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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' TRIAL BRIEF

Date: February 9, 2012
Time: 3:00 p.m.
Dept.: 20
Judge: Hon. Robert B. Freedman

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I. INTRODUCTION

Plaintiffs Lavon Godfrey and Gary Gilbert ("Plaintiffs") on behalf of themselves and the Class, file this brief to aid the Court in preparation for trial commencing February 14, 2012.

The Court is quite familiar with the facts of this case as it has progressed almost entirely in Department 20 before the Honorable Judge Freedman since 2009. This case is a wage and hour class action suit brought by two Plaintiffs, who are former truck drivers of AB Trucking and were certified as class representatives of the Class and Subclasses.[1] The operative class action complaint in the instant action (Second Amended Complaint, filed September 20, 2010, hereafter "Complaint") contains eight causes of action.[2] Plaintiffs seek to recover any and all wages due and applicable penalties on behalf of themselves and the Class. Plaintiffs also seek the difference between the Living Wage and the lower wage rate paid for the period of January 10, 2005 – February 3, 2006, and the difference between the overtime rate for the four (4) years prior to the filing of the Complaint, for themselves and the Class. Plaintiffs request treble damages pursuant to the OLW, costs of litigation and attorneys' fees.

II. PROCEDURAL STATUS

A. PLAINTIFFS' PRETRIAL MOTIONS

- Motion to Quash Defendant's Notice to Attend and Produce Documents
- Motion in Limine Excluding Witnesses and Evidence

III. ARGUMENT AND AUTHORITIES

A. FAILURE TO PAY FOR ALL HOURS WORKED[3]

The evidence will show that as a direct result of Defendant's default practice and policy of automatically deducting one hour's pay from each driver per each shift worked – despite the fact that no records of any "meal periods" were maintained, and overwhelming driver testimony that

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[1] The hearing on Defendant's motion to decertify the class is one hour prior to the pretrial conference; as a result, Plaintiffs' trial brief addresses all claims, and as to the Class.

[2] 1) Unfair Business Practices (Business & Professions Code §§17200, et seq., "UCL"), 2) Failure to Pay for All Hours Worked (Labor Code §§510, 1182.12, and 1194; IWC Wage Order No. 9, §4), 3) Failure to Pay for Any Hours Worked Due to Misclassification of Employment Status (Labor Code §§510, 1182.12 and 1194; IWC Wage Order No. 9, §40, 4) Failure to Pay Overtime (Labor Code §§510 and 1194; IWC Wage Order No. 9, §3), 5) Failure to Pay Living Wage (Oakland City Charter §728) ("OLW"), 6) Failure to Provide Meal and/or Rest Periods (Labor Code §§226.7 and 512; IWC Wage Order No. 9), 7) Failure to Pay Wages Owing at Discharge or Quitting (Labor Code §§201, 202 and 203), and 8) Failure to Provide Accurate Itemized Wage Statements (Labor Code §226).

[3] (See Industrial Welfare Commission Wage Order No. 9 ("Wage Order"), sections 3 and 4, codified at 8 California Code of Regulations 11090; Labor Code §§ 510, 1182.12, 1194.)

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drivers were never instructed to take one hour meal periods, nor did they actually receive one hour meal periods (and were typically encouraged not to take, or prevented from taking, even a 30-minute meal period) – drivers worked an hour each day for which they were not paid. This is a violation of California labor laws, which require compensation for every hour an employee is suffered or permitted to work. Moreover, where an employer fails to keep records of hours worked, employees may establish the hours worked solely by their testimony, and the burden of overcoming such testimony shifts to the employer. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.)

"A review of our labor statutes reveals a clear legislative intent to protect the minimum wage rights of California employees" (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324.) In fact, Wage Order 9, section 4(B), applicable to the Class of drivers here, provides: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise [Italics added]." This language expresses the intent to ensure that employees be compensated at least at the minimum wage for each hour worked. (*Armenta*, 135 Cal.App.4th at p. 323; see also *Ontiveros v. Zamora* (2009) 2009 U.S. Dist. LEXIS 13073, 9-10.)

