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
Telephone (510) 337-1001
Fax (510) 337-1023

Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

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' OPENING POST-TRIAL BRIEF

Trial Date: February 14, 2012
Judge: Hon. Robert B. Freedman

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	SUMMARY OF WITNESS TESTIMONY	1
	A. MEAL PERIODS AND REST BREAKS	1
	B. FAILURE TO PAY FOR ALL HOURS WORKED	4
	C. FAILURE TO PAY FOR ANY HOURS WORKED DUE TO MISCLASSIFICATION	4
	D. FAILURE TO PAY OAKLAND LIVING WAGE	5
III.	ARGUMENT AND AUTHORITIES	5
	A. FAILURE TO PROVIDE MEAL AND REST PERIODS	6
	1. A "meal period" must be off-duty	7
	2. Drivers overwhelmingly testified they were never instructed to take a one-hour—nor a 30-minute—uninterrupted, off-duty meal period	10
	3. Drivers testified they did not actually receive one hour meal periods and were typically encouraged not to take, or prevented from taking, even a 30-minute meal period	10
	4. Drivers testified AB did not authorize and permit rest breaks and encouraged drivers not to take, or prevented drivers from taking, rest breaks	12
	B. FAILURE TO PAY FOR ALL HOURS WORKED	12
	1. AB automatically deducting one hour's pay from each driver per each shift worked	13
	C. FAILURE TO PAY FOR ANY HOURS WORKED DUE TO MISCLASSIFICATION OF EMPLOYMENT STATUS	15
	1. Nothing in the law provides for no payment, even for those in training	16
	2. Workers cannot waive their statutory right to the minimum wage	16
	3. AB's argument that the Port required extra individuals entering the Port be designated as "trainees" is irrelevant and not credible	17

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF CONTENTS (cont'd)

Page

4. AB's argument that members of the public, for instance news reporters, were the majority of individuals who trained is not supported by evidence....17

D. FAILURE TO PAY THE OAKLAND LIVING WAGE....17

1. AB, alone or as an "enterprise" with the Oakland Port Scale, employed 20 persons or more during the OLW liability period who spent more than 25% of their time on Port-related employment....19

a. AB employed 20 employees or more including unpaid trainees misclassified as non-employees....19

b. AB employed 20 employees or more as an "enterprise" with the Scale....19

c. AB's employees spent 25% or more of their time on Port-related employment....21

d. There were at least 20 employees employed during pay periods in the OLW liability period....21

E. UNFAIR BUSINESS PRACTICES, FAILURE TO PAY WAGES OWED AT DISCHARGE OR QUITTING AND FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS....22

IV. DAMAGES MODEL....23

A. PLAINTIFFS PROVIDED MS. DON'S TESTIMONY TO SUMMARIZE VOLUMINOUS RECORDS UNDER EVIDENCE CODE SECTION 1523(D)....23

B. CASE LAW AB CITES IS INAPPOSITE....25

V. CONCLUSION....26

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF AUTHORITIES

Page

Cases

Armenta v. Osmose, Inc.
(2005) 135 Cal.App.4th 314 12

Brinker v. Superior Court
(April 12, 2012), No. D049331 ..... passim

Cicairos v. Summit Logistics, Inc.
(2005) 133 Cal.App.4th 949, 962-63 ..... 6, 7, 14

Grimshaw v. Ford Motor Company
(1981) 119 Cal.App.3d 757 25

Hernandez v. Mendoza
(1988) 199 Cal.App.3d 721, 727 ..... 14, 21

Korsak v. Court of Appeal
(1992) 2 Cal.App.4th 1516 25

Martinez v. Combs
(2010) 49 Cal.4th 35, 69 12

Morillion v. Royal Packing
(2000) 22 Cal.4th 575, 585 ..... 8, 9, 12

Murphy v. Kenneth Cole Productions, Inc.
(2007) 40 Cal.4th 1094, 1105 6

People v. Coleman
(1985) 38 Cal.3d 69 25

Price v. Starbucks Corp.
(2011) 192 Cal.App.4th 1136, 1143 23

Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.
(2002) 102 Cal.App.4th 765, 778 16

San Pedro Lumber Co. v. Reynolds
(1898) 121 Cal. 74, 86 24

Statutes

California Business & Professions Code §17200 ..... 1, 22

California Evid. Code § 412 ..... 13, 21

California Evid. Code § 1523(d) 23, 24, 25

Labor Code §201 ..... 1, 22, 23

Labor Code §202 ..... 1, 22, 23

Labor Code §203 ..... 1, 23

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF AUTHORITIES (cont'd)

Page

Labor Code §206.5 16

Labor Code §219 16

Labor Code §226 ..... 1, 6, 19, 22, 23

Labor Code §510 ..... 1, 12, 15, 17

Labor Code §512 ..... 1, 6

Labor Code §1182.12 ..... 1, 12, 15, 17

Labor Code §1194 ..... 1, 12, 15, 16, 17

Labor Code §2802 16

Labor Code §2804 16

State Regulations

California Code of Regulations § 11090 (IWC Wage Order No. 9) 6

Federal Cases

Dole v. Odd Fellows Home Endowment Bd.
(4th Cir. 1990) 912 F.2d 689, 692-93 20

Ontiveros v. Zamora
(2009) 2009 U.S. Dist. LEXIS 13073, 9-10 12

Reich v. Bay, Inc.
(5th Cir. 1994) 23 F.3d 110 19

Reich v. Japan Enters. Corp.
(9th Cir. 1996) 1996 U.S. App. LEXIS 17677 19

United States v. Meyers, 874 F.2d 1408
(9th Cir. 1988) 24

United States v. Rizk, 660 F.3d 1125
(9th Cir. 2011) 24

Wirtz v. Savannah Bank & Trust Co.
(5th Cir. 1966) 362 F.2d 857, 861 20

Federal Statutes

29 U.S.C. §203(r) 18, 19

29 U.S.C. §203(s)(1)(a)(ii) 21

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF AUTHORITIES (cont'd)

Page

Federal Rules

Federal Rules of Evidence § 1006 24

Federal Regulations

29 C.F.R. § 779.218 20

Other Authorities

Oakland City Charter § 728 ..... *passim*

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

I. INTRODUCTION

Plaintiffs Lavon Godfrey and Gary Gilbert on behalf of themselves and the Class ("Plaintiffs"), file this post-trial closing brief. The operative complaint, Second Amended Complaint, filed September 20, 2010 ("SAC"), in this wage and hour class action brought by truck driver employees against AB Trucking ("AB")[1] contains eight causes of action.[2]

The certified Class is:

> All drivers who performed work for Defendant out of its Oakland, California facility from the period of March 28, 2004 through the date of notice to the class [March 15, 2011] ("Drivers") and ("statutory period").

The fourth cause of action for failure to pay overtime was dismissed by Plaintiffs during trial, leaving seven causes of action and eliminating the need for the Overtime Subclass. Based on the evidence revealed at trial, Plaintiffs are entitled to recover all wages due and applicable penalties on behalf of the Class, including the difference between the Oakland Living Wage ("OLW") and the lower wage rate paid for the period of January 28, 2005 – February 10, 2006, and payments owed for the failure to provide meal and rest periods. The Class is also entitled to treble damages pursuant to the OLW, costs of litigation and attorneys' fees.

