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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated, Plaintiffs, v. OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, and DOES 1 through 20, inclusive, Defendants.	Case No. RG08379099 PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO CERTIFY CLASS Date: June 25, 2010 Time: 11:00 a.m. Dept: 20 Judge: Robert B. Freeman

Plaintiffs LAVON GODFREY and GARY GILBERT ("Plaintiffs") hereby submit their reply in support of class certification.

I. INTRODUCTION

On December 15, 2009, Plaintiffs filed their motion for class certification. On May 7, 2010, six months later, Defendant OAKLAND PORT SERVICES d/b/a AB TRUCKING ("AB" or "Defendant") filed an Opposition littered with misrepresentations.[1] For example, Defendant's Opposition repeatedly claims that Plaintiffs have submitted no evidence in support of the motion. The absurdity of this assertion lies in the fact that Plaintiffs rely predominantly on the testimony of Defendant's own persons most knowledgeable. Defendant's Opposition fails to refute Plaintiffs' showing of ascertainable classes for purposes of the wage and hour claims, community of interest, adequacy of representation, and superiority of class treatment. As the standards for class certification have been met, the proposed classes should be certified.

II. ARGUMENT

A. CLASS CERTIFICATION IS SUPERIOR

This case is exceptionally well-suited to class treatment and Defendant's response confirms this. There is no real dispute that the entire proposed class is similarly situated. All of the drivers work out of a common facility, report to the same supervisors and managers, are paid pursuant to identical payroll practices, are subject to the same work rules and policies, and receive wage statements with the same information.[2]

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

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[1] As one example of Defendant's efforts to mislead the court, Defendant attached Plaintiffs' original responses to form interrogatories to the Declaration of Jay Ian Aboudi. Plaintiffs are unclear as to why Defendant would attach Plaintiffs' original responses when Plaintiffs submitted supplemental responses to form interrogatories on January 5, 2010 and additional supplemental responses to form interrogatories on February 16, 2010. See Supplemental Declaration of Lisl R. Duncan, ¶ 5.

[2] See Plaintiff's Memorandum of Points and Authorities ("Memo"), pp. 14-15 (discussing common questions of fact).

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B. THIS CASE SATISFIES ALL THE REQUIREMENTS FOR CLASS CERTIFICATION

1. The Proposed Classes are Ascertainable and Susceptible to Class Treatment.

The identities of class members, current and former truck drivers for Defendant, may be easily ascertained through AB Trucking's records. (See *Vasquez v. Superior Court* (*Karp*) (1971) 4 Cal.3d 800, 811; *Rose v. City of Hayward* ["*Rose*"] (1981) 126 Cal.App.3d 926, 932.) Defendant's Opposition cannot refute that the proposed classes are ascertainable from these records. Indeed, the ascertainability of the classes, here, is based primarily upon the testimony and admissions of Defendant's witnesses, William Aboudi and Jovi Aboudi (Defendant's designated persons most knowledgeable ("PMK") on several subjects including operations of the company and payroll practices), as discussed in Plaintiffs' moving papers. Defendant's PMK regarding payroll, Jovi Aboudi, admitted in deposition that Defendant had uniform payroll practices – such as an automatic deduction in the payroll system of one hour for a meal period – applicable to all employees generally, not on any individualized basis. (See Exh. C.[3])

a) Plaintiffs may propose subclasses in its motion for class certification.

For the purpose of facilitating the ascertainment of the classes at the class certification stage, Plaintiffs have proposed five (sub)classes pertaining to each of the specific wage violations Plaintiffs' claim. Unable to deny the fact that the five classes proposed by Plaintiffs in their motion are ascertainable by reference to Defendant's testimony and records, Defendant's Opposition argues Plaintiffs' formulation of class definitions is limited by the proposed classes set forth in Plaintiffs' complaint. (See Opp. at 1:20-3:23.) This is a silly argument. There is no rule of procedure prohibiting the refinement of the class definition at the class certification stage, and for this reason Defendant is unable to cite any precedent for its position. Rule of Court 3.764 explicitly provides that any party may move to certify a class, determine and certify subclasses, and/or amend or modify an order certifying a class. (Cal. Rule of Court 3.764(a); see also *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 134.) The Rule clearly contemplates that the

[3] All references to Exhibits ("Exh.") are references to those attached to the Declaration, or Supplemental Declaration, of Lisl R. Duncan in support of class certification filed with the moving papers, unless otherwise noted.