Wage Order 9(2)(H) defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so": "The "suffered or permitted to work" language does not limit whether time spent "subject to the control of an employer" is compensable." (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582; see e.g., *Martinez v. Combs* (2010) 49 Cal.4th 35, 69: "The language thus "cast a duty upon the owner or proprietor to prevent the unlawful condition, and the liability rest[ed] upon principles wholly distinct from those relating to master and servant. *The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist.*") The evidence will show drivers were suffered or permitted to work for one hour each day but were not compensated.

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Drivers are entitled, not only to wages earned but not paid, but to liquidated damages in addition, in an amount equal to the wages unlawfully unpaid with interest. (See Labor Code §1194.2.)

B. FAILURE TO PAY FOR ANY HOURS WORKED DUE TO MISCLASSIFICATION OF EMPLOYMENT STATUS[4]

The evidence will reflect that drivers AB misclassifies as non-employees, "trainees," are suffered or permitted to work, but AB does not compensate these drivers for *any* hours, at any wage rate. Not only are trainees suffered and permitted to work, performing functions that other compensated drivers perform, but trainees do not receive any non job-specific training. AB has no program or organized action for trainees, and it has no AB training manuals or materials. The "trainers" are other drivers, who are given no special instruction on how to train. Trainees perform the job functions of employee drivers, regardless of the fact that they are accompanied by an employee driver while performing these functions. Some drivers were called trainees when they began work for AB, but they were paid for their work, which only further illustrates that all trainees should have been compensated.

In fact, Wage Order 9 allows for an exception for learners, regardless of age, who may be paid not less than 85% of the minimum wage rounded to the nearest nickel during their first 160 hours of employment in occupations in which they have no previous similar or related experience. As of February 2012, this rate was $6.80 per hour. (Available at http://www.dir.ca.gov/dlse /FAQ_ MinimumWage.htm) AB did not pay a learner rate. Moreover, the Oakland Living Wage does not provide a separate learner rate. (See Plaintiff's Request for Judicial Notice ("RJN") granted 6/25/10.) As the OLW Ordinance was in effect from January 10, 2005 through February 3, 2006, it is the default for any wage analysis during that time period. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 778.) Trainees must receive no less than the OLW during that time period as a result.

[4] (Wage Order 9, sections 3 and 4; Labor Code §§ 510, 1182.12, 1194.)

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1. Regardless of how AB may try to characterize the unpaid trainees' relationship with the company, workers cannot waive their statutory right to the minimum wage.

In California, wage claims cannot be waived. California law zealously protects employees' right to wages already earned. Several sections of the Labor Code prohibit the waiver of wage claims. For example, Labor Code section 206.5 provides:

> An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made. A release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee. Violation of the provisions of this section by the employer shall be a misdemeanor.

Further, Labor Code section 219 makes it illegal for any employer or employee to enter into an agreement that would negate or undercut the provisions of the Labor Code that require the timely payment of all wages due. Labor Code sections 2802 and 2804 provide that an employer must indemnify an employee for any losses caused by the discharge of his duties and any agreement to waive that protection is void. Labor Code section 1194(a), which requires the payment of the minimum wage and overtime as provided by statute and regulation provides:

> ***Notwithstanding any agreement to work for a lesser wage***, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit [emphasis added].

Trainees misclassified as non-employees and not paid at all are entitled, not only to wages earned but unpaid, but to liquidated damages in addition, in an amount equal to the wages unlawfully unpaid with interest. (See Labor Code §1194.2.)

C. FAILURE TO PAY OVERTIME[5]

Again, the evidence will reflect that as a direct result of Defendant's default practice and policy of automatically deducting one hour's pay from each driver per each shift worked, drivers worked an hour each day for which they were not paid. Drivers worked at least 9 hours each day,

[5] (Wage Order 9, sections 3 and 4; Labor Code §§ 510, 1182.12, 1194.) Unpaid trainees, misclassified as non-employees, did not experience AB's auto-deduction practice. This fact is immaterial, however, as trainees misclassified as non-employees were not paid at all. Unpaid trainees worked with drivers and, therefore, also typically worked 9 hours in a day.