II. SUMMARY OF WITNESS TESTIMONY

A. MEAL PERIODS AND REST BREAKS

Ike Cooper testified no one at AB told him to take a half hour, uninterrupted, off-duty meal period, until in mid-2009 when Trina, the dispatcher, told him on one occasion that he should take a one hour lunch break. Before 2009, though he was able to stop for 5-20 minutes to grab food, he was not allowed to take a lunch break and had to eat in the truck in line at the Port while turning the motor on and off. After 2009, he was told to take a lunch break when it was not busy, but often he was told it was "too late." On cross-examination, he testified that he believes he was prevented from taking a lunch break by AB because there was "not enough time" as he

---

[1] Reference herein to AB encompasses Oakland Port Services ("OPS") and Baymodal, as OPS was doing business as AB Trucking and Baymodal during the statutory period.

[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).

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

was "dispatched back to back." Drivers could not leave their trucks when the line into the Port was not moving and he never got out of the line to pull over and eat. He never recorded taking a meal period, nor was he asked to do so. He was not told by AB to take rest breaks. By contrast, he had been interrupted when he tried to take a break, giving the example of a time he stopped at a Jack in the Box to use the restroom and Bill Aboudi called him and told him not to stop there. Cooper believed that Aboudi used GPS to determine his location. He was never paid an hour of pay at his regular wage rate for having missed a meal period.

Gary Gilbert testified the "trainer" driver he rode with, Erik Gaines,[3] usually brought food from home, and he learned to do the same. He was not instructed by Gaines about any "rules" about meal and rest breaks. He was not encouraged to take a meal or rest period, nor was he instructed to do so. He had to relieve himself in a bottle while the truck was moving because of the route, no time, and no available facility to use; he did this upon the suggestion of the driver with whom he was "training."

Steve Wellemeyer testified AB did not give him any instruction to take a 30-minute meal period,[4] nor was he encouraged to take a 30-minute meal period. He was prevented from taking a meal period because he was kept busy and continuously dispatched. He ate in the truck in line at the Port. He never received a one-hour off-duty meal period. He testified drivers could not leave their truck unattended outside or inside the Port as, outside the Port the driver would lose his place in line, and, inside the Port, due to Port rules. He was not instructed, nor encouraged to take rest breaks. On cross-examination, he testified that he trained for two and a half months with Gaines, but Gaines did not tell him rules regarding meal periods or rest breaks. He was able to eat with Gaines, but he testified (and confirmed on redirect) that they never stopped and ate off-duty for a full 30-minutes. He estimated that for the entirety of the time he worked at AB he got a 30-minute meal period five times. He clarified that while he was always able to "eat," it did not mean that he was able to take an "off-duty" meal period. He defined "off-duty" as "when I can

---

[3] Gaines opted out of the suit. He views this lawsuit as a personal attack on Bill Aboudi. He left AB and went to work for another company, but was hospitalized and called Aboudi and got his truck back immediately. He admitted to calling drivers to try to get them to opt-out.

[4] Wellemeyer testified that he became aware of the lawsuit through David Blyth or Gaines. He recalled being told that "[he] should opt-out and Bill will help him out."

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

do what I want." When he arrived at a customer location to have his truck loaded, and the workers at the customer location were on break, he would have to wait. He was never paid an hour of pay at his regular wage rate for having missed a meal period.

Saga Llewellyn testified that when he first began working at AB he was not instructed to take a meal period of any length, and he did not receive meal periods. In late 2008/early 2009, for the first time, he was told to take a one hour meal period. He was instructed that he could only take a meal period when Trina allowed it and gave him specific instructions to take a meal period. After late 2008/early 2009, frequently he would leave the Port at 1:30 or 2:00 p.m. and Trina, the dispatcher, would tell him they were too busy for him to be able to take a meal period. While in line to enter the Port, he could not leave the truck unattended as he testified he must stay in the truck whenever he was dispatched. Drivers could not leave the truck once inside the Port. He was never paid an hour of pay at his regular wage rate for having missed a meal period.

Gina Williams testified she worked for AB in 2007 and again beginning in March 2010. She did not receive meal periods in 2007. When she started in 2010, Aboudi told her that she now got an hour lunch. Even though she was told this, when she tried to take her breaks it became a problem. Except for her start date in 2010, no one from AB told her she could take a meal or rest break. There were many times she would come back to the yard to take her meal period, but the dispatcher would tell her, "we have to keep it moving." She was discouraged from taking rest breaks as well. She described an incident in 2007 when Aboudi asked her, "why were you sitting for 22 minutes?" and she told him it was because she was in the bathroom and he responded, "well you should get a bucket and put it in the truck, then you won't have to be out of the truck so much." Williams was never paid an hour of pay at her regular wage rate for having missed a meal period.

Lavon Godfrey testified she was not instructed to take a 30-minute meal period, and that, instead, she was prevented from taking meal periods giving the example of management telling her to get back in the truck when she was warming her food in the microwave in the lunch room. She was discouraged from taking rest breaks particularly by the occasion when Aboudi told her

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

she should get a funnel to use with a bottle in the truck so she would not have to stop to use the bathroom as often.

AB's witness, James Francis,[5] testified, "you can take a break whenever you want to" but that AB management would say to him, "if we're super busy, I ask you to postpone or put off your breaks." Francis admitted he generally does not take a one hour lunch. On the day he testified he said he had left his truck "unattended on Maritime"; however, nothing in the record established that leaving his truck in that manner was legal. He admitted drivers cannot leave their trucks unattended in the Port. Francis testified that sometimes Port clerks rotate so the Port can operate while longshoremen are on break.

B. FAILURE TO PAY FOR ALL HOURS WORKED

Cooper testified he worked more than eight hours in a day as an employee driver. On cross-examination, he testified that at times he and other drivers were required by AB to pick up paper and clean AB's yard on weekends, holidays, or at other times when it was slow. Cooper was paid for 75 hours every two weeks, despite the fact that he worked five days a week and more than eight hours each day. Llewellyn testified he typically worked more than eight hours each day, but that he was typically only paid for eight hours each day. Drivers were generally unaware of the one hour automatic deduction from their paychecks.

C. FAILURE TO PAY FOR ANY HOURS WORKED DUE TO MISCLASSIFICATION

Cooper testified he was a paid truck driver with AB from July 2008 – October 2009, and an unpaid trainee with a Class A license from March – June 2008. Cooper testified on cross-examination that as both a driver, and as an unpaid trainee, he drove AB's trucks. Gilbert drove for AB as an unpaid trainee with a Class A license from October 2008 until the end of December 2008. Sometimes Gilbert's trainer, the driver he was riding with, would drive and sometimes he would drive. On cross-examination Gilbert was asked, "if you didn't show up, what would happen?" Gilbert would have been speculating had he answered, but his response was that this had never occurred because he always gave notice if he was going to be absent, as he had the

[5] James Francis opted out of this lawsuit by sending in a request for exclusion. Francis and Gaines appeared without a subpoena, and the two are the most senior employees at AB with Jose Luis Navarro.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

impression that he should let AB know if he was not going to come in. Gilbert was not paid at all by AB. Wellemeyer testified he worked for AB from approximately October 2007 – March 2009, and worked as an unpaid trainee, without a Class A license, from July – October 2007. Llewellyn was a driver with AB from October 2007 – August 2009. He was a trainee for one week and was paid. Llewellyn testified he trained 6-12 other workers during his tenure as a driver with AB. Sometimes these trainees drove and, at other times, he drove. Francis estimated he had trained between 10-20 trainees, which was a relatively small number as the insurance on his particular truck did not allow for others to drive it.

