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IN THE 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 MOTION FOR CLASS CERTIFICATION** Date: December 3, 2010 Time: 10:00 a.m. Dept: 20 Judge: Robert B. Freedman Reservation Number: R-1114331

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I. INTRODUCTION

Plaintiffs moved to certify a class and five subclasses of individuals who performed work for AB Trucking ("Defendant" or "AB") but did not receive all the appropriate compensation due to them for that work. Defendant opposes the motion for class certification primarily because it alleges Plaintiffs' motion is premature based on the pendency of Defendant's demurrer to the Second Amended Complaint ("SAC"), and Plaintiffs' have not shown "substantial evidence" of a number of discrete issues including numerosity and typicality. Defendant's opposition fails to address the legal and factual questions common to resolution of the underlying claims made on behalf of the named plaintiffs and all putative class members. Defendant's attempt to cloud the issues does not refute the superiority of class certification to this case.[1]

Plaintiffs address the standard for class certification followed by responses to Defendant's meritless objections and defenses.

II. ARGUMENT

A. PLAINTIFFS PROVIDE SUBSTANTIAL EVIDENCE IN SUPPORT OF EACH OF THE REQUIREMENTS OF CLASS CERTIFICATION

Defendant argues Plaintiffs have failed to provide evidence in support of the class and subclasses they seek to represent. Review of the moving papers negates this claim.

1. Numerosity

Defendant's payroll records reflect approximately 50 putative class members.[2] Defendant

[1] Defendant states in its opposition and in its Objection to Plaintiffs' Attempt to Use Declarations that the Court's ruling of June 25, 2010 was "uncontested." While Plaintiffs' respectfully deferred to the Court's instructions, Plaintiffs by their presence and argument at the hearing contested the ruling. Notwithstanding the irrelevance of Defendant's characterization to the question before the Court, such unfounded assertions should not be well-taken.

[2] Defendant produced records, including payroll records, to Plaintiffs during the discovery process. (See Declaration of Lisl R. Duncan in support of class certification ["Duncan Decl."] at ¶ 5.) Defendant's payroll records reflect an average of 12 "employee" drivers at any given time period. (See for example, Duncan Decl., Exhibit B at Exhs. 2-4, 10.) Exhibits 2-4 and 10 reflect payroll records from January 2008, January 2007 and November 2007. (See also, Duncan Decl. at Exh. B at p. 15:18-24 in which Defendant's PMK W. Aboudi states AB Trucking employed 10 drivers at the time of his deposition in June 2009.) The statutory period covers at least the four years prior to the filing of the Complaint. It has been well-over two years since the filing of this action. There are six years of drivers who would fall into the putative class and subclasses. Exhibits 2-4 reflect 11-12 drivers on payroll, W. Aboudi testified that in June 2009 there were 10 drivers, and Exhibit 10 reflects 17 drivers on AB's payroll. Plaintiffs' estimation of a putative class of 50 drivers is based on some amount of turnover with an average number of 12 drivers over the course of six years. Plaintiffs' calculation does not assume that there were 12 totally different drivers each of these six years.

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attempts to argue that there may be only "12" putative class members. (See Opp. at p. 6:4-8.) Even if Plaintiffs' estimation were generous, the records clearly show more than "12" putative class members as Defendant implies. (See footnote 2, *supra*; Duncan Decl., Exh. B[3] at Exh. 2-4, 10.) Notably, Defendant has produced no evidence, records or other compilation showing that the class is limited to 12 people or less. Defendant's point could be easily made by pointing to support in the record. However, no such support is offered.

Courts are explicit that there is no certain magic number that determines the numerosity requirement for class certification met. (See e.g. *Rose v. City of Hayward* ["*Rose*"] (1981) 126 Cal.App.3d 926, 934 [finding that 42 individuals is sufficient for class certification]; see also *Collins v. Roca* (1972) 7 Cal.3d 232 [upholding class action with 35 class members].) The requirement is that there must be "many" class members. (*Rose*, *supra*, 126 Cal.App.3d at p. 934.) Again, Plaintiffs' estimation of 50 drivers comes from review of all payroll records produced by Defendant during discovery (a representative sample of which were authenticated by Defendant's PMK W. Aboudi, attached as exhibits to his deposition and then filed with the Court as exhibits to Duncan Decl.) and deposition testimony. (See footnote 2, *supra*.) Defendant has not countered Plaintiffs' calculation.