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class(es) may be defined or refined from classes alleged in a complaint. Plaintiffs do not now assert a different class claim than what has been pled and litigated. Rather, the Complaint and the First Amended Complaint have always alleged wage and hour violations applicable to a class of employees and former employees.

b) Plaintiffs' motion is fully supported by admissible evidence.

Defendant's attempts to argue Plaintiffs do not provide *"any"* evidence in support of their position and that Plaintiffs failed to assert that either of the named Plaintiffs are representative of the "overtime class" or the "living wage" class ignores the evidence set forth by Plaintiffs. (Opp. at 3:24-4:1.) Plaintiffs establish from the outset that they are "truck drivers formerly employed by Defendant" and that their claims are "based upon practices that were generally applied to Defendant's driver employees." (Memo at 1:2-6.) The specific referral to Ms. Godfrey and the "all hours worked" class and Mr. Gilbert and the "misclassified employees or no wages received," is offered for clarification purposes, which is apparent when the two sentences are read in the context of the memo as a whole, and from a reading of the facts.[4] Throughout the litigation, the theories of recovery have remained consistent.

Defendant raises an irrelevant issue at this stage by claiming the named Plaintiffs lack standing to seek injunctive relief. (Opp. at 4.) Relief is not an issue at the class certification stage. The named Plaintiffs adequately represent the class, and this is the appropriate standard for inquiry at this stage. Defendant's Opposition cites several cases to support its argument, but the cases do not deal with standing in the context of a class certification motion and are consequently irrelevant.[5]

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[4] If clarification is still needed, Plaintiff Godfrey is representative of the "all hours worked," "overtime," living wage," and "meal and rest period" classes because Defendant classified her as an employee. Plaintiff Gilbert is representative of the "misclassified employee or no wages received," "overtime," living wage," and "meal and rest period" classes because Defendant classified him as a trainee.

[5] The court in *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, determined: "Blumhorst's pleadings allege he had suffered domestic violence in the past, not at the time he made the test calls to shelters. Thus, he does not allege he was a victim of shelters' alleged unlawful discriminatory practices. Accordingly, Blumhorst lacks standing, in that he was not personally aggrieved." (*Id.* at p. 1003.) Defendant's citation to *Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, is similarly misplaced because *Coral Construction* was not a class or representative action. Furthermore, the court found the plaintiff in *Coral Construction* did have standing. (*Id.*, at p. 25.)

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2. The Proposed Classes are Typical and Susceptible to Class Treatment.

A class representative's claim is typical if it arises from the same event, practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Defendant cites several cases purportedly to establish that the two named Plaintiffs' claims are not typical of those of the proposed classes, but it does not successfully contest the evidence offered by Plaintiffs in support of this standard.

a) Plaintiffs' claims are typical because Plaintiffs and all proposed class members were subject to the same practices, supervision and control.

Defendant applies the same time-keeping and payroll system to all drivers. Drivers are all under the control of the company's president, Bill Aboudi. These and other conditions addressed in Plaintiffs' Memo show the common treatment of drivers. By contrast, the explanation offered by Defendant's Opposition as to why Defendant asserts Plaintiffs fail to show typical claims is difficult to follow. (See Opp. at 6:25-7:12.) Defendant appears to argue that maintaining an oral meal period policy means that individual inquiries predominate. Bill Aboudi testified that he is the only individual who can provide employees with the terms of their employment and set human resource policy. (Exh. B at 15:12-17.) Bill Aboudi's central control over these policies demonstrates why class treatment is so appropriate here. Mr. Aboudi testified that he communicates the policy on meal periods to drivers when he hires them and as he goes along, "if need be, if they need clarification." (Exh. B at 117:23-24.) Mr. Aboudi indicated that he does not clarify frequently, as he had "no idea" in his deposition of the last time he had done so. (Exh. B at 117:25-118:8.)

b) The cases Defendant cites do not defeat typicality.