D. FAILURE TO PAY OAKLAND LIVING WAGE

Cooper, Gilbert, Wellemeyer, Godfrey and Williams were not provided healthcare benefits by AB. All witnesses testified they were paid $11.00 per hour when they started.

III. ARGUMENT AND AUTHORITIES

Witness testimony and documentary evidence presented at trial proved AB failed to meet basic obligations required of every employer in the state of California. First, the evidence established conclusively that AB failed to provide meal and rest periods to drivers in the manner required by California law. Second, this failure to provide meal and rest periods confirmed AB failed to pay drivers for "all hours worked" as drivers worked through these breaks yet were not compensated for that time deducted. Third, the evidence further revealed—what AB could do nothing but admit—that AB failed to pay *at all* workers it misclassified as non-employee trainees for hours they were suffered and permitted to work. Fourth, the evidence established that during the period of January 28, 2005 – February 10, 2006 ("OLW liability period"), AB was a "Port-Assisted Business" ("PAB") as defined in the Charter of the City of Oakland, Article VII, Port of Oakland, Section 728, Living Wage and Labor Standards at Port-Assisted Business, subsection (1), and was consequently obligated to pay the OLW to its drivers.[6] AB was a Port Contractor—an entity holding a subcontract with a party to a contract with the Port of Oakland (Oakland Maritime Support Services ("OMSS"))—involved in a Port Maritime Business employing more

[6] Attached to the Declaration of Lisl R. Duncan in support of Plaintiffs' Post-Trial Brief ("Duncan Dec.") at ¶ 3, Exhibit A and discussed further, *infra*. The documents attached to Duncan Dec. are documents already filed with the Court (for convenience), text from the Fair Labor Standards Act (for convenience), a summary of Andrea Don's testimony at trial, and documents admitted as evidence at trial.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

than 20 persons per pay period. During the OLW liability period, AB employed more than 20 persons as part of an "enterprise" as defined under the Fair Labor Standards Act ("FLSA") due to the number of employees at the Oakland Port Scale ("Scale"). Regardless of the number of Scale employees and the "enterprise" concept, AB was a Port Contractor during the OLW liability period due to its employment of unpaid trainees misclassified as non-employees who were not counted on AB's payroll. The evidence reflected AB did not pay drivers at least the OLW during the OLW liability period. Fifth, derivative of AB's failure to provide meal and rest periods, pay for all hours worked (either due to the failure to provide breaks or due to misclassification as a non-employee), and pay the OLW, AB committed further violations of law. Specifically, AB gained an unfair competitive advantage, failed to pay all wages owed to drivers when they quit or were discharged, and failed to provide drivers with accurate itemized wage statements. Finally, Plaintiffs carried their burden of proof as to all these claims and AB presented no meritorious defense. Based on the evidence exposed at trial and for the reasons discussed herein, Plaintiffs must prevail on all claims.

A. FAILURE TO PROVIDE MEAL AND REST PERIODS[7]

California's meal period laws require truck driver employers to relieve workers of duty for thirty minutes in a work period of more than five hours, as held in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-63.[8] (See also *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105.) The California Supreme Court's very recent decision in *Brinker v. Superior Court* (April 12, 2012), No. D049331, Slip op.,[9] supports a finding that AB failed to comply with its obligation to afford drivers meal periods because *Brinker* holds an employer's duty "is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and

---

[7] Industrial Welfare Commission Wage Order 9, sections 11 and 12 codified at 8 California Code of Regulations 11090; Labor Code §§ 226.7, 512.

[8] This standard does not mean employers must *force* employees to take their meal periods. Relieving workers of duty does not "force" them to do anything. Workers may choose to eat, run an errand, socialize, or relax. The employer's duty is simply to ensure that work stops for the required thirty minutes and that the employee is free to engage in personal activities. Otherwise employers are free to pile substantial work on employees under time requirements and a demeanor that suggest no break should or can be taken.

[9] Plaintiffs' analysis of the recent Supreme Court ruling in *Brinker* is preliminary and non-exhaustive due to the limited amount of time between the issuance of the Supreme Court's ruling on April 12 and the deadline by which Plaintiffs' brief was to be filed on April 13.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (See *id.* at p. 36.) The focus here is the Supreme Court's holding that an employer does *not* satisfy its obligation if it "*impedes*" or "*discourages*" employees from taking an "*uninterrupted* 30-minute break." (*Id.*, emphasis added.) AB knew drivers were stuck in line to enter the Port, once inside the Port, and in order to exit the Port, every single day. Yet, it did nothing to provide for the relief of its employees' duties during this "waiting" time. In fact, the evidence showed AB discouraged off-duty meal periods, and instructed drivers to eat while in line and "on duty." The record is clear that every day during the statutory period AB impeded and discouraged drivers from taking an uninterrupted meal period.

In *Cicairos,* the employer "did not schedule meal periods, include an activity code for them, or monitor compliance." (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962.) "As a result, 'most drivers ate their meals while driving or else skipped a meal nearly every working day.' Furthermore, the defendant's management pressured drivers to make more than one daily trip, making drivers feel that they should not stop for lunch." (*Id.*) The Court of Appeal found that under these facts, the defendant's obligation to provide drivers with an adequate meal period was not satisfied by *assuming* that the meal periods were taken. (*Id.* at pp. 962-63.) Here, AB similarly did not schedule meal periods, nor monitor compliance with meal period law. To the contrary, AB failed to establish at trial even that it gave drivers anything with which to comply, as it provided no proof drivers were, at a minimum, given instruction that they were entitled to and should take a 30-minute, uninterrupted, off-duty meal period after five hours of work.[10]

1. A "meal period" must be off-duty

A 30-minute lunch break must be off-duty in order to constitute a "meal period" under California law. Wage Order 9 provides that no employer "shall employ" any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, specifically delineating only one exception "... that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee." This language creates a "'duty of the management to exercise its control and see

[10] Aboudi's testimony lacked personal knowledge, was vague, and was impeached by his deposition testimony.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

that the work is not performed if it does not want it to be performed.'" (See *Morillion v. Royal Packing* (2000) 22 Cal.4th 575, 585.) The Wage Order further illustrates that the "meal period" contemplated by California law must be "off-duty" by definition in Subsection (C):

> Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

Here, the nature of the work does not prevent drivers from being relieved of all duty in order to receive a meal period, as there is no reason drivers cannot be instructed to stop to take their meal period prior to entering the Port, immediately after exiting the Port, or immediately prior or after picking up a load at a client location. For the rare circumstance that a meal period is truly impossible, for instance, if a driver is "trapped" inside the Port for a full eight hours, AB could have attempted to enter into written agreements with drivers to protect against the event of these conditions and, at a very minimum, AB should have paid drivers an extra hour for the "on duty" meal period (rather than make an automatic deduction). Putting whatever AB could have done to comply with legal requirements aside, in fact, AB did not relieve drivers of all duty for a 30-minute meal period during work periods of more than five hours. Nor did AB create written agreements between AB and drivers for an on-the-job paid meal period.[11]

The only evidence offered by AB which attempts to rebut Plaintiffs' showing was testimony of two, long-term drivers of AB who "always got their lunch," but without any clarification as to what was meant by "lunch" or whether their definition would match the legal standard.[12] These two drivers are not class members and their testimony is therefore irrelevant. AB made arguments that drivers took a meal period when they were able to "eat," "buy something to eat it in their truck," or if they spent time "waiting," none of which constitute an "off duty" meal period under state law. However, nothing in the law contemplates an employer

---

[11] The overwhelming evidence reflected that all witnesses, including management, were aware that drivers would be "stuck" in the Port regularly and thus be unable to receive a meal period. There is no excuse for AB's failure to plan accordingly for this possibility.

[12] AB's counsel rarely, if ever, defined terms such as "lunch" or "break" in his questioning at trial. Consequently, responses to such vague questioning were almost never sufficiently clear enough for the Court to rest its findings.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

meeting its obligation by allowing an employee to eat at the same time she performs job functions while she waits to complete an assigned task for the benefit of her employer.

"Waiting" consists of waiting in line at the Port, to exit the Port, at the yard for the next dispatch, and at the customer location. There was no dispute at trial that drivers regularly waited a significant portion of their shift with AB and no dispute that drivers regularly get "stuck" in the Port.[13] For example, Francis testified that on a busy day he would complete approximately 6 loads, but that he might complete as few as one load if he gets "stuck" in the Port, and all witnesses agreed they had experienced getting "stuck" in the Port. Witnesses testified that it is against Port rules to get out of the truck at the Port, except in designated loading areas. Gaines attempted to make it sound as if drivers are able to get out of their trucks at any point inside the Port. He told a story about leaving his truck and walking through an opening in the fence at the Port to get food on the outside. However, this statement was both contrary to what all other drivers testified to, including Francis, and he backtracked later in his testimony to explain he was referring to stopping inside the Port in the "trouble yard" only. The "trouble yard," as the name implies is not a parking lot for drivers to leave their trucks unattended and walk around the Port or off of Port grounds, rather it is an area to which drivers go when having mechanical difficulties with their vehicles or some other issue. Gaines admitted his job as a driver is "85% waiting." He testified that at times he would arrive at a customer location and they are not ready for him, so he "goes to sleep and gets paid." Gaines made statements like, "I always have lunch in the truck because it has an air conditioner, radio."

However, waiting, even in a comfortable location, is "on-duty" by definition: here, drivers were waiting to complete a task assigned by their employer. (See *Morillion*, *supra*, 22 Cal.4th at p. 582.) While waiting to complete an assigned task, drivers unquestionably were not free to leave to engage in personal activities. (See *Brinker*, *supra*, at p. 36; concurrence at p. 2 and ft. 1.)

---

[13] There was varying testimony about the "shut down" of the Port at midday. Witnesses testified that some terminals shut down at midday, while other terminals did not. Some witnesses testified that terminals shut down for one hour, while others testified that the Port employees worked rotating shifts, such that there was only a midday shut down of 15 minutes. There was also testimony that even when terminals shut down, the entry points would continue processing drivers at the initial step for entering the Port.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

2. Drivers overwhelmingly testified they were never instructed to take a one-hour—nor a 30-minute—uninterrupted, off-duty meal period

AB's argument that postings on walls provided instruction is unsupported by the evidence. Aboudi was impeached by his deposition testimony: "I don't know. We have the posting like everybody is required to have the postings on the back of the door for the lunch room … I have never looked at it. I've never read it when I was an employee. I never read it when I was an employer." (See Aboudi Depo. at p. 96:1-12.) Instead, drivers testified they were never instructed to take a one-hour—nor a 30-minute—uninterrupted, off-duty meal period. Under any reading of the Labor Code and Wage Order, even without addressing AB's "affirmative obligation," AB is required, as an employer, at a minimum, to inform drivers of their right to a 30-minute, uninterrupted, off-duty meal period after five hours of work. The evidence reflected AB failed to do even that. Especially prior to May 2009,[14] drivers were never instructed by AB to regularly (or even occasionally) take a 30-minute, uninterrupted, off-duty meal period after every five hours worked (or at all).

3. Drivers testified they did not actually receive one hour meal periods and were typically encouraged not to take, or prevented from taking, even a 30-minute meal period

The fact that drivers were not instructed to take meal periods of any length, supports their consistent and credible testimony that they did not *receive* 30-minute, uninterrupted, off-duty meal periods, nor one hour meal periods. As drivers were not trained, instructed or advised to take one hour (or 30-minute) meal periods each shift, that they did not receive them is not surprising. The recent *Brinker* decision provides two examples of discouragement that would be unlawful—a scheduling policy that makes taking breaks "extremely difficult" and an informal

[14] Plaintiffs filed this suit in March 2008. This Court certified the Class in December 2010. Wellemeyer, who worked for AB until approximately March 2009, testified he never received instruction to take a meal period of any length. Cooper testified he was told for the first time in mid-2009 that he could take a meal period, Llewellyn testified he was told for the first time in late 2008/early 2009 that he could take a meal period, Williams testified that when she began working in March 2010 she was told for the first time that she could take a meal period. Gilbert and Godfrey (whose employment ceased prior to the filing of the lawsuit) testified that they did not receive any instruction regarding meal periods. In summary, Plaintiffs' damages model estimates that a change regarding the provision of meal periods to drivers occurred in May 2009. However, no evidence reflected that AB ceased its automatic payroll deduction practice.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

anti-meal-break policy enforced through ridicule or reprimand. (See *Brinker*, *supra*, at p. 36; concurrence at p. 2 and ft. 1.) Both unlawful scenarios exist here.

Six drivers, Cooper, Gilbert, Wellemeyer, Llewellyn, Williams and Godfrey, testified that they did not receive one hour, uninterrupted, off-duty meal periods prior to May 2009. Even Gaines and Francis admitted that they rarely received a one hour, uninterrupted, off-duty meal period.[15] Francis admitted that the AB dispatcher would "discourage" him from taking a meal period. Francis qualified the answer by saying that dispatch would discourage a meal period only if a job was "hot." However, for this employer witness to admit that dispatch discouraged meal periods further substantiates the credible testimony of the class members who testified they not only did not receive meal periods, but they were frequently discouraged from taking meal periods.