2. <u>Typicality</u>

The function of a class representative is to be typical of the rest of the class, not necessarily to provide evidence on what has happened to other class members. At certification, it is sufficient to show that the claims of the representatives are common to all based on the practices and policies of the employer. (*Sav-on Drug Stores, Inc. v. Superior Court* ["*Sav-On Drug*"] (2004) 34 Cal.4th 319, 325). Notably, no evidence is provided by Defendant to indicate that the experiences of Gilbert and Godfrey differed from that of any other driver at AB Trucking. The heart of Plaintiffs' support for class certification is the common practices and policies applied by AB Trucking on its employees.

Defendant's designated PMKs on matters related to Defendant's operations, timekeeping

[3] Unless otherwise noted, all "Exhibits" or "Exhs." reference exhibits attached to the Declaration of Lisl R. Duncan in support of class certification, or Duncan Decl.

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and payroll (see Duncan Decl. at ¶¶ 3-4) were William Aboudi ("W. Aboudi") and Jovi Aboudi ("J. Aboudi"). In light of J. Aboudi's testimony describing Defendant's pay practices and W. Aboudi's testimony regarding management and direction of drivers, it is irrelevant to what extent Ms. Godfrey and Mr. Gilbert are competent to testify about the actions of others. As discovery has shown, wage payment issues discussed in the moving papers are uniformly applicable to five ascertainable classes of people; it is of no consequence whatsoever whether Ms. Godfrey and Mr. Gilbert knew what happened to other drivers when they were working for Defendant. A showing of institutional practices is sufficient to show common questions of fact predominate: "... alleged 'institutional practices by CLS ... affected all of the members of the potential class in the same manner ... At this stage, no more is required.'" (*Ghazaryan v. Diva Limousine, LTD.* (2009) 169 Cal.App.4th 1524, 1537 quoting *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1329.) The Aboudis' admissions alone are enough to compel certification. (See *Sav-On*, *supra*, 34 Cal.4th at p. 334; *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286 ["*Jaimez*"].)

3. **Common Questions of Law and Fact Predominate**

a) **Oakland Port Services Truck Driver Training Program Trainee Participations and Release of Liability Agreement**

Defendant is correct that Plaintiffs state, "whether or not this agreement is valid in light of statutory authority and Wage Order 9(2) is a common question to all individuals classified as trainees." (MPA at p. 10:13-14.) This is precisely what the inquiry should be at this stage. The question is not whether or not the agreement is legally valid, but whether the question of its validity will be common to all putative subclass members such that the Court would have to make the same determination in all cases. This is based on the requirement that the Court perform at this stage, not a merits evaluation, but an evaluation of whether a community of interest exists between putative class members. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) At certification, it is sufficient to show that the claims of the representatives are common to all based on the practices and policies of the employer. (*Sav-on, supra*, 34 Cal.4th at p. 325). Notably, no evidence is provided by Defendant to indicate that the experiences of Gilbert differed from that of any other trainee who signed the Agreement at AB. Instead, W. Aboudi and J.

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Aboudi's testimony and the time sheets attached to their depositions as exhibits show there were other "trainees" who were treated similarly. (See Exh. B, Exhs. 2, 3, and 10; Exh. C at 23:3-19.)

B. PLAINTIFFS PROVIDE SUBSTANTIAL EVIDENCE IN SUPPORT OF THE CLASS AND EACH OF THE SUBCLASSES TO BE CERTIFIED

CCP section 382 authorizes class action suits when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. (See *Sav-on, supra*, 34 Cal.4th at p. 326.)

1. Failure to Pay for All Hours Worked Class

Plaintiffs allege that Defendant failed to pay for all hours worked, in part, by making automatic deductions from employee wages for meal periods that were not taken. The time cards kept by the employer along with the admitted common practice of the employer provide evidence of this harm. The time cards do not have a place to indicate a meal period and no other meal period records have been kept. (See Exh. 2 to Exh. B; Exh. B 118:9-13). Notwithstanding the absence of meal period records or any evidence of meal periods actually being taken, the employer's payroll documents uniformly show a deduction for 1 hour a day (5 hours a week) as compared to the time sheets. As a result, it is clear that all employees paid by the employer have been denied payment for all hours worked. Time cards, wage statements and deposition testimony regarding the common practice have been provided. (See Exhs. 2-4, 10 to Exh. B; Exh. B 118:9-13; Exh. C 36:9-17). The question at this stage is not whether Plaintiffs will ultimately succeed on the merits, but whether the process of resolution will be the same for all class members. Whether this practice, as a matter of law, denies employees wages earned, will need to be resolved on a class-wide basis. Ms. Godfrey, as an individual undisputedly subjected to this practice, is an adequate representative of this class.

