised by Defendant. (See Section C, *infra.*) Defendant  
18 fails to address the clear precedent on this issue under pertinent and “controlling” California law.  
19 (See *In re BCBG Overtime Cases, supra*, 163 Cal.App.4th at p. 1298.)

20 In addition, the standards Defendant applies are not only from federal law, but they are the  
21 standards the federal court would use to determine whether to *certify* a class, not to conduct an  
22 analysis at the pleadings stage. For instance, Defendant relies on Federal Rule of Civil Procedure  
23 23, which is entitled “Class Actions.” Defendant specifically cites subsection C of Rule 23,  
24 “Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.” (See  
25

26  
27 <sup>1</sup> Because it is a reoccurring concern (see e.g. Defendant’s Opposition to Plaintiffs’ Motion for Class Certification filed  
28 August 11, 2010), Plaintiffs make note of Defendant’s failure to lodge federal authorities in compliance with  
California Rules of Court 3.1113(i). This deficiency is particularly bizarre considering Defendant nearly exclusively  
cites federal authority.

1 Defendant's MPA at pp. 1-2.) In effect, Defendant writes an opposition to Plaintiffs' motion for  
2 class certification disguised as a demurrer, applying non-binding legal precedent.

3       Regardless of how Defendant attempts to frame the issue, governing California precedent is  
4 clear that a demurrer is not the appropriate mechanism to resolve class allegations. (See e.g.  
5 *Prince v. CLS Transportation, Inc.* (2004) 188 Cal.App.4th 1320, 1322 fn. 2 ["*Prince*"];  
6 *Tarkington, supra*, 172 Cal.App.4th 1494; and most recently *Gutierrez, supra*, 187 Cal.App.4th  
7 969.) The Court of Appeal in *Gutierrez* summarized the rationale of courts by stating that "the  
8 wisdom of permitting the action to survive a demurrer is elementary ... If the judicial machinery  
9 encourages the decision to be made at the pleadings stages and the judge decides against class  
10 litigation, he divests the court of the power to later alter that decision." (*Id.*) These cases show that  
11 demurrer to resolve class allegation issues in a wage and hour class action is strongly disfavored  
12 and rarely successful. A demurrer to class allegations may be sustained without leave to amend  
13 only if it is clear "there is no reasonable possibility that the plaintiffs could establish a community  
14 of interest among the potential class members and that individual issues predominate over common  
15 questions of law and fact." (See *Gutierrez, supra*, 187 Cal.App.4th 969, 975 citing *Blakemore v.*  
16 *Superior Court* (2005) 129 Cal.App.4th 46, 53.) Here, the SAC plainly demonstrates allegations  
17 on a class wide basis covering eight causes of action. Defendant has not articulated which causes  
18 of action it believes fail to state facts (assumed to be true by the Court as it must at this stage)  
19 sufficient to show a "reasonable possibility" that Plaintiffs can show a community of interest  
20 among class members.

21       Notwithstanding Defendant's misplaced theories, Plaintiffs have proven a prima facie  
22 community of interest sufficient that Defendant's demurrer should be denied. Plaintiffs' class  
23 certification motion is set to be heard by the Court on December 3, 2010. As such, there is no  
24 practical reason the Court should make a determination on these very issues at a hearing on the  
25 pleadings. Moreover, the timing of Defendant's demurrer can only be motivated by a wish to  
26 further delay the litigation. Defendant's filing of a demurrer, when Plaintiffs' class certification  
27 motion is pending (and when Defendant is well aware that Plaintiffs were required by the Court to  
28

1 refile the motion prior to a date certain), is nothing more than a thinly veiled attempt to  
2 inappropriately impede this process. Such tactics are not only improper, but create wide-reaching  
3 inefficiencies for the Court, Plaintiffs, and the putative class.

4 For the forgoing reasons, particularly because the legal precedent in this area is explicit,  
5 Plaintiffs do not walk through a direct opposition to each of Defendant's arguments regarding class  
6 allegations, such as "commonality" (see Defendant's MPA at pp. 4-5), "typicality" (see *id.* at pp. 5-  
7 6), "adequacy" (see *id.* at pp. 6-7) and "common questions of law or fact" (see *id.* at p. 7), suffice it  
8 to say, Defendant demurrers based purely on class issues.

9 **C. PLAINTIFFS HAVE PROVEN A "PRIMA FACIE COMMUNITY OF INTEREST"**  
10 **EXISTS AMONG CLASS MEMBERS**

11 The legal standard provides that if Plaintiffs prove a prima facie community of interest  
12 among class members, Defendant's demurrer must fail. ( See *Gutierrez, supra*, 187 Cal.App.4th at  
13 p. 975.) Plaintiffs have met their burden to show a prima facie case. CCP section 382 authorizes  
14 class action suits when the question is one of a common or general interest of many persons, or  
15 when the parties are numerous, and it is impracticable to bring them all before the court. (See *See*  
16 *Sav-On Drug Stores, Inc. v. Super. Ct.* ["Sav-On"] (2004) 34 Cal.4th 319, 326.) The party seeking  
17 certification must establish the existence of both an ascertainable class and a well-defined  
18 community of interest among the class members. (*Lockheed Martin Corp. v. Superior Court*  
19 (2003) 29 Cal.4th 1096, 1104.) To establish the requisite community of interest, the proponent of  
20 certification must show "(1) predominant common questions of law or fact; (2) class  
21 representatives with claims or defenses typical of the class; and (3) class representatives who can  
22 adequately represent the class." (*Id.*, citations omitted; see e.g. *Linder v. Thrifty Oil Co.* (2000) 23  
23 Cal.4th 429, 446 ["Linder"]; *Prince, supra*, 118 Cal.App.4th at p. 1329.) Plaintiffs' SAC makes  
24 allegations more than sufficient to address each of these criteria.