Likewise, Cooper, Gilbert, Wellemeyer, Llewellyn, Williams and Godfrey testified that they did not receive 30-minute uninterrupted, off-duty meal periods prior to May 2009. Gilbert testified to regularly eating in the truck, while Gaines was driving—then switching so that Gaines ate in the cab while Gilbert drove. Wellemeyer testified that, while he always ate, he never received a one hour, uninterrupted, off-duty meal period. He testified he had experienced management telling him to get back in the truck. Llewellyn testified that he was yelled at for trying to take a lunch and told to get back into the truck. Williams testified that when she came back into the yard in order to take her meal period, management would tell her, "we have to keep it moving." The evidence also reflected examples of AB discouraging or preventing drivers from receiving meal periods in the manner required by law, even after May 2009. For example, Cooper testified that he would get stuck inside the Port for hours and not get out until roughly 1:30 p.m. He would then try to stop to take his meal period, but the dispatcher told him: "it's too late, you have to keep going." Williams testified that after May 2009, she was instructed by Mr. Aboudi to eat "while waiting in line at the Port or while waiting at the customer's."

[15] Again, as they are current employees and the questioning was generally vague as to time, it was difficult to discern whether Francis and Gaines were speaking about conditions post-filing of the lawsuit, or during the statutory period.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

4. Drivers testified AB did not authorize and permit rest breaks and encouraged drivers not to take, or prevented drivers from taking, rest breaks

Drivers likewise testified that AB did not authorize and permit ten minute rest breaks. Moreover, the evidence reflected AB typically encouraged drivers not to take, or prevented drivers from taking, rest breaks. (See testimony of Cooper, Wellemeyer, Llewellyn, Williams and Godfrey.)

Plaintiffs' damages model accordingly reflects AB's failure to provide one hour of premium pay for one missed meal period and one hour premium pay for one missed rest break five days per week (unless a holiday or other absence was noted[16]), and, starting in May 2009, employees are assumed to have missed three meal periods per week.

B. FAILURE TO PAY FOR ALL HOURS WORKED[17]

The evidence presented at trial demonstrated drivers were not paid for all hours they were suffered or permitted to work for AB in violation of law. Wage Order 9(4)(B) 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]." (See *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323-4; 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*, *supra*, 22 Cal.4th at p. 582; see e.g., *Martinez v. Combs* (2010) 49 Cal.4th 35, 69.) The evidence reflected that as a direct result of AB'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.

[16] See Duncan Dec. at ¶ 7 regarding overall reduction and general methodology used in creating the damages model.
[17] See Wage Order No. 9, sections 3 and 4; Labor Code §§ 510, 1182.12, 1194.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

1. AB automatically deducting one hour's pay from each driver per each shift worked

Plaintiffs called AB's designated person most knowledgeable on payroll and payroll processing, Maria Jovita (Jovi) Aboudi, as a witness at trial. Ms. Aboudi admitted that AB automatically deducted one hour's pay from each driver per each shift worked. (See Plaintiffs' Exhibits ("P-Ex.") 10-14, see e.g., "D-2" on P-Ex. 10 at pp. 4, 9, 10; "D-14" on P-Ex. 11 at p. 3, 5, 6; D-27 on P-Ex. 12 at pp. 25, 34, 35; Plaintiff Godfrey and "D-43" ("trainee") on P-Ex. 13 at pp. 5, 6, 7; last driver listed on P-Ex. 14 at p. 5; P-Ex. 14 at p. 22; see also Deposition of J. Aboudi at 35:10-36:17, 60:8-61:6.) Ms. Aboudi admitted that any time a driver worked over five hours in a day, there was always a deduction of one hour applied. (See e.g., "D-14" on Monday on P-Ex. 12 at p. 10.)

The documentary evidence presented at trial (see e.g., P-Exs. 10-14) from 2004-2008, reflects, *on its face*, deductions of one hour per each driver, per each shift of five hours or more worked, each day. [18] Moreover, no documentary evidence produced by AB reflects that the automatic one-hour deduction ever ceased.[19] Ms. Aboudi's testimony only further corroborated what is plain on the face of AB's timekeeping and payroll records. Plaintiffs' damages model mirrors the evidence. All versions of the damages model reflect a one-hour deduction, per each driver, per each shift of five hours or more, each day for the entirety of the statutory period.[20]

AB alleges that the one-hour automatic deduction, and thus failure to pay at least minimum wage, was made because drivers received a one-hour, off-duty meal period. Yet, 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); see *Brinker*, *supra*, concurrence at p. 2 and ft. 1 ["An employer's assertion that it did

---

[18] See Duncan Dec. at ¶ 8.

[19] AB's counsel made argument on the record that Bill Aboudi had testified that the deduction had stopped at a certain point, however, this self-serving statement (if it was in fact made by Aboudi) did not, in any event, clearly delineate any date that this practice allegedly ceased. Furthermore, no documentary or "best evidence" was ever produced by AB in support of its claim that deductions ceased. (See Evid. Code § 412.)

[20] The statutory period, unless stated otherwise for certain violations, is March 28, 2004 – March 15, 2011. Plaintiffs' damages model is quite conservative due to the fact that violations could be continuing to the present date, which would add an additional year of liability that is not reflected in the damages model provided at trial. The statutory period ends on March 15, 2011, the date of mailing of the Class Notice, per the Court's order certifying the Class.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief"] citing *Cicairos*, *supra*, at p. 961 ["Where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer not the employee."]) AB failed to record meal periods, further confirming the testimony of the six Class members. In fact, AB does not claim to have complied with this provision prior to some date (not provided at trial, nor before to Plaintiffs (Duncan Dec. at ¶ 2)) after the filing of this lawsuit. (See *Cicairos*, *supra*, 133 Cal.App.4th at pp. 962-63.) 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; see also *Brinker*, *supra*, concurrence at p. 1 ["If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided"].) AB offered no documentary evidence at trial showing meal periods received by drivers at any time during the statutory period.

Though there was no showing at trial that the *automatic deduction of one hour* ceased or changed in any way, there was some indication that AB made a change to its record-keeping policies after the filing of the lawsuit. Williams testified that the second time she began working for AB, in 2010, there was a new form AB asked her to fill out; this new form included a place to write whether she received a meal period—though not the times the meal period started and finished. Notwithstanding Ms. Williams' testimony, AB never produced records of meal periods recorded (or received) by drivers for any time during the statutory period, whether in discovery or at trial. (See *Brinker*, *supra*, at p. 36; concurrence at p. 2 and ft. 1.)

As discussed in detail above in Section III(A) "Meal and Rest Periods," the overwhelming evidence reflects that prior to May 2009, drivers did not receive one-hour, uninterrupted, off-duty meal period after every five hours worked (or at all). Post-May 2009, there is some evidence that drivers received at least 30-minute meal periods (if not one hour meal periods) when it was not "busy." However, despite these described changes to instruction or general awareness regarding

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

meal periods, no evidence reflected AB ceased its automatic deduction policy and practice. As demonstrated above, the evidence also reflected examples of AB discouraging or preventing drivers from receiving meal periods in the manner required by law, including after May 2009. Even Francis admitted he generally did not receive a one hour meal period. Gaines admitted he frequently eats while "waiting" in his truck.[21]

Consequently, the damages model assumes deductions of one hour, even after the model begins assuming that, starting in May 2009, employees missed three, instead of five, meal periods per week. (See Labor Code § 1194.2.)