2. Misclassified or No Wages Received Class

Individuals who were classified as trainees received no wages as AB Trucking did not believe them to be employees. Whether the individuals, identified on the employer's time sheets, were actually employees is a question of law. The evidence in support of this claim is the deposition testimony of W. Aboudi surrounding the program and the "trainee" agreement. (Exh. B

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138:17-24; 142:23-144:21; Exh. 1 to Exh. E). Mr. Gilbert's declaration and deposition, as well as Ms. Godfrey's declaration, indicate the duties performed by the so-called trainees. (See Gilbert Decl. ¶¶ 9-13; Godfrey Decl. ¶¶ 4-8). The deposition testimony of J. Aboudi shows that, as a practice, trainees are not paid and are not added to payroll without the explicit instruction of W. Aboudi. (Exh. C. 22:1-23:20). It is undisputed that AB Trucking used the services of a group of trainees and no argument has been made that any trainees were treated differently.

The record shows Mr. Gilbert was a "trainee" and that he drove around in Defendant's vehicles with another driver, sometimes taking the wheel and other times riding with the other driver. (See Exh. E-2 at 100:10-12.) Defendant admits it has a trainee system. (See Exh. B at 138:1-24, Exhs. 4 at bate stamp nos. 49, 54, 48, 57.) Defendant admits Mr. Gilbert was one of these "trainees," in fact, Defendant cites to the "agreement" signed by Mr. Gilbert entitled "Oakland Port Services Corporation Truck Driver Training Program: Trainee Participation and Release of Liability Agreement." (See Exh. 1 to Exh. E.) Defendant admitted it does not compensate trainees for the "training" process. (See Exh. C at 22:1-23:20.) Mr. Gilbert, as discussed below, never advanced to a paid position with AB. (See Gilbert Decl. at ¶ 18.)

3. **The Overtime Class**

Both AB's PMKs, W. Aboudi and J. Aboudi, testified that drivers receive only straight time for all hours worked. (See Exh. B at 119:20-120:4; Exh. C at 19:10-15.) As a result, all drivers who worked more than 8 hours a day and/or 40 hours a week share a community of interest regarding this overtime claim. If overtime is available to drivers, all drivers subject to AB Trucking's common practice of paying only straight time have been harmed. Time cards and wage statements show the failure to pay overtime after 8 hours work in a day or 40 hours in a week across individuals. (See Exhs. 2-4, 10 to Exh. B; See also Godfrey Decl. ¶ 18; Exh. B 119:20-25; Exh. C 19:10-15).

The issue to be addressed during class certification is whether all drivers were subject to the same practice such that resolution of the overtime issue is manageable on a class-wide basis. This is clearly established. Both AB's PMKs testified that drivers receive only straight time for all

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hours worked. (See Exh. B at 119:20-120:4; Exh. C at 19:10-15.) As a result, drivers share a community of interest regarding this overtime claim.

4. **The Living Wage Class**

Through requests for judicial notice previously granted, it has been established that the living wage in Oakland during the period of July 2007-June 2008 was $11.58 without benefits and $10.07 with benefits. Defendant's PMK J. Aboudi testified that all employees started at $11. (Exh. C at 68:2-5). The majority of drivers were not given health benefits: frequently only 1 driver out of, for instance, 12 drivers received health benefits. (Exh. B at Ex. 2 at bate stamp nos. 20-21 [showing 2 drivers receiving health benefits]; Ex. 3 at bate stamp nos. 5-6 [showing 1 driver receiving health benefits]; Ex. 4 at bate stamp nos. 34-35 [showing 1 driver receiving health benefits]; Ex. 10 at bate stamp nos. 492-493 [showing 2 drivers receiving health benefits]). Admitted payments of $11.00 a hour, an amount 58¢ less per hour than the living wage, shows a violation of the Oakland living wage ("OLW"), if the Living Wage Ordinance (Oakland Municipal Code section 2.28) applies.

Defendant states that Plaintiffs only offer "future proof" on the question of whether all drivers are entitled to the OLW. (Opp. at p. 4:13.) Contrary to this assertion, Plaintiffs have provided substantial evidence to indicate the OLW applies to the drivers (see MPA at pp. 13-14). Moreover, it is Defendant who refused to answer questions about its status in discovery blocking Plaintiffs from evidence on this issue. (See Exh. B at p. 35:4-20 [wherein attorney for AB Trucking instructs W. Aboudi not to answer questions regarding AB Trucking's lease].) Regardless, the legal questions asked at any deposition of the Port of Oakland's PMK would be applicable to *every driver* clearly making this issue common to all putative class members. Again, the question on certification is not whether Plaintiffs will ultimately succeed on the merits, but rather, whether resolution will be the same for all putative class members.