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but were only paid for 8 hours because of this auto-deduction. Not only does this result in a failure to pay the minimum wage for all hours worked, but, because the unpaid hour extends beyond 8 hours in a day, drivers are entitled to backpay and liquidated damages at an overtime wage rate. (See Labor Code §1194.2.) Trainees worked the same hours as the drivers classified as employees with whom they rode and/or "trained."

Plaintiffs acknowledge that drivers would not be entitled to both payment at their regular wage rate (for the all hours worked violation) and payment at the overtime wage rate (for the overtime violation) for the same 1 hour. Whether drivers are compensated for this unpaid hour each day at their regular wage rate (plus liquidated damages) or at an overtime wage rate (plus liquidated damages), will be decided at trial and the amount owed can easily be determined in the damages phase.

Defendant's payroll records show the automatic deduction of one hour of pay each day, and that drivers worked more than 8 hours in a day and 40 hours in a week. Drivers' testimony will corroborate this evidence. Defendant does not dispute that drivers worked more than 8 hours in a day and 40 hours in a week, but rather raises an affirmative defense arguing that its drivers are exempt from overtime. Defendant bears the burden of proving this affirmative defense. (See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 338 ["the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption"] citing *Ramirez v. Yosemite Water, Inc.* (1999) 20 Cal.4th 785, 794–795; *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562 [an "employer bears the burden of proving an employee is exempt"].)

Even should Defendant succeed in meeting its burden, drivers, including trainees, will still be entitled to compensation and liquidated damages for the one hour worked, but unpaid, each day, as discussed above.

D. FAILURE TO PAY LIVING WAGE[6]

Plaintiffs will prove **Defendant was a Port-Assisted Business** and thus required to compensate its employees at not less than the Oakland Living Wage ("OLW") rate **from**

[6] (Oakland City Charter § 728; Wage Order 9, sections 3 and 4; Labor Code §§ 510, 1182.12, 1194.)

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approximately January 10, 2005 through February 3, 2006. Plaintiffs acknowledge that there is no evidence at this time of a lease or sublease with the Port of Oakland and AB Trucking and/or OMSS, between March 28, 2004 and January 10, 2005, or from February 3, 2006 through the present. **As a result, Plaintiffs will narrow their claim at trial to the time period during which these leases existed and created the obligation under the OLW.**

Section 728 of the Oakland City Charter, also known as the Oakland Living Wage Ordinance, is entitled, "Living Wage and Labor Standards at Port-Assisted Business." Section 728 provides in pertinent part:

> (1) Scope and Definitions. The following definitions shall apply throughout this Section:
>
> > (A)"Port" means the Port of Oakland.
> >
> > (B) "Port-Assisted Business" or "PAB" means (1) any person involved in a Port Aviation or Port Maritime Business receiving in excess of $50,000 worth of financial assistance from the Port, or (2) any Port Contractor involved in a Port Aviation or Port Maritime Business if the person employs more than 20 persons per pay period, unless in the prior 12 pay periods the person has not had more than 20 such employees and will not have more than 20 persons in the next 12 pay periods. A PAB shall be deemed to employ more than 20 persons if it is part of an 'enterprise' as defined under the Fair Labor Standards Act employing more than 20 persons. "Port Contractor" means any person party to a Port Contract as herein defined.
> >
> > (C)"Port Contract" means:
> >
> > > (1) Any service contract with the Port for work to be performed at the Port under which the Port is expected to pay more than $50,000 over the term of the contract;
> > >
> > > (2) Any contract, lease or license from the Port involving payments to the Port expected to exceed $50,000 either (a) over the term of the contract, lease or license, or (b) during the next 5 years if the current term is less than 1 year but may be renewed or extended, either with or without amendment;
> > >
> > > (3) Any subcontract, sublease, sublicense, management agreement or other transfer or assignment of any right, title

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or interest received from the Port pursuant to any of the foregoing contracts, leases or licenses.