C. FAILURE TO PAY FOR ANY HOURS WORKED DUE TO MISCLASSIFICATION OF EMPLOYMENT STATUS[22]

The legal standards providing workers be paid for all hours worked discussed above also apply to this claim. Instead of one hour per shift owed as the result of an automatic deduction, however, drivers misclassified as non-employees were not paid for *any* hour worked. The evidence reflected that AB misclassified drivers who were suffered or permitted to work as non-employees, or unpaid "trainees." AB witnesses Aboudi and Ms. Aboudi admitted there was a subclass of drivers classified as non-employee trainees who were not paid at all for any hours worked. The payroll and timekeeping records likewise confirm trainees who were not paid at all for any hours worked existed. (See P-Ex. 10-14; see e.g., P-Ex. 13 at pp. 5, 6, 7.) Cooper, Gilbert and Wellemeyer testified they worked for a period of time for AB as "trainees" and were not paid for *any* hour they worked as trainees.[23] Llewellyn estimated he trained between 6-12 drivers and Godfrey trained one in her employment of less than one year.[24]

---

[21] David Blyth admitted he would eat in his truck while in line outside and inside the Port, and he considered that to be a "meal period." (Ex. P-23 at 80:1-13; 81:9-14.) Navarro also testified his "meal periods" were taken while "waiting" in the Port, and thus when he was not "off-duty" as required by law. (Exh. P-24 at 30:18-24; 33:1-25.) Navarro also admitted he does not take rest breaks in the last four hours of his shift each day and that he has never been compensated by AB for missing a rest break. (*Id.* at 36:1-4; 36:19-21.) Moreover, Blyth and Navarro both hold unique relationships with Bill Aboudi and/or his son Jay Aboudi. Blyth lived on AB property for a number of months in exchange for watching and cleaning up the grounds, and at the time of his deposition he was renting a space to park his truck from OMSS. (Ex. P-23 at 52:17-53:4; 54:2-6; 60:9-10.) Jay Aboudi accompanied Navarro in a separate legal proceeding regarding a ticket. (Ex. P-24 at 54:13-16; 55:2-16.) Blyth and Navarro's relationships with the Aboudis, however, do call into question the veracity of their testimony as relied upon by AB because both have an incentive to paint AB in the most favorable light possible. Navarro is also currently employed as a driver. In his deposition he hinted at a fear of causing trouble with his employer if he were to remain in the lawsuit. (Ex. P-24 at 39:22-40: 2; 40:11-12; 42:1-4.) Aboudi was present at both Blyth and Navarro's depositions.

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

[23] David Blyth was also an unpaid trainee. (See P-Ex 23.)

[24] The estimates given by witnesses at trial placed the number of trainees working at one time between 1-5.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

The evidence reflected AB had no program or organized action for trainees, nor did it have any AB training manuals or materials. The "trainers" are other drivers, who were given no special instruction on how to train. Trainees performed the job functions of employee drivers, regardless of the fact that they were accompanied by an employee driver while performing these functions. Some drivers (Llewellyn, Williams and Godfrey) 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.

1. <u>Nothing in the law provides for no payment, even for those in training</u>

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 OLW does not provide a separate learner rate. (See Plaintiff's Request for Judicial Notice ("RJN") granted 6/25/10, Duncan Dec. at ¶ 3, Exhibit B.) As the OLW Ordinance was in effect from January 28, 2005 through February 10, 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, which is reflected in the damages model.

2. <u>Workers cannot waive their statutory right to the minimum wage</u>

In California, wage claims cannot be waived. Several sections of the Labor Code prohibit the waiver of wage claims. (See e.g., Labor Code §§ 206.5, 219, 2802, 2804.) 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].

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

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.)

3. AB's argument that the Port required extra individuals entering the Port be designated as "trainees" is irrelevant and not credible

This defense was never made by AB prior to trial. No information as to the Port's requirement that passengers in a vehicle entering the Port be labeled a trainee, was provided to Plaintiffs in discovery, nor mentioned by Bill Aboudi in his deposition. (See Duncan Dec. at ¶ 4.) The TWIC card policy of requiring each person entering the Port to have a card, was implemented in "late November 2008" according to Aboudi, months after the lawsuit was filed. The testimony of all driver witnesses showed that there were indeed individuals who were suffered or permitted to work by AB and not paid, regardless of whether the Port chose to call them trainees or not.

4. AB's argument that members of the public, for instance news reporters, were the majority of individuals who trained is not supported by evidence

Curiously, this defense also was never made by AB prior to trial. No information as to news reporters or politicians was provided to Plaintiffs in discovery, nor mentioned by Bill Aboudi in his deposition. (See Duncan Dec. at ¶ 5.) The one example cited at trial was the exception, not the rule. (See e.g., testimony of Cooper, Gilbert, Wellemeyer, Llewellyn, Williams and Godfrey regarding their "training.") Plaintiffs carried their burden as to this claim.

D. FAILURE TO PAY THE OAKLAND LIVING WAGE[25]

The applicable authority in considering Plaintiffs' OLW claim is the Charter of the City of Oakland, Article VII, Port of Oakland, section 728, Living Wage and Labor Standards at Port-Assisted Business. On December 15, 2009, Plaintiffs filed, with their original class certification motion, Plaintiffs' Request for Judicial Notice ("RJN"), which includes a request that the Court take judicial notice of Section 728 of the Charter. (See Duncan Dec. at ¶ 3, Exhibit A.) This request was granted on June 25, 2010. (See Duncan Dec. at ¶ 3, Exhibit B.) At trial, Plaintiffs

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

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

proved Defendant was a PAB as defined in Section 728 and thus required to compensate its employees at not less than the OLW rate for the OLW liability period.

Section 728(1)(B) provides that a "Port-Assisted Business" or "PAB" is "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." Further, 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.[26]" A "Port Contractor" means any person party to a Port Contract as defined.

> Section 728(1)(C) "Port Contract" means:
>
> (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 or interest received from the Port pursuant to any of the foregoing contracts, leases or licenses.

Section 728(2)(B) and (C) exempt from coverage an "[e]mployee who spends less than 25 percent of his work time on Port-related employment" and "a person who employs not more than 20 employees per pay period."

The evidence reflected at trial that during the OLW liability period each of the three PAB elements existed: AB was a (1) "Port Contractor," (2) employing more than 20 persons, (3) spending 25% or more of their time on Port-related employment. Under Section 728(1)(B) Plaintiffs proved AB was a person party to a "Port Contract," and thus 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. (See P-Ex. 3 at p. 10, P-Ex. 5.) AB held a lease with OMSS, a "sublease," at the time of OMSS's lease with the Port. (*Id.*) As a result, AB held a "sublease" (under section 728(1)(C)(1)) with the Port pursuant to OMSS's "lease … from the Port involving payments to

[26] 29 U.S.C. §203(r); see Duncan Dec., Exh. C.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

the Port expected to exceed $50,000" over the term of the lease (under section 728(1)(C)(2)).[27] Not only is OMSS a "Port Contractor," but AB is also a "Port Contractor."