5. **The Meal and Rest Period Class**

The employer has no policy regarding meal and rest periods. The drivers do not regularly take meal and rest periods. It is the employer's obligation to ensure meal periods are actually

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taken. Here, both Mr. Gilbert and Ms. Godfrey were subjected to work without meal and rest breaks (Gilbert Decl. ¶¶ 14-15; Godfrey Decl. ¶¶ 13-15; 17). Further, when teamed with other drivers, both Gilbert and Godfrey noted the lack of meal periods and rest breaks (Gilbert Decl. ¶¶ 14-15, Godfrey Decl. ¶ 13).

Here, Defendant's time keeping and payroll practices assume meal periods are taken by all drivers. (Exh. C at 35:10-36:17, 60:8-61:6; Exh. B at Exh. 2, 16.) All drivers are treated the same. For instance, Defendant's time keeping system does not provide for a place for drivers to record their meal periods each shift. (See Exh. B, Exhs. 2-4.) Defendant's records show *on their face* that drivers enter their start time and end time with no indication of a meal period. There can be no meal period assumed from this documentation by the drivers; this documentation indicates only the start time and end time for the driver's shift. Furthermore, IWC Wage Order 9(7) requires employers to record and retain accurate information with respect to each employee, including information regarding employees' meal periods. (Wage Order 9(7)(A)(3), (7)(C).) Defendant presents nothing to refute what its records, combined with the testimony of its PMKs, show.

Plaintiffs allege that AB failed to authorize and permit drivers with a minimum of 10 minutes of rest for every four hours worked in a day, or any major fraction thereof. (See Godfrey Decl. ¶¶ 13, 14, 16, 17 and Gilbert Decl. ¶¶ 14, 15, 18.) Where an employer fails to provide a required paid rest break, the employer must pay the employee one hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided. (Labor Code § 226.7(b); Wage Order 9(12)(B).)

W Aboudi's testimony and documents produced show no written policy on meals or rest periods and thus cannot support that any training was given on meals and rests periods. (Duncan Decl. ¶8 and Exh. B at 116:13-15; 99:14-100:13; Godfrey Decl. at ¶¶16.) Regardless, whether meal periods and rest breaks were provided as a matter of law, is a question on the merits to be decided on a class-wide basis. However, it is clear that all drivers were subject to common practices and policies from the employer on this issue. Again, the merits are not at issue at this stage, but whether the process of resolution will be the same for all class members.

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6. **The Class definition includes the wages owed at discharge and the wage statement claims**

All drivers were paid under a common payroll system and received wage statements in the same format. (Exh. B at 171:24-173:7; 180:4-21; 189:6-13; Exh. 2-4, 10; Exh. C at 8:12-9:4; 9:16-10:3, 10:22-11:9, 12:6-12; Godfrey Decl. at ¶11; Gilbert Decl. at ¶16.) This common experience is sufficient to show a community of interest exists for putative class members. (See, e.g., *Jaimez, supra*, 181 Cal.App.4th at p. 1304 [finding employer's policy and practice of deducting 30 minutes per shift for each driver, regardless of whether the driver took a meal break, raises common legal and factual issues].[4]) These claims are, to some degree, derivative of other claims and therefore, do not require additional subclasses; all drivers who worked for AB received wage statements in violation of Labor Code section 226 and any driver who is a member of any of the five subclasses and has separated employment is owed wages, giving rise to Labor Code section 203 penalties. The proper inquiry at this stage is whether these claims will be resolved in the same manner for all putative class members, not whether Plaintiffs will ultimately succeed on the merits.

a) Payment of Wages After Discharge and Quit

Plaintiffs' Memorandum explains that "this claim is applicable for all members of the proposed class and each subclass." (MPA at p. 17:14-15.) Whether AB paid drivers all wages owed each pay period, including wages at the applicable wage rate (overtime and/or OLW), for each hour worked and premiums for missed meal and rest periods are inquiries common to all drivers in the putative class. Whether AB did not pay trainees any wages, and as such failed to pay all wages owed each pay period and the wages owed at the separation of Plaintiffs' working relationship with AB, are similarly common inquiries. Plaintiffs claim Defendant failed to pay putative class members in violation of a variety of laws (see below for a discussion of each). As a result, Defendant failed to pay all appropriate wages to class members at the time of discharge or