Defendant cites several cases that do not deal with wage and hour issues. These cases are irrelevant.[6] Defendant's citation to *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 716-717

[6] Defendant cites *Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal. App. 3d 435, which involved a claim brought under the Unruh Civil Rights Act on behalf of homosexual men who alleged they were denied access to a bath house. Defendant also references *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 659 ["*Caro*"] where the plaintiff alleged the defendant had falsely represented its orange juice to be "fresh." The court concluded the plaintiff did not demonstrate that substantial benefits to the litigants and the court would result from class certification. The "damage was the $3 purchase price [Caro] paid for each of four 64-ounce cartons of Fresh Choice orange juice." (*Caro, supra,* at p. 659.)

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["*Daar*"], is similarly misguided because *Daar*, while it does set forth general criteria for class certification, deals with an appeal to a demurrer, not a motion for class certification. Moreover, Plaintiffs in *Daar* prevailed in the action establishing that the classes were ascertainable and that a well-defined community of interest existed sufficient to establish a class action.[7] Defendant also cites *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385 ["*Acree*"] [8] to say that a class action will not be permitted if each member is required to "litigate substantial and numerous factually unique questions" before a recovery may be allowed. (Opp. at 7:3-5.) Defendant quotes only half the phrase used by the *Acree* court, thus missing a key portion of the rule:

> *A class action can be maintained even if each class member must at some point individually show his or her eligibility for recovery or the amount of his or her damages*, so long as each class member would not be required to litigate substantial and numerous factually unique questions to determine his or her individual right to recover [emphasis added].

(*Acree, supra,* at p. 397.) Notably, the court in *Acree* found that the case had always maintained the character of a class action lawsuit. (*Id.* at p. 402.)

c) The evidentiary record supports Plaintiffs' motion.

In an attempt to mislead the Court, Defendant's Opposition mischaracterizes the evidence produced by Plaintiffs: "[Plaintiffs] have not shown by *any evidence in the record*" that Defendant violated the law as Plaintiffs assert. (Opp. at 5:24-6:2.) Defendant's argues that Plaintiffs did not suffer actual damage, yet cites to only an incomplete hypothetical situation taken out of context. (Opp. at 6:4-8.) Defendant's Opposition incorrectly asserts, without referring the Court to any evidence whatsoever, that Plaintiffs present a "litany of *supposed* 'events,' 'practices,' and 'courses of conduct,' (Memo at 18:15-16) that supposedly would establish typicality" but that Plaintiffs "cite to absolutely nothing in the record to substantiate or support their assertions (citing

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[7] The court in *Daar* held: "We, therefore, arrive at this final conclusion: that each count of the complaint shows (1) the existence of an ascertainable class and (2) a well defined community interest in the questions of law and fact involved affecting the parties to be represented; and that, accordingly, the complaint and each count thereof sets forth sufficient facts to establish a class action." (*Daar, supra,* at pp. 716-717.)

[8] The issue in *Acree* was a question about the method used by Defendant for computing earned premiums and whether Defendant breached the implied covenant of good faith and fair dealing. The court found that "since the evidence showed that there was a significant number of class members ... the trial court properly directed that damages be bifurcated from liability." (*Acree, supra,* at p. 396.)

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Memo 19:7-16.)." (Opp. at 6:14-17.) These unsupported statements completely ignore the citations to the depositions of Defendant's PMKs. (See Memo at 14:20-15:28.) Defendant's assertions are completely devoid of any reference to evidentiary support and should be simply disregarded.[9] It is not Plaintiffs' burden, nor the Court's burden, to search the record for support for Defendant's unsupported arguments. Defendant similarly mischaracterizes Plaintiffs' citations to the testimony of Defendant's PMKs as "ineffectual and misleading," but, again, Defendant offers no explanation of how Plaintiffs' presentation is ineffectual and/or misleading, along with no offer of an alternate explanation of what Defendant believes occurred. (Opp. at 6:18-21.)

d) The obligation to ensure meal and rest periods are provided is exclusive to AB Trucking.