1. AB, alone or as an "enterprise" with the Oakland Port Scale, employed 20 persons or more during the OLW liability period who spent more than 25% of their time on Port-related employment.

a. AB employed 20 employees or more including unpaid trainees misclassified as non-employees

As described above, AB consistently employed at least one, and sometimes as many as five, unpaid trainees misclassified as non-employees.[28] Had these unpaid trainees been properly classified and paid, thus appearing on AB's payroll, AB would have had at least 20 employees during the OLW liability period.

b. AB employed 20 employees or more as an "enterprise" with the Scale

AB and the Scale constitute an "enterprise" as defined under the FLSA, because the businesses are (1) engaged in related activities, (2) performed for a common business purpose (3) through common control and unified operation.[29] In order to constitute an "enterprise" under the FLSA, a business must be engaged in "related activities" that are performed for a "common business purpose," through "common control" or a "unified operation." (See Duncan Dec. at ¶ 6, Exhibit C (29 U.S.C. § 203(r)); see e.g., *Reich v. Japan Enters. Corp.* (9th Cir. 1996) 1996 U.S. App. LEXIS 17677 [Related activities are "operation[s] through substantial ownership or control of a number of firms engaged in similar types of business activities;" In determining whether there is common control, courts heavily emphasize common ownership; "Determinative question is whether a common entity has the power to control the related business operations;" "Common business purpose" is not defined by the FLSA, but the test is about the same as the one for related activities"]; *Reich v. Bay, Inc.* (5th Cir. 1994) 23 F.3d 110 [deeming contractor and subcontractor

---

[27] 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). (P-Ex. 3 at p. 10.) That is sufficient to make AB Trucking a "Port Contractor." Plaintiffs can make the next two inquiries using AB's status as a Port Contractor; it is irrelevant that OMSS is *also* a "Port Contractor" (except as it furthers evidence of the existence of an "enterprise" between AB Trucking and OMSS.)

[28] It is AB's obligation to keep record of its employees. (See Labor Code § 226; Wage Order 9.) In absence of these records, Plaintiffs met their burden to show the existence of one, if not more, unpaid trainee each pay period during the statutory period. AB did not overcome Plaintiffs' showing.

[29] In addition, those employees of AB and the Scale 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. There are numerous admissions that AB's payroll was done in Vallejo as a regular matter.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

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, 861 [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: "a shared profit motive is sufficient to establish a 'common business purpose'"; *Dole v. Odd Fellows Home Endowment Bd.* (4th Cir. 1990) 912 F.2d 689, 692-93 [Entities which provide mutually supportive services to the substantial advantage of each entity are operationally interdependent and may be treated as a single enterprise under the Act.]) Unification may exist through leases or other agreements. (See 29 C.F.R. § 779.218.)

Aboudi is a "Managing Member," deputy weighmaster, and co-owner of the Scale.[30] (See D-Exs. K and L.) The Scale opened in approximately October 2004. (See D-Ex. J.) Aboudi set up an account between his two companies, AB and the Scale, so that AB drivers could charge the cost to weigh AB's trucks at the Scale, without having to pay themselves at the time of the transaction. AB encouraged its drivers to use the Scale. (See e.g., testimony of Francis.) The common purpose of AB and the Scale is to offer and facilitate trucking services. In order for AB to operate, its trucks must be weighed. Although others may use the Scale, this does not change the nature of the connection between AB's operations and the Scale. AB's drivers were also encouraged to grab food to eat it in line at the Port from the mini-mart connected to the Scale. AB and the Scale provide "mutually supportive services to the substantial advantage of each entity" and are thus "operationally interdependent." Moreover, the two entities operate "through substantial ownership or control" as Aboudi is a Managing Member, co-owner, and the agent for service of process of the Scale, as well as for AB. Aboudi admitted he can frequently be found performing functions at the Scale. Similarly, Ms. Aboudi testified that when the Scale started up she did its payroll, just as she continued to do AB's payroll. Both entities share the "profit

[30] Aboudi is also the president and sole owner of OMSS. He testified that during the OLW liability period, he employed one other employee by OMSS, Doris Vaughti, who worked with Aboudi from 1996 to approximately 2010, who helped keep track of OMSS's numerous tenants. According to Aboudi, Vaughti shows up on AB's payroll despite the fact she performed work for OMSS.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

motive" of earning money from trucking operations in and out of the Port. Finally, AB stipulated that AB had an annual gross sales volume of more than $500,000. (See 29 U.S.C. § 203(s)(1)(a)(ii).)

c. AB's employees spent 25% or more of their time on Port-related employment

AB performed drayage operations in and out of the Port. Drivers spent the majority of their time driving back and forth to the Port. All staff and auxiliary staff performed work supporting the operation of drivers in and out of the Port, or Port-related employment. Those performing AB's payroll functions in Vallejo would not have had that job, but for the drivers' job duties at the Port.

d. There were at least 20 employees employed during pay periods in the OLW liability period

In the OLW liability period of January 28, 2005 – February 10, 2006, if it is assumed that 1 unpaid trainee was working (in addition to those employees who were issued checks by AB), the number of pay periods AB employed 20 employees, and should have paid the OLW, was approximately six. (See testimony of Aboudi admitting 17 employees total were employed (i.e. issued checks) by AB during the OLW liability period.) If it is assumed the five Scale employees employed during that time period are included in the number of AB's employees, the number of pay periods AB employed 20 employees, and should have paid the OLW, was approximately twenty-seven. (*Id.*) Plaintiffs have met their burden of proof. (*Id.*; P-Ex. 16.) Should AB wish to argue that there were not 20 employees in the preceding or subsequent 12 pay periods, AB has the burden to prove what it claims. (See Evid. Code § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust"]; *Hernandez*, *supra*, 199 Cal.App.3d at p. 727.)

As a result, AB Trucking owes workers paid less than the OLW rate during the applicable time period backpay, other remedies, treble damages, and penalties.

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

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

> records to the Port … 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 …

The evidence reflected AB failed to maintain these records (in large part because the records AB did maintain were inaccurate in that they did not reflect all hours worked, and for some workers, *no* hours worked), and it was undisputed AB failed to provide any such records to the Port on the dates required. As a result, AB owes the penalty of $500 per day, from the date of the failure to the present, to the workers employed during the OLW liability period.

AB will argue that the $500 remedial compensation should not be paid directly to the workers. However, Section 728(9), Private Rights of Action, provides:

> 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.

This section does not prohibit, nor does Section 728(8), the payment of the $500 to the affected employees. To the contrary, Section 728(9) provides that any person claiming a violation of Section 728 may bring an action against the PAB and be entitled to "all remedies available to remedy any violation of this Section." It further provides, those remedies include—*but are not limited to*—back pay, reinstatement or injunctive relief. (Section 728(8)(A).) In any event, nothing in the Ordinance may be construed to allow AB to catch a windfall by pocketing the accruing $500 remedial compensation clearly owed. Finally, the evidence reflected that AB 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).) Those class members AB should have paid the OLW rate, but did not, are entitled to backpay and treble damages, which is reflected in the damages model.