A contract, lease or license with the Port or any agreement derived therefrom shall not be deemed a Port Contract unless entered into after enactment of this Section, or amended after enactment of this Section to benefit in any way the party dealing with the Port.

(D) "Employee" means any individual employed by a PAB in Port related employment.

(E) "Person" includes any natural person, corporation, partnership, limited liability company, joint venture, sole proprietorship, association, trust or any other entity.

(F) "Valid collective bargaining agreement" as used herein means a collective bargaining agreement entered into between the person and a labor organization lawfully serving as the exclusive collective bargaining representative for such person's employees.

(G) "Port Aviation or Port Maritime business" means any business that principally provides services related to maritime or aviation business related services or whose business is located in the maritime or aviation division areas as defined by the Port.

(2) Exemptions from Coverage. In addition to the above exemption for workforces of fewer than 20 workers, the following persons shall also be exempt from coverage under this Section:

(A) An Employee who is (1) under twenty-one (21) years of age and (2) employed by a nonprofit entity for after-school or summer employment or for training for a period not longer than ninety (90) days, shall be exempt.

(B) An Employee who spends less than 25 percent of his work time on Port-related employment.

(C) A person who employs not more than 20 employees per pay period.

1. <u>Plaintiffs will provide evidence of each of the three elements proving AB Trucking was a Port-Assisted Business from 2005-2006.</u>

Plaintiffs will prove AB (1) was a "Port Contractor," (2) employing more than 20 persons, (3) spending 25% or more of their time on Port-related employment.

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i. AB Trucking was a "Port Contractor."

Plaintiffs will prove AB Trucking was a Port Contractor as defined in the Oakland Living Wage Ordinance during the statutory period:

1. A "Port Contractor," under Section 728(1)(B) means any person party to a "Port Contract."

2. Plaintiffs will prove that AB Trucking was a "party to a Port Contract," and thus was a "Port Contractor:"

    - OMSS had a lease with the Port of Oakland through which it paid over $50,000 over the term of the lease.

    - AB Trucking (OPS) held a lease with OMSS, a "sublease," at the time of OMSS's lease with the Port.

As a result, AB Trucking held a "sublease" (under §728(1)(C)(1)) received from the Port pursuant to OMSS's "lease … from the Port involving payments to the Port expected to exceed $50,000" over the term of the lease (under §728(1)(C)(2)).[7]

ii. AB Trucking, alone or as an enterprise with OMSS, JayGav and/or Baymodal, employed more than 20 persons during the time period in question who spent more than 25% of their time on Port-related employment.

Plaintiffs will also prove AB Trucking met the additional elements making it a Port-Assisted Business ("PAB") during the time period in question.

A "Port Contractor" is a PAB if:

1. It "employs more than 20 persons per pay period, unless in the prior 12 pay periods the person has not had more than 20 such employees and will not have more than 20 persons in the next 12 pay periods" ((§728(1)(B)); and #2 (below).

    - Plaintiffs note: "A PAB shall be deemed to employ more than 20 persons ***if it is part of an 'enterprise' as defined under the Fair Labor Standards Act*** employing more than 20 persons [emphasis added]." (§728(1)(B).)

    - AB Trucking, OMSS, JayGav and Baymodal, constitute an "enterprise" as defined under the Fair Labor Standards Act, because the businesses are engaged in related

[7] Defendant's argument that Plaintiffs are required to prove that *OMSS* had more than 20 employees because OMSS held the Port Contract is flawed. AB Trucking held a sublease with OMSS, which held a lease with the Port (through which it paid the Port over $50,000). That is sufficient to make AB Trucking a "Port Contractor." Therefore, Plaintiffs can make the next two inquiries using AB Trucking's status as a Port Contractor – it is irrelevant that OMSS is *also* a "Port Contractor" (except so far as it furthers evidence of the existence of an "enterprise" between AB Trucking and OMSS.)

