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 11 LAVON GODFREY and GARY GILBERT

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

ORIGINAL

14 LAVON GODFREY and GARY GILBERT, on)
 15 behalf of themselves and all others similarly)
 16 situated,)

Case No. RG08379099
 PLAINTIFFS' REPLY TO
 DEFENDANTS' OPPOSITION TO
 MOTION FOR CLASS CERTIFICATION

Plaintiffs,

v.

17 OAKLAND PORT SERVICES CORP. d/b/a)
 18 AB TRUCKING, and DOES 1 through 20,)
 19 inclusive,)

Date: August 20, 2010
 Time: 10:00 a.m.
 Dept: 20
 Judge: Robert B. Freeman

Defendants.

FAXED
 FIRST LEGAL SUPPORT SERVICES

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I. INTRODUCTION

Plaintiffs moved to certify 5 subclasses of individuals who have performed work for AB Trucking but have not received all the appropriate wages due to them for that work. Defendant opposes the motion for class certification alleging, in essence, Plaintiffs have provided insufficient evidence that the underlying claims exist on a class-wide basis.

Defendant's opposition misses the mark and fails to address the legal and factual questions common to resolution of the underlying claims on behalf of the named plaintiffs and all putative class members.

II. ARGUMENT

A. **DEFENDANT'S MAIN OPPOSITION, LACK OF COMMONALITY, FAILS**

1. **Plaintiffs as representatives for all other class members**

Defendant argues Plaintiffs have failed to establish a community of interest exists between Godfrey, Gilbert and the putative class. (Opp. p. 6). Defendant mistakenly believes that because Gilbert and Godfrey do not testify about the practices of other putative class members, the requisite community has not been established. (*Id.*)¹

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. 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 addressed at the damages stage of litigation. At certification, it is sufficient to show that the claims of the representatives are common to all based on the practices and policies of the employer. (*Sav-on Drug Stores, Inc. v. Superior Court* ["*Sav-On Drug*"] 2004) 34 Cal.4th 319, 325). Notably, no evidence is provided by Defendant to indicate that the experiences of Gilbert and Godfrey differed from that of any other driver at AB Trucking. The heart of Plaintiffs' support for class certification is the common practices and policies applied by AB Trucking on its employees. The commonality

¹ Defendant also attempts to argue that Plaintiffs cannot adequately represent the proposed classes. (Opp. 15-17). The content of this argument is a repetition of Defendant's belief that Plaintiffs have not shown their claims to be common to the rest of the class.

1 of these practices across all drivers establishes the necessary community of interest. Defendant
2 does not, and cannot dispute, that all drivers report to common supervision, that all drives are paid
3 under the same pay system and the same time keeping records are used for all class members.

4 In light of J. Aboudi's testimony describing Defendant's pay practices and W. Aboudi's
5 testimony regarding management and direction of drivers, it is irrelevant to what extent Ms.
6 Godfrey and Mr. Gilbert are competent to testify about the actions of others. As discovery has
7 shown, wage payment issues discussed in the moving papers are uniformly applicable to five
8 ascertainable classes of people; it is of no consequence whatsoever whether Ms. Godfrey and Mr.
9 Gilbert knew what happened to other drivers when they were working for Defendant. The
10 Aboudis' admissions alone are enough to compel certification. (See *Sav-On Drug Stores, supra*,
11 34 Cal.4th at p. 334; *Jaimez v. Daihls USA, Inc.* (2010) 181 Cal.App.4th 1286 ["*Jaimez*"].)

12 Similarly, Defendant's Opposition argues that Plaintiff Godfrey presents no evidence that
13 there exists a class of AB Trucking employees that constitute an all hours worked or meal and rest
14 period class, or that she has any personal knowledge of facts about them. (Opp. at 8:23-25.)
15 Defendant's argument does not differentiate between Ms. Godfrey's ability to possess personal
16 knowledge about the working conditions of fellow drivers, and whether or not there is sufficient
17 evidence to show a class of drivers existed who were not compensated for, for instance, all hours
18 worked. Plaintiff Godfrey was a driver for Defendant. (See generally Exh. D; Exh. 3 to Exh. B at
19 bate stamp nos. 5 and 11.)² As a driver, she testified at deposition and participated in the discovery
20 process regarding her experience as a driver. The evidence shows that Defendant, as a matter of
21 course, automatically deducted one hour of pay from all drivers' compensation each day. (See
22 Exh. C at 35:16-36:17; 61:8-61:6.) The evidence shows that Ms. Godfrey's pay was similarly
23 reduced in this manner. (*Id.*) Defendant admitted that this deduction was without any type of
24 confirmation that drivers had actually taken a full one hour meal period. (*Id.*; Exh. B at 118:9-25.)
25 Ms. Godfrey's experience was common to all drivers in this regard.