E. UNFAIR BUSINESS PRACTICES, FAILURE TO PAY WAGES OWED AT DISCHARGE OR QUITTING AND FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS[31]

Based on its violations of the Labor Code discussed above, AB violated the California

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

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Business & Professions Code section 17203, which 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. The evidence demonstrates the Class 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. The evidence reflects AB never paid monies owed for its failure to pay for all hours worked, any hours worked, meal and rest period violations, and Labor Code section 226 violations; this money continues to be owed to drivers, and AB owes the Class for Section 203 violations, which are reflected in the damages model.

Labor Code section 226 and Wage Order 9 require AB 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 proved 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; see testimony of Jovi Aboudi.) Applicable penalties are reflected in the damages model. AB's failure to provide accurate itemized wage statements was willful. Based on the evidence presented at trial, there is no question AB had knowledge that drivers did not receive one hour, off-duty, uninterrupted meal periods each day worked, yet AB deducted one hour each day from their pay. AB willfully paid drivers less than they were owed and willfully provided wage statements reflecting false "hours worked" as a result. (See e.g., P-Ex. 17.) AB knew it suffered and permitted trainees to work, preparing those drivers for the day one of AB's trucks opened up for a new driver, without paying drivers (or providing them with wage statements) at all. Plaintiffs carried their burden of proof.

IV. DAMAGES MODEL

A. PLAINTIFFS PROVIDED MS. DON'S TESTIMONY TO SUMMARIZE VOLUMINOUS RECORDS UNDER EVIDENCE CODE SECTION 1523(D)

Plaintiffs never offered Andrea Don as an expert witness, nor was she asked to give her opinion on any subject. Ms. Don's testimony, and the damages model she prepared, was offered

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

as a summary of documents produced by AB in discovery to Plaintiffs. California Evidence Code section 1523, subsection (d) provides:

> Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Summaries of voluminous records have been utilized in California since as early as 1898. (See *San Pedro Lumber Co. v. Reynolds* (1898) 121 Cal. 74, 86 ["The records … were most voluminous … they would weigh a ton … [the expert] was rigidly cross-examined as to the items composing his schedules, and their correctness was established. They were, therefore, unquestionably admissible."].) The provisions of the Evidence Code relating to the "Secondary Evidence Rule" enacted in 1998, continues to provide for the admissibility of such summaries. (See 2 Witkin, Cal. Evidence, (4th ed. 2000), Documentary Evidence, §§ 30, 31, 40 pp. 156-158, 166.) Once secondary documentary evidence became generally admissible, there was no longer a need for a specific provision governing documents summarizing voluminous writings.[32] (See Evid. Code § 1523(d).)

Ms. Don was reported as a witness on Plaintiffs' witness list and AB made no objection. AB had a full opportunity to cross-examine Ms. Don at trial, and it did so. It was clear from her testimony Ms. Don was not offering her opinion, but rather a summary of records she had reviewed. AB's objection is made more ridiculous by the fact that the only documents Ms. Don reviewed in preparing the damages model were AB's own payroll records, provided to Plaintiffs by AB. Plaintiffs' advocacy tool in the form of these models is to be weighed by the Court and a convenience to the Court saving it "great loss of time" in reviewing voluminous records. (See

---

[32] Federal Rules of Evidence Rule 1006 provides: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." The purpose of the rule is to allow the use of summaries when the documents are unmanageable or when the summaries would be useful to the judge and jury. (See *United States v. Rizk* (9th Cir. 2011) 660 F.3d 1125, 1130-1131.) It must be shown that the underlying materials upon which the summary is based (1) are admissible in evidence and (2) were made available to the opposing party for inspection. (*Id.*) These materials must be admissible, but need not themselves be admitted into evidence. (*Id.* citing *United States v. Meyers*, 847 F.2d 1408, 1412 (9th Cir. 1988).) The availability requirement ensures that the opposing party has "an opportunity to verify the reliability and accuracy of the summary prior to trial." (*Id.*) In *Rizk*, the summaries presented were permissible under Rule 1006 because the underlying materials for the charts were standard real estate records that were both admissible in evidence and made available to the opposing side for inspection. Federal law likewise supports the admissibility of Plaintiffs' damages model (P-Ex. 16.)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Evid. Code § 1523(d).) The underlying information upon which Ms. Don relied to create the damages model—AB's payroll records provided to Plaintiffs in discovery—are unquestionably admissible evidence, making the damages model, and her testimony, likewise admissible. (*Id.*)

B. CASE LAW AB CITES IS INAPPOSITE

AB cites *Grimshaw v. Ford Motor Company* (1981) 119 Cal.App.3d 757, *Korsak v. Court of Appeal* (1992) 2 Cal.App.4th 1516, and *People v. Coleman* (1985) 38 Cal.3d 69 in support of its argument that the testimony of Andrea Don, offered by Plaintiffs to explain the damages model created and offered by Plaintiffs, is inadmissible. None of these cases support AB's position. All three deal with opinion testimony of *expert* witnesses and none deal with Evidence Code section 1523(d) and summaries of voluminous records. *Grimshaw* is the well-known tort case where the court held there was ample evidence that the corporate defendant knew its Pinto car's fuel tank and rear structure would expose consumers to serious injury or death in a low speed collision, and that defendant could have corrected the design defects at minimal cost, but decided not to after conducting a cost-benefit analysis balancing human lives and limbs with corporate profits. (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 813.) *Grimshaw* held that while an expert witness may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters *if they are otherwise inadmissible*, and that he may not under the guise of reasons bring before the jury incompetent hearsay evidence. (*Id.* at pp. 788-89.) In *Korsak*, a case in which the plaintiff was injured by a shower head at the defendant hotel, the Court of Appeal found it was improper for an expert to testify to incompetent hearsay evidence of an informal survey the expert conducted about general hotel maintenance practices. (See *Korsak*, *supra*, 2 Cal.App.4th at p. 1519.) The California Supreme Court reversed the defendant's conviction of two counts of first degree murder, one count of second degree murder, and assault with intent to commit murder in *Coleman.* The Supreme Court, citing *Grimshaw*, reiterated the rule that while an expert witness may state the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. (See *Coleman*, *supra*, 38 Cal.3d at p. 92.) AB presented no authority supporting its position.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

V. CONCLUSION

In conclusion, for the forgoing reasons, Plaintiffs respectfully request the Court enter judgment in favor of Plaintiffs and the Class in the amount of $2,256,309.64 as is listed on the damages model incorporating the Regular Wage Rate and including 5 Scale Employees, or, in the alternative, one of the other totals listed on Plaintiffs' proposed alternative damages model versions. (P-Ex. 16.)

Dated: April 13, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: DAVID A. ROSENFELD
CAREN P. SENCER
LISL R. DUNCAN
Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

118212/664034

PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On April 13, 2012, I served the following documents in the manner described below:

PLAINTIFFS' OPENING POST-TRIAL BRIEF

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to each addressee below.

☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.

☐ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jkoffler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Guy A. Bryant
Bryant & Brown
476 3rd Street
Oakland, CA 94607
(510) 836-7564 (fax)
guybryant@bryantbrownlaw.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 13, 2012, at Alameda, California.

Karen Scott

Karen Scott

118212/651241

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001