Defendant's Opposition suggests that it can shirk its statutory obligation to provide meal and rest periods to its employees by shifting blame on to the Port of Oakland. (Opp. at 9:4-7.) Defendant attempts to distinguish *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962 ["*Cicairos*"], simply by stating, "That, of course, as the plaintiffs here must concede, simply cannot be the finding of the court: here, it is the way in which the Port of Oakland operates its queues, not any policy of AB Trucking, that prevents the drivers from taking their meal periods." (Opp. at 9:16-20.) This is a common factual defense asserted by Defendant, which shows that this is a common fact properly subject to class treatment. Contrary to Defendant's position, Wage Order 9 requires "[e]very employer [to] keep accurate information with respect to each employee … Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease … need not be recorded. … An employee's records shall be available for inspection by the employee upon reasonable request." (Cal. Code Regs., tit. 8, § 11090, subd. 7(A)(3), (C).) The court in *Cicairos* has already found attempts to avoid liability, like AB Trucking's, unavailing. Despite the fact the employees hold the occupation of truck drivers, the obligation to ensure meal and rest periods remains with the employer. (See *Cicairos, supra,* 133 Cal.App.4th at p. 962.) Here, Defendant's time keeping and payroll practices assume

[9] "All references to exhibits or declarations in supporting or opposing papers must reference the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number." (Cal. Rule of Court 3.113(k).)

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meal periods are taken by all drivers. (Exh. C at 35:10-36:17, 60:8-61:6; Exh. B at Exh. 2, 16.) All drivers are treated the same. This is not sufficient under *Cicairos* to establish compliance with Wage Order 9.

3. Common Questions of Law and Fact Predominate.

Common legal issues predominate as Plaintiffs' claims concern a uniform pattern of statutory violations by AB Trucking. Common questions of fact predominate as drivers worked under the same practices, supervision and management control. Defendant's Opposition repeats many of the same general class certification standards already provided in Plaintiffs' moving papers, but Defendant does not apply the standards to the case at hand.

Defendant disingenuously ignores the testimony of Defendant's own witness relied upon in Plaintiffs' moving papers. Mr. Aboudi's deposition shows that as a matter of Defendant's management hierarchy, not as a matter of any individual issue, all drivers reported to and were directed by him. Ms. Aboudi's deposition shows that as a matter of Defendant's pay practices, not as a matter of any individual issue, Defendant applied its pay system to all drivers and automatically deducted one hour for a meal period. This issue alone raises common legal and factual inquiries appropriate for class certification. (See e.g. *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304 ["*Jaimez*"] [10] [finding indeed, First Choice's policy and practice before 2006 of deducting 30 minutes per shift for each RSR, regardless of whether the RSR took a meal break, raises common legal and factual issues].) Defendant's Opposition makes no mention of evidence cited on pages 14-15 of Plaintiffs' Memo, nor attempts to distinguish it, as if seeking to mislead the Court into believing that "plaintiffs have utterly failed to meet their burden of showing predominance of common questions of fact as to any of these 'classes'." (Opp. at 12:25-26).

[10] This case was not included in Plaintiffs' motion because at the time a petition and depublication request(s) in the case were pending before the California Supreme Court. The Court denied the petition and depublication request(s) on May 12, 2010. The court of appeals' holding is in favor of class certification: "In light of the numerous common issues of fact and law that predominate in this lawsuit, we conclude that proceeding by way of class action is the superior method of adjudication. Doing so would further judicial economy by avoiding repetitious suits, would unify what would otherwise be a series of small claims so as to enhance the class members' access to redress, and would put to rest any current employee concerns about retaliation." (*Jaimez, supra*, at p. 1308.) *Jaimez* is strong support for class certification here.

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a) Defendant's records alone establish the named Plaintiffs are adequate representatives based on their status as drivers working for Defendant.

The function of a class representative is to be typical of the rest of the class, not necessarily to provide evidence on what has happened to other class members. Defendant repeatedly argues that Plaintiff Gilbert produced no information about other drivers or trainees not getting their meal or rest periods. Defendant's Opposition does nothing to refute the evidence in the record from Defendant's own PMKs, time cards and payroll records that indicate that *other* drivers and trainees were not getting their meal or rest periods, and that the same deductions were made for each employee. For instance, Defendant's time keeping system does not provide for a place for drivers to record their meal periods each shift. (See Exh. B, Exhs. 2-4.) Defendant's records show *on their face* that drivers enter their start time and end time with no indication of a meal period. There can be no meal period assumed from this documentation by the drivers; this documentation indicates only the start time and end time for the driver's shift. Defendant presents nothing to refute what its records, combined with the testimony of its PMKs, shows.