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activities, performed for a common business purpose through common control and unified operation. Plaintiffs discuss this standard in greater detail below. Those employees of AB Trucking, OMSS, JayGav and Baymodal, who worked in Vallejo doing payroll and other auxiliary tasks are included in the tally of whether the enterprise employed 20 persons, regardless of what city they worked in.[8]

- As a result, AB Trucking employed 20 persons during the period of time it was a Port Contractor.

2. Its employees spend 25% or more of their time on Port-related employment.

- AB Trucking performs, and performed, drayage operations in and out of the Port of Oakland. Drivers spent the majority of their time driving back and forth to the Port of Oakland. All staff and auxiliary staff performed work supporting the operation of drivers in and out of the Port, or Port-related employment.

2. Oakland Port Services d/b/a AB Trucking and Baymodal, with JayGav and/or OMSS constitute an "enterprise" under the Federal Labor Standards Act.

In order to constitute an "enterprise" under the Federal Labor Standards Act (FLSA), a business must be engaged in "related activities" that are performed for a "common business purpose," through "common control" or a "unified operation.[9]" (See *Reich v. Bay, Inc.* (5th Cir.

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[8] There are numerous admissions that AB Trucking's payroll was done in Vallejo as a regular matter. (See e.g., Deposition of Bill Aboudi.)

[9] 29 U.S.C. §203(r)
(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement,
(A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or
(B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or
(C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.
(2) For purposes of paragraph (1), the activities performed by any person or persons—
(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or
(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or
(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

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1994) 23 F.3d 110 [deeming contractor and subcontractor to be single enterprise where contractor provided subcontractor with bookkeeping, payroll, recruitment, and advertising services and where they shared office space, shared several officers and directors, kept business records in same area, and employed same individual to control those records]; *Wirtz v. Savannah Bank & Trust Co.* (5th Cir. 1966) 362 F.2d 857 [holding that bank's operation of 15-story building it built constituted auxiliary service rendering those activities sufficiently related to bank's business purpose so as to make it a single enterprise].)

Unification may exist through leases or other agreements. (See 29 C.F.R. §779.218.)

Plaintiffs will prove that Oakland Port Services, doing business as "AB Trucking" *and* doing business as "Baymodal," and constituting an "enterprise" with "OMSS" and "JayGav," employed over 20 persons spending at least 25% of their time on Port-related employment.

i. OMSS

Though Mr. Bill Aboudi refused to answer questions regarding OMSS at his deposition, Plaintiffs will prove Bill Aboudi is the president and an owner of OMSS.

ii. JayGav

Bill Aboudi has testified that "JayGav" is corporation related to OPS and AB Trucking.

iii. Oakland Port Services d/b/a Baymodal

Bill Aboudi has testified that Oakland Port Services does business as AB Trucking and as "BayModal."

3. <u>AB Trucking did not obtain a waiver from the Port Board.</u>

Plaintiffs will show AB Trucking did not obtain a waiver from the Port Board allowing it to compensate workers less than the OLW during the applicable time period. (See §728(6).)

4. <u>AB Trucking owes workers paid less than the OLW rate during the applicable time period backpay, other remedies, treble damages, and penalties.</u>

Section 728(8), Enforcement, provides:

> Each PAB shall maintain for each person in Port-related employment a record of his or her name, pay rate and, if the PAB claims credit for health benefits, the sums paid by the PAB for the Employee's health benefits. The PAB shall submit a copy of such records to the Port at least by March 31st, June 30th, September 30th and December 31st each year, unless the PAB unless the PAB

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> has employed less than 20 persons during the preceding quarter in which case the PAB need only submit a copy of such records every December 31st. Failure to provide a copy of such records within five days of the due date will result in a penalty of five hundred dollars ($500.00) per day. Each PAB shall maintain a record of the name, address, job classification, hours worked, and pay and health benefits received of each person employed, and shall preserve them for at least three years.