[4] See also, *Sav-on, supra*, 34 Cal.4th at p. 325 [granting class action certification where employer had a standardized policy of misclassifying managers as exempt employees so as to avoid overtime payments]; *Bell v. Farmers Insurance Exchange* (2004) 15 Cal.App.4th 715 [affirming class certification for former and current insurance representatives in suit against company for unpaid overtime compensation]; *Stephens v. Montgomery Ward & Co.* (1987) 193 Cal.App.3d 411, 420-421 [class action appropriate where employer's centralized personnel practices overcame fact that each store functioned independently].)

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quit. There is no need in Plaintiffs' view to create a separate subclass for this claim as it will be applicable to all members of the proposed class.

b) Inaccurate Wage Statements

Likewise, Plaintiffs' Memorandum explains that "this claim is applicable for all members of the proposed class and each subclass." (MPA at p. 17:26-27.) Plaintiffs claim Defendant failed to pay putative class members in violation of a variety of laws (see, *supra*, for a discussion of each). As a result, Defendant could not have provided "accurate" wage statements when any of the alleged violations were committed because the "total wages" listed could never be "accurate." As the employer improperly deducted one hour each day from each drivers' paid time, each wage statement under reports the total hours worked. The group classified as "trainees" received no wage statements at all. There is no need in Plaintiffs' view to create a separate subclass for this claim as it will be applicable to all members of the proposed class.

C. CLASS CERTIFICATION IS THE MOST ADVANTAGEOUS METHOD OF RESOLUTION

All of the drivers work out of a common facility, report to the same supervisors and managers, are paid pursuant to identical payroll practices, are subject to the same work rules and policies, and receive wage statements with the same information.[5] Defendant's payroll records and time cards conclusively show the number of individuals hired as drivers and working as trainees, the hours worked, the failure to record meal periods and automatic deductions for meal periods from hours worked. (See Exhs. 2-4, 10 to Exh. B).

The principal dispute in this case is whether the employer met its affirmative duties under the Labor Code, IWC Wage Order 9 and the Living Wage Ordinance to provide payment for all hours worked at the appropriate rate, payment for overtime hours worked, and meal and rest periods. In order to decide these disputes, the Court will have to rely on common evidence and decide common, identifiable legal issues.

[5] See Plaintiff's Memorandum of Points and Authorities ("MPA") for more analysis of this issue and specific legal conclusions and evidence that will be common to the resolution of this case.

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D. DEFENDANT'S REMAINING ARGUMENTS ARE NOT APPLICABLE OR SUBSTANTIATED

1. A determination based on class issues is not appropriate at the pleadings stage

Defendant's demurrer is not the appropriate stage for a determination of the adequacy of class certification. Defendant bases its demurrer, scheduled to be heard December 3, 2010, solely on arguments regarding class allegations, including Plaintiffs' proposed class and subclasses, and the factors of commonality, typicality and adequacy. Legal precedent on the use of a demurrer to test class allegations found in a complaint is unambiguous. If there is a reasonable possibility Plaintiffs can plead a prima facie community of interest among class members, "the preferred course is to defer the decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation." (*Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 975 citing *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 988.) "Judicial policy in California has long discouraged trial courts from determining class sufficiency at the pleading stage and directed that this issue be determined by a motion for class certification. 'In order to effect this judicial policy, the California Supreme Court has mandated that a candidate complaint for class action consideration, if possible, be allowed to survive the pleadings stages of litigation'." (*Id.* at p. 976 citing *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1510 citations omitted.) Plaintiffs have proven a prima facie community of interest sufficient that Defendant's demurrer should be denied.

Notably, nearly a year ago Plaintiffs filed their initial motion for class certification. Since that time, Plaintiffs have refiled their motion on more than one occasion each time fine tuning the motion based on additional information and in response to the Court's request for clarification on certain issues. The parties have conducted extensive discovery. Contrary to Defendant's unsupported assertions, Plaintiffs have made a prima facie showing of a community of interest between class members.

The pending hearing on Defendant's demurrer does not affect the Court's ability to grant class certification because the standard is clear that class issues should be determined at class

certification and because, notwithstanding this principle, Plaintiffs have made a prima facie showing of community of interest such that Defendant's demurrer to the SAC must fail. As more fully expressed in the opposition to Defendant's Motion to Strike Portions of Plaintiffs' SAC, set to be heard December 3, 2010, the stipulated SAC is a method recommended by the Court for aligning the pleadings with the evidence adduced through discovery.