25 Plaintiffs' SAC challenges Defendant's actions on identical legal grounds for each member  
26 of the putative class and subclasses, implicating the same types of remedial issues. These facts  
27 disclosing some right to relief are set forth clearly in the SAC. (See SAC, III. Factual Allegations  
28 at pp. 3-6; see also *id.* IV. Class Allegations, B. Commonality at p. 9; *id.* V-XII. Causes of Action

1 at pp. 11-25.) For instance, Plaintiffs allege in the SAC:

2 Defendant engaged in:

3 A pattern and practice of failing to pay wages for all hours worked;

4 A pattern and practice of failing to pay wages for any hours worked as a  
5 result of misclassification of drivers' employment status;

6 A pattern and practice of failing to pay minimum wage as required by  
7 California law;

8 A pattern and practice of failing to provide minimum compensation under  
9 the Port of Oakland Living Wage Ordinance;

10 A pattern and practice of failing to pay overtime wages as required by  
11 California law;

12 A pattern and practice of failing to provide meal and rest periods as required  
13 under California law;

14 A pattern and practice of failing to provide employees with accurate wage  
15 statements;

16 A pattern and practice of failing to provide all compensation owed in a  
17 timely manner; and

18 A pattern and practice of failing to provide all compensation owed at the  
19 time of discharge or quit.

20 (See SAC at ¶ 10; see also *id.* IV. Class Allegations at pp. 7-11.) Plaintiffs cite the applicable law  
21 under which the Plaintiffs and the putative class members have a right to recover. (See SAC at ¶¶  
22 11-35.) In addition, Plaintiffs make these allegations on behalf of a class and subclasses. (*Id.* IV.  
23 Class Allegations at pp. 7-11.) The common questions of fact and law alleged in the SAC apply to  
24 all putative class members. The only question involving individual treatment is the calculation of  
25 how much is owed to each class member. Where common issues predominate, the potential need  
26 for individual damage computations does not defeat class treatment. (*Sav-on, supra*, 34 Cal.4th at  
27 p. 328.) A case may proceed as a class action "so long as each class member will not be required  
28 to litigate numerous and substantial issues to establish his individual right to recover." (*Id.* at p.  
811; see also *Vasquez v. Superior Court (Karp)* (1971) 4 Cal.3d 800, 815 [holding the need of each  
class member to establish individual damages "does not preclude the maintenance of the suit as a  
class action"]; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 744 [upholding

1 class treatment of a wage and hour case even where individual determination of damages was  
2 necessary].)

3 Again, the complaint survives a demurrer “so long as it states facts disclosing some right to  
4 relief.” (*Longshore, supra*, 25 Cal.3d at p. 22.) The court takes as true the well-pleaded factual  
5 allegations of the complaint. (*TIG, supra*, 29 Cal.4th 189 at p. 193.) As described above,  
6 Plaintiffs’ SAC sufficiently sets forth factual allegations of class wide violations and class wide  
7 theories of recovery.

8 Moreover, Defendant’s demurrer does not exist in a vacuum. Throughout the two years  
9 this case has been before the Court, both parties conducted extensive written discovery. (See  
10 Duncan Decl. at ¶ 19.) Defendant took the depositions of the two named Plaintiffs over the course  
11 of four days. (*Id.*) Plaintiffs took the deposition of two of Defendant’s designated persons most  
12 knowledgeable on a variety of related issues. (*Id.* at ¶ 15.) Most notably, Plaintiffs filed their  
13 motion for class certification on more than one occasion each time fine tuning based on additional  
14 information and in response to the Court’s request for clarification on certain issues. (*Id.* at ¶ 20.)  
15 Contrary to Defendant’s unsupported assertions, Plaintiffs have made a prima facie showing of a  
16 community of interest between class members.

17 As Plaintiffs sufficiently plead their claims as a class action in the SAC, articulating those  
18 claims in further detail in their motion for class certification, Plaintiffs, not only have the ability to  
19 prove, but have in fact proved, a “prima facie community of interest” among class members.

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //



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

**III. CONCLUSION**

For the reasons set forth in this opposition, and those which may be offered to the Court at the time of oral argument on this matter, Plaintiffs request that this Court overrule Defendant's demurrer in its entirety and that Defendant be ordered to answer the SAC within 10 days. Alternatively, should the Court sustain the demurrer, Plaintiffs request leave to amend to correct any defect in the pleading.

Dated: November 18, 2010

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

By: 

DAVID A. ROSENFELD  
CAREN P. SENCER  
LISL R. DUNCAN  
Attorneys for Plaintiffs

118212/594145