Plaintiffs will prove that Defendant failed to maintain these records, and to provide any such records to the Port on the dates required. As a result of its failure to meet this recording and reporting requirement, Defendant owes the penalty of five hundred dollars per day, from the date of the failure to the present, to the workers employed from January 10, 2005 through February 3, 2006.

Section 728(9), Private Rights of Action, provides:

> (A) Any person claiming a violation of this Section may bring an action against the PAB in the Municipal Court or Superior Court of the State of California, as appropriate, to enforce the provisions of this Section and shall be entitled to all remedies available to remedy any violation of this Section, including but not limited to back pay, reinstatement or injunctive relief. Violations of this Section are declared to irreparably harm the public and covered employees generally.
>
> (B) Any employee proving a violation of this Section shall recover from the PAB treble his or her lost normal daily compensation and fringe benefits, together with interest thereon, and any consequential damages suffered by the employee.

Those class members Defendant should have paid the OLW rate, but did not, are entitled to backpay and treble damages.

E. FAILURE TO PROVIDE MEAL AND/OR REST PERIODS[10]

1. Plaintiffs' meal and rest period claims are not preempted.

Defendant has argued that Plaintiffs' meal and rest period claims are preempted. Defendant relies only on a federal district court case *Dilts v. Penske Logistics, LLC* (2011) 2011 U.S. Dist. LEXIS 79378, which holds no binding authority on this Court. (See *United States ex rel. Lawrence v. Woods* (7th Cir. 1970) 432 F.2d 1072, 1075, cert. denied (1971) 402 U.S. 983.)

States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety are only a few examples. (See, e. g., *Day-Brite*

[10] (Wage Order 9, sections 11 and 12; Labor Code §§ 226.7, 512.)

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Lighting, Inc. v. Missouri (1952) 342 U.S. 421.) It is a traditional exercise of the States' "police powers to protect the health and safety of their citizens." (*Hill v. Colo.* (2000) 530 U.S. 703, 715 citing *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 475.)

In any event, Plaintiffs' claims are akin to those in *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, in which the Ninth Circuit squarely held that the language and structure of the FAAA Act does *not* evidence a clear and manifest intent on the part of Congress to preempt California's Prevailing Wage Law (Labor Code §§ 1770-80) ("CPWL"). Similarly, California's meal and rest period laws fit squarely into the Court's police power to regulate the safety of the workers in the state. The standard for preemption by the Federal Aviation Authorization Act ("FAAA Act"),[11] the statute Defendant alleges preempts Plaintiffs' claims, is that state regulation in an area of traditional state power having no more than an indirect, remote, or tenuous effect on a motor carriers' prices, routes, and services are not preempted. (*Mendonca*, 152 F.3d at p. 1188.) *Mendonca* held that, while CPWL "in a certain sense" is "related to" the employer's "prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous … We do not believe that CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition." (*Mendonca*, *supra*, at pp. 1185, 1189.) Plaintiffs recognize that prevailing wage laws are not identical to meal and rest break laws. However, the reasons offered by the employer (also of drivers) in *Mendonca* in support of preemption under the FAAA Act were nearly identical to the concerns raised by Penske in *Dilts v. Penske Logistics, LLC* (2011) 2011 U.S. Dist. LEXIS 79378.[12]

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[11] Section 601 of the FAAA Act became federal law in 1995. "As a general matter, this section preempts a wide range of state regulation of intrastate motor carriage. It provides:

> (c) Motor carriers of property.
> (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision *having the force and effect of law related to a price, route, or service of any motor carrier* . . . with respect to the transportation of property."

(*Mendonca*, *supra*, at p. 1187.)

[12] The employer in *Mendonca* argued that CPWL "increases its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, [employer] alleges that its rates for "services" are based on: (1) costs, including costs of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, including prevailing wage requirements." (*Mendonca*, *supra*, at p. 1189.)