The record shows Mr. Gilbert was a "trainee" and that he drove around in Defendant's vehicles with another driver, sometimes taking the wheel and other times riding with the other driver. (See Exh. E-2 at 100:10-12.) Defendant admits it has a trainee system. (See Exh. B at 138:1-24, Exhs. 4 at bate stamp nos. 49, 54, 48, 57.) Defendant admits Mr. Gilbert was one of these "trainees," in fact, Defendant cites to the "agreement" signed by Mr. Gilbert entitled "Oakland Port Services Corporation Truck Driver Training Program: Trainee Participation and Release of Liability Agreement." (See Exh. E, Exh. 1.) Defendant admitted it does not compensate trainees for the "training" process. (See Exh. C at 22:1-23:20.)

The Court may find based on this evidence that trainees were subject to the same treatment as a matter of course, due to their status as trainees, or in the "misclassified or no wages received" class. Plaintiff Gilbert is a member of this subclass because the record shows he received this treatment characteristic of this group of individuals (See Exh. E, Exh. 1.) In seeking class certification at this stage, Plaintiffs are under no obligation to prove that all or any "other drivers or trainees" did not receive their meal or rest periods with particularity; that inquiry is properly

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addressed at the damages stage of litigation. Instead, Plaintiffs' motion shows that drivers' meal and/or rest periods were not monitored in any way, but were subject to a policy of deductions for meal periods regardless, thus creating common working conditions.

In light of Ms. Aboudi's testimony describing Defendant's pay practices and Mr. Aboudi's testimony regarding management and direction of drivers, it is irrelevant to what extent Ms. Godfrey and Mr. Gilbert are not aware of any "information whatsoever either about any other drivers or trainees not getting their lunch or meal breaks or about any other drivers or trainees not getting their rest periods [citations omitted]." (Opp. at 8:6-10.) As discovery has shown, wage issues discussed in the moving papers are uniformly applicable to five ascertainable classes of people; it is of no consequence whatsoever whether Ms. Godfrey and Mr. Gilbert knew what happened to other drivers when they were working for Defendant. The Aboudis' admissions alone are enough to compel certification. (See *Sav-On Drug Stores, Inc v. Superior Court* (2004) 34 Cal.4th 319, 334; see also *Jaimez, supra,* 181 Cal.App.4th 1286.)

Similarly, Defendant's Opposition argues that Plaintiff Godfrey presents no evidence that there exists a class of AB Trucking employees that constitute an all hours worked or meal and rest period class, or that she has any personal knowledge of facts about them. (Opp. at 8:23-25.) Defendant's argument does not differentiate between Ms. Godfrey's ability to possess personal knowledge about the working conditions of fellow drivers, and whether or not there is sufficient evidence to show a class of drivers existed who were not compensated for, for instance, all hours worked. Plaintiff Godfrey was a driver for Defendant. (See generally Exh. D; Exh. B, Exh. 3 at bate stamp nos. 5 and 11.) As a driver, she testified at deposition and participated in the discovery process regarding her experience as a driver. The evidence shows that Defendant deducted one hour of pay from all drivers' compensation each day. (See Exh. C at 35:16-36:17; 61:8-61:6.) The evidence shows that Ms. Godfrey's pay was deducted automatically in this manner. (*Id.*) Defendant admitted that this deduction was without any type of confirmation that drivers had actually taken a full one hour meal period. (*Id*; Exh. B at 118:9-119:19.) Ms. Godfrey's experience was common to all drivers in this regard.

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b) No percipient witness declarations are required.

Defendant argues that "whereas in a case such as *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal. App. 4th 1333 ["*Ali*"] – where in upholding a finding of a lack of commonality of questions of law and fact, the court noted that the trial court had been presented with the 'declarations of 36 putative class members as to their actual conduct,' … here, this court is presented with *no percipient witness declaration whatsoever*." (Opp. at 13:3-8.) In *Ali*, it was the *defendant*, not the plaintiffs, who produced declarations of 36 putative class members. The court determined that declarations *could* support a finding of a lack of commonality, but the court in no way, as Defendant would engineer it to hold, held that a plaintiff in a class action lawsuit is *required* (or even encouraged) to produce declarations. (See *Ali, supra*, at p. 1340.) In essence, Defendant is complaining because its own witnesses confirmed the appropriateness of class treatment.