2. By the Court's own order, the previously-filed Declarations of Godfrey and Gilbert may be relied upon

Defendant argues that the Declarations of Plaintiffs Godfrey and Gilbert may not be relied upon because Defendant argues "those purported declarations were neither served on the Defendant nor filed with the Court." (Defendant's Opposition to Plaintiffs' Motion for Class Certification ["Opp."] at p. 2:19-20.) First, this statement is erroneous. Plaintiffs indisputably served the Declarations of Plaintiffs Godfrey and Gilbert on Defendant and filed these declarations with the Court, on July 19, 2010. (Available at http://apps.alameda.courts.ca.gov/domainweb /html/casesumbody.html, "Motion for Class Certification Filed for Plaintiff," Documents #17129541: Godfrey and #17129542: Gilbert.) Second, the Court specifically instructed the parties that material already filed might be relied upon without refiling and reserving the material.

The Court's Case Management Order of 10/07/10 at 2:00 p.m. states in pertinent part:

> 4. To the extent the parties rely on declarations or other material filed in support of, opposition, or reply to opposition of the previous class certification motion, they may incorporate such materials by reference in connection with the contemplated renewed motion. However, each side must provide "hard copy" courtesy copies of all such material to Dept. 20 along with courtesy copies of any new filings.

Plaintiffs made very minor modifications to the class certification motion filed July 19, 2010 before refiling the motion in its current form, which is scheduled to be heard on December 3, 2010. As a result and in the interest of clarity, Plaintiffs refiled the notice of motion, the memorandum of points and authorities and the declaration of Lisl R. Duncan in support thereof. Plaintiffs saw no need to refile the *unchanged* Declarations of Plaintiffs Godfrey and Gilbert and, following the Court's direction, served "hard copy" courtesy copies on the Court and referenced

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the Declarations in their moving papers.[6]

Defendant attempts to play games by pretending it is unfamiliar with these Declarations, yet Defendant admits it received the Declarations in question. (See Defendant's Objection to Plaintiffs' Attempt to Use Declarations at p. 3:13-19.) This argument is more fully addressed in Plaintiffs' reply to Defendant's Objection to Plaintiffs' Attempt to Use Gilbert and Godfrey Declarations filed with Defendant's opposition, filed herewith.

3. Plaintiff Gilbert did not advance to a paid position with Defendant

Defendant claims that Plaintiffs fail to address issues raised by the Court, such as whether Plaintiff Gilbert ever advanced to a paid position. This concern was raised by the Court in its June 25, 2010 order. On July 19, 2010, Mr. Gilbert's declaration was filed. His declaration states unequivocally in Paragraph 18:

> I did not advance to a paid position with AB Trucking. I have received no wages, nor any other payment, from AB Trucking.

As a result, Defendant's argument, "none of the references to the purported Gilbert Declaration is ever cited even to address, much less make "clear" as the Court requested, "whether Gary Gilbert ever advanced to a paid position with Defendant"," (Opp. at p. 2:21-23) or that the Court must "cull" the record to look for this information, is inapplicable and completely refuted by the record. (*Id.* at p. 3:5.)

III. CONCLUSION

Plaintiffs have established substantial evidence in support of the class and each of the five subclasses to be certified and have provided sufficient evidence to establish their appropriateness as class representatives. Defendant's opposition fails to refute this evidence. The claims of the Plaintiffs are common to all putative class members based on the standardized practices and policies of the employer as admitted through AB Trucking's persons most knowledgeable and

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[6] Plaintiffs take the position that, while the Court's order instructed that the parties may rely upon "material filed in support of, opposition, or reply to opposition," this does not extend to moving papers, opposition, or a reply. Plaintiffs were obligated to refile their motion and did with appropriate changes. In contrast, Defendant has filed a short opposition that fails to address the majority of Plaintiffs' moving papers filed October 29, 2010. Per the Court order, the supporting materials are incorporated, but neither party has the ability to incorporate any positions or defenses from prior motions, oppositions, or replies. Plaintiffs therefore expect Defendant's opposition is limited to only the opposition filed on November 22, 2010.

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documents. In light of these facts, Plaintiffs seek certification of the class and five subclasses.

Dated: 11/24/10

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By: _____
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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 November 24, 2010, 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 MOTION FOR CLASS CERTIFICATION

[ ] **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 November 24, 2010.

Karen Scott

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