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In the end of its decision addressing other types of preemption issues not present here, the California appellate court in *Fitz-Gerald v. Skywest, Inc.* (2007) 155 Cal.App.4th 411, found that actions to enforce California's minimum wage laws and labor laws governing meal and rest breaks are *not* preempted by the Airline Deregulation Act ("ADA").[13] The preemption language used in the ADA and the FAAA Act is identical. (See *Mendonca*, *supra*, at p. 1187.) This appellate court case is binding on this Court. Thus, the present state of precedential California law is such that Plaintiffs' claims are not preempted.

Even if some question of law exists, here, how could California's meal and rest period laws have "*acutely* interfere[ed] with the forces of competition" in this case, where drivers did not receive meal and rest periods, and instead had one hour of pay deducted from them for meal periods never taken?[14] (See *Mendonca*, *supra*, at pp. 1185, 1189.)

What exists here is an employer that claimed to provide drivers with one hour per day for a "meal period." Notwithstanding the fact that Plaintiffs will prove this employer did nothing to make that a reality, Defendant has never before claimed that the provision of this "one hour meal period" acutely interfered with its prices, routes or services. To the contrary, Defendant has claimed to have operated its business with each driver taking a one hour meal period each day. Defendant cannot have it both ways. Either it provided one hour meal periods to drivers as it claims it has always done (Plaintiffs will prove it did not), *or* it was unable to provide a 30-minute meal period to drivers under California law because of the burden that created on its operation (which it has not claimed) – it cannot be both. The facts of *Dilts* thus do not apply.

Plaintiffs will prove that meal and rest periods were not provided to drivers, including trainees. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d, *supra*, at p. 727 [Where an employer fails to keep records of hours worked, employees may establish the hours worked solely by their testimony, and the burden of overcoming such testimony shifts to the employer].)

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[13] In *Skywest*, the appellate court's analysis of preemption under the Railway Labor Act is a separate issue dealing with the court's inability to "interpret" the terms of parties' collective bargaining agreement and regarding the goal of avoiding an impact on interstate commerce caused by *labor strife*. None of those issues is present here.

[14] As discussed above, California law does not permit any time worked to be uncompensated. (See *Carrillo v. Schneider Logistics, Inc.* (2011) 2011 U.S. Dist. LEXIS 126167 citing *Armenta v. Osmose, Inc.*, *supra*, 135 Cal.App.4th at pp. 317, 324; see also *Ontiveros, supra.*) This is undisputed, and California minimum wage law is not preempted by federal minimum wage law.

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F. UNFAIR BUSINESS PRACTICES; FAILURE TO PAY WAGES OWING AT DISCHARGE OR QUITTING; AND FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS[15]

Based on liability determinations as to the alleged violations of the California Labor Code discussed above, Plaintiffs allege Defendant violated the California Business & Professions Code ("B&P Code"). B&P Code section 17203 provides that the Court may restore to any person in interest any money or property which may have been acquired by means of such unfair competition and to which that person or persons have an ownership interest. Plaintiffs will prove the Class has suffered direct and economic injury in that they have not been paid all wages and/or compensation due in a timely manner.

Labor Code sections 201, 202 and 203 require an employer to pay all wages owed to an employee at the time of separation of employment. Because Plaintiffs will prove AB never paid monies owed for its failure to pay for all hours worked, any hours worked, overtime, meal and rest period violations, and Labor Code section 226 violations, AB owes drivers for Section 203 violations.

Labor Code section 226 and Wage Order 9 require Defendant to provide accurate itemized wage statements showing the correct number of hours worked, the applicable hourly rate for each hour worked, and each category of compensation received, among other details. Plaintiffs will prove they suffered injury as a result of this violation because the incorrect number of hours worked set forth on wage statements made it impossible for employees to calculate the wages to which they were entitled. (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1143.)

G. DAMAGES PHASE

Plaintiffs have created an extensive damages model to be presented at the damages phase.

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[15] (California Business and Professions Code § 17200 *et seq.*; Labor Code §§ 201, 202, 203, 226.)

IV. CONCLUSION

For the forgoing reasons, the Court should enter judgment in favor of Plaintiffs and the Class.

Dated: February 9, 2012

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