In *Jaimez v. Daiohs USA, Inc., supra*, the Plaintiff sought certification of the following classes:

> Class I (overtime class) based upon the failure to pay overtime to the class; class II (meal break class) based upon the failure to permit or authorize meal breaks and the failure to pay one hour of wages for each meal break violation; class III (rest break class) based upon the failure to permit or authorize rest breaks and the failure to pay one hour of wages for each rest break violation; class IV (pay stub class) based upon the failure to provide pay stubs which comply with California law.

(*Id.*) The motion in *Jaimez* sought a determination that Jaimez was a suitable class representative and also asserted that certification was appropriate because the defendant subjected the class to "uniform policies and practices including failure to properly compensate its RSR employees, by failing to pay proper straight time, premium overtime, double time, missed meal & rest period compensation, failure to provided RSRs with compliant pay stubs and waiting time penalties." (*Jaimez,* 181 Cal. App. at p. 1292.)

c) All hours worked.

The predominant legal issue of whether drivers were paid for hours worked in accordance with applicable law, and the predominant factual issue of Defendant's uniform practice regarding compensation for drivers, are amendable to class certification.

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d) Misclassified or no wages received.

The pertinent inquiry is whether drivers were misclassified as trainees at some point during the class period. If classified as a trainee, he or she should have received wages as an employee.[11]

e) Overtime.

The predominant common factual issues regarding overtime include whether Defendant had a uniform practice of misclassifying drivers as exempt from overtime and whether Defendant had a uniform policy of requiring drivers to work more than 8 hours in a day or 40 hours in a week, but failing to pay them at an overtime rate for that work. (See *Jaimez, supra*, at p. 1302.) Both PMKs testified that drivers receive only straight time for all hours worked. (Memo at 15:24-26.)

f) Living Wage.

Whether Defendant pays drivers at a rate less than the Living Wage is a common factual question. Whether Defendant is required to pay its employees the Living Wage as prescribed by the Oakland City Charter will be a central and identical legal issue in each case.

g) Meal and rest period.

All drivers are commonly subject to Defendant's lack of a written meal and rest period policy.[12] Defendant interprets this argument as presented in Plaintiffs' Memo to mean Plaintiffs are arguing that this fact violates some un-cited law; instead the fact that there was no written policy means that all employees were subject to the same "lack of a policy." (Opp. at 6:21-24.) All drivers shared the typical experience of no written policy on meal and rest periods. All drivers are commonly subject to the instruction of William Aboudi regarding company policy on meal and rest periods at the time of hiring. (Exh. B at 117:15-118:25.) Defendant's practices are the predominant common factual issues on the meal and rest break claims. The automatic deduction of one hour of pay for a meal period is a common factual *and* legal inquiry. (See e.g., *Jaimez, supra*, at p. 1303-1304.)

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[11] By comparison, the court in *Jaimez* articulated the following common questions of law and fact: The predominant legal issue (whether First Choice misclassified its RSR's as exempt) and the predominant factual issue (First Choice's uniform practice regarding RSR classification) are amenable to class treatment. (*Jaimez, supra,* at p. 1301.)

[12] If the Court determines a finding on the meal and rest period classes would be premature because of uncertainty in the law, holding that issue in abeyance would be within the Court's inherent power.

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The court in *Jaimez* certified a meal and rest period class. The court in *Jaimez* properly determined that the class certification determination could be made without addressing the merits of the meal and rest period claims: "... we are not, at this stage, charged with adjudicating the legal or factual merits of Jaimez's causes of action. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.)" (*Jaimez, supra*, at p. 1303) The Court, here, should likewise certify the meal and rest period claims.

4. The Named Plaintiffs are Adequate Representatives of the Proposed Class.

Adequacy of representation is met where plaintiffs' interests are not antagonistic to those of the class, plaintiffs will vigorously prosecute class claims, and plaintiffs are represented by qualified counsel. (See *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450; *Cal Pak Delivery, Inc. v. United Parcel Serv.* (1997) 52 Cal.App.4th 1, 12.) Ignoring this standard, Defendant points to one error in Plaintiffs' Memo. Declarations from the named Plaintiffs were not provided in addition to their deposition testimony with Plaintiffs' motion. The statement in paragraph 16 of Plaintiffs counsel's declaration was an error due to oversight on the part of Plaintiffs' counsel. The statement was inadvertent and not intended to cause confusion.

a) The named Plaintiffs adequately represent the classes.

The only argument raised by Defendant on the adequacy of Plaintiffs Godfrey and Gilbert as class representatives is based on prior criminal records. While a felony conviction may cast doubt on the credibility of a *witness* under California Evidence Code section 788, this does not automatically make the plaintiff a less than adequate representative for purposes of class representation. Indeed, Bill Aboudi seems to have hired a number of ex-felons so it is disingenuous to now argue without citation that they cannot be adequate representatives. In *Jaimez*, discussed *supra*, the court determined that the named plaintiff was not an adequate representative. Nowhere, however, did the court state that the plaintiff's "credibility issues" arose from his felony conviction; rather questions about his credibility arose from his *lying* about the conviction and other factors.[13] It is undisputed that Mr. Gilbert has been convicted of a felony

[13] See *Jaimez, supra,* at p. 1296: "Jaimez was not an adequate class representative because he lied on his First Choice employment application about his felony conviction and incarceration, he admitted his view that it is acceptable to lie

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within the last fifteen years. However, Mr. Gilbert has been exonerated as to all charges that were pending against him since the time after the filing of this lawsuit, which resulted in his inability to sit for the second day of his deposition outside of Santa Rita. The Court should not find a named Plaintiff an inadequate representative simply because he has a felony conviction.[14] In fact, if the Court were required to do so, a number of citizens, including parolees and inmates, would be precluded from asserting their rights and serving as class representatives.[15] In effect, AB Trucking argues it can cheat workers because of their prior criminal activity.

Ms. Godfrey has no felony convictions on her record. She explained that her one conviction has been expunged.[16] (See Exh. D-2 at 210:20-214:2.) This fully explains any discrepancy with her response to discovery, to which Plaintiffs objected based on the difficulty in determining whether Plaintiff should respond in the affirmative as she officially has no felony convictions on her record. Plaintiff Godfrey was forthcoming about an explanation in her deposition. (*Id.*)

For individuals with criminal records, the occupation of truck driver is often one of the only positions available. Even the president of AB Trucking, William Aboudi, raised his familiarity with employing drivers with criminal records in his testimony.[17] The prevalence of criminal records among current and former employees of the Defendant in this case, should not deter the ability of the putative class members from realizing their rights under the law.

5. The Proposed Classes are Sufficiently Numerous and Susceptible to Class Treatment.

The classes to be certified would include all current and former drivers employed by Defendant during the statutory period. Defendant's records show the classes would consist of over fifty drivers. (See Memo at 13:22-23; see Exh. B-2 at 47:19-49:21; see Exh. B, Exhs. 2, 3, and 4.)

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in order to obtain or maintain employment, questions surrounded his purported falsification of time records and other documents (notably, manifests), and his declaration may be contradicted by his deposition testimony."

[14] See generally, the body of California law which creates no hard and fast rule on this issue.

[15] See *In re Lugo* (2008) 164 Cal.App.4th 1522, 1533 (certifying the class pursuant to a class action *habeas corpus* petition by life-sentence prisoners where felony convict was the class representative.)

[16] See exceptions set forth in California Evidence Code section 788, subsections (a)-(c).

[17] See Exh. B-2 attached herewith at 58:11-15; 136:6-19; 160:2-6.

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C. CLASS CERTIFICATION IS ADVANTAGEOUS TO THE JUDICIAL PROCESS

The putative class members here are truck drivers. Many of them have criminal records; due to the nature of the job, driving a truck is one of the few professions that can accommodate such a record. Many of the current and former employees of AB Trucking are and were low-wage workers making approximately $11.00 per hour. (See Exh. B, Exh. 2.) These individuals do not have the luxury of pouring money into legal fees in pursuit of the vindication of their rights under the Labor Code. Indeed, many may not come forward in fear that they will cause more trouble for themselves or incur a negative reputation with other potential employers in the truck driving employer community. There is a particular interest in bringing this type of class action under the Labor Code for these very reasons. That concern certainly exists here. Defendant's Opposition falsely states Plaintiffs make no mention of relevant factors, "much less analyze the case in light of them." (Opp. at 11:18-19.) Plaintiffs direct Defendant to page 11 of its Memo where Plaintiffs set forth the importance of bringing this type of lawsuit.[18] Considering the extensive overlapping legal and factual determinations, the class mechanism is the most efficient way to seek a resolution. This is exactly why class actions are utilized to protect low wage workers from being cheated.

D. DEFENDANT'S ARGUMENTS REGARDING THE MERITS ARE MISPLACED AND IRRELEVANT TO THE QUESTION OF CLASS CERTIFICATION

Defendant's Opposition makes numerous arguments not properly addressed at this stage. These include:

- The two named plaintiffs in this case lack standing to seek injunctive relief.[19] (Opp. at 4.)
- That drivers generally and routinely ate their food while in their trucks … was … something dictated by the way in which the Port of Oakland operates its facility, not by any policy dictated by AB Trucking.[20] (Opp. at 9.)

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[18] For example, the Supreme Court again stressed the value of class action litigation in adjudicating wage and hour claims in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 ("*Gentry*") because of the importance of the class action device in assuring the effective enforcement of statutory policies. (See *Vasquez v. Superior Court* (*Karp*) (1971) 4 Cal.3d 800, 808.) As the Court of Appeals recently observed, "it is no accident that 'wage and hour disputes (and others in the same general class) routinely proceed as class actions.' [Citation.]" (*Ghazaryan v. Diva Limousine, LTD.* (2009) 169 Cal.App.4th 1524, 1538.)

[19] This point is addressed, *supra,* at p. 3.

[20] This point is addressed, *supra,* at p. 6. This issue raises a common defense well-suited for class-wide resolution.

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- *Insofar as concerns the waging of a class action for injunctive relief*, the plaintiffs simply have not shown that they can meet, and in fact cannot meet, the numerosity requirement to qualify this action as a class action.[21] (Opp. at 13.)
- Defendant AB Trucking does not have contracts with the Port of Oakland and does not meet the minimum criteria to be bound by the Oakland Living Wage requirement.[22] (Opp. at 13.)
- Plaintiffs misconstrue the law applicable to the purported overtime class they purport to represent.[23] (Opp. at 15.)

The determination of whether to certify a class does not contemplate an evaluation of the merits. (See *Jaimez*, 181 Cal. App. 4th at p. 1300.) However, many of the issues raised above argue in favor of class certification. The application of overtime laws, living wage ordinances and the common defense of Port operations will be common to all class members.

III. CONCLUSION

"The relevant comparison [here] lies between the costs and benefits of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by numerous separate actions—*not* between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339, fn. 10.) For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Class Certification.

Dated: June 10, 2010

WEINBERG, ROGER & ROSENFELD
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By: _____
DAVID A. ROSENFELD
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Attorneys for Plaintiff

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[21] This point is addressed, *supra*, at p. 13 and in Plaintiffs' motion to strike filed herewith.

[22] This point is a common issue that will, by necessity, need to be resolved on a class-wide basis.

[23] This point is addressed in the common issues of fact and law section, *supra*, at p. 11.

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PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On June 10, 2010, I served upon the following parties in this action:

Jay Ian Aboudi
The Law Office of Jay Ian Aboudi
1855 Olympic Blvd.,Ste. 210
Walnut Creek, CA 94596

copies of the document(s) described as:

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO CERTIFY CLASS

[X] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[ ] **BY OVERNIGHT DELIVERY SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and placed the same for collection by Overnight Delivery Service by following the ordinary business practices of Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery Service correspondence, said practice being that in the ordinary course of business, Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service offices for next day delivery the same day as Overnight Delivery Service correspondence is placed for collection.

[ ] **BY E-MAIL** I caused to be transmitted each document listed herein via the e-mail address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on June 10, 2010.

Jennifer Koffler

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