26 //

27
28 ² Referenced exhibits are attached to the Declaration of Lisl R. Duncan in support of class certification.

1 Similarly, all trainees, including Mr. Gilbert, were unpaid. (Exh. B 138:17-25; 142:23-25.)
2 No driver received compensation at 1½ the regular rate for work performed beyond 8 hours in a
3 day or 40 hours in a week (Exh. B 119:20-120:4) and the vast majority of drives were paid less
4 than the Oakland Living Wage rate. (Exhs. 2-4, 10 to Exh. B and prior request for judicial notice.)

5 **2. Pattern and Practice is sufficient to establish commonality**

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

20 Mr. Aboudi's deposition shows that as a matter of Defendant's management hierarchy, not
21 as a matter of any individual issue, all drivers reported to and were directed by him, or at most, a
22 small core of managers. (See Exh. B, 16:14-16.) J. Aboudi's deposition shows that as a matter of
23 Defendant's pay practices, not as a matter of any individual issue, Defendant applied its pay
24 system to all drivers and automatically deducted one hour for a meal period. (Exh. C, 36:9-17
25 [discussion of entries from time cards into the payroll system].) This issue alone raises common
26 legal and factual inquiries appropriate for class certification. (See e.g. *Jaimez, supra*, 181
27 Cal.App.4th at p. 1304 [finding First Choice's policy and practice before 2006 of deducting 30

1 minutes per shift for each RSR, regardless of whether the RSR took a meal break, raises common
2 legal and factual issues].) The common payroll system is shown through the documentary
3 evidence produced by the company and the related testimony of Defendant's PMK's regarding
4 payroll practices. (See Exhs. 2-4, 10 to Exh. B). The automatic deduction from the hours worked in
5 the TimeCalc system is verified by J. Aboudi (See Exh. C, 35-36 [on TimeCalc in general]; 60:8-
6 61:6 [on TimeCalc deductions for meal periods].

7 The documents submitted in support of class certification show, without question, that
8 drivers were not paid for all hours worked. The combination of time cards and payroll processing
9 sheets show drivers were regularly shorted for hours worked. The time cards and absence of
10 payroll processing sheets show individuals classified as "trainees" did not receive pay for any
11 hours worked. The absence of meal period records shifts the burden to the employer to establish
12 meal periods were taken (See 8 CCR 11090(7) [establishing record keeping requirement];
13 *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) The absence of a meal period or rest
14 break policy, combined with the declarations and deposition testimony of Gilbert and Godfrey
15 establish sufficient evidence to certify a class on meal periods and rest breaks.

16 Defendant admits compensation at 1½ the regular rate was not paid to any driver who
17 worked more than 8 hours in a day or 40 hours in a week. As a result, only the common legal
18 questions of whether such hours must be compensated at the overtime rate or whether an overtime
19 exemption applies to the drivers remains.

20 Defendant argues Plaintiff have failed to meet the burden of establishing common facts and
21 law as necessary to the resolution of the merits of the litigation. (Opp. 19:16-20:20.) In support of
22 its claim that putative class member declaration should have been provided, Defendant relies on *Ali*
23 *v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333. In *Ali*, Defendant, in its effort to defeat class
24 certification, provided 36 putative class member declarations. These declarations highlighted
25 differences from Plaintiffs' alleged common patterns and practices of the employer, based on
26 standardized corporate policy. Defendant AB Trucking has not provided any evidence to dispute
27 the common practices and policies as asserted by the Plaintiffs. These common practices, outlined
28 in the First Amended Complaint (See ¶¶ 10, 13, 18, 19, 21, 23 and 25) and the Memorandum in

1 Support of Class Certification (See pp. 7-15), are undisputed by Defendant in regard to either the
2 named plaintiffs or the putative class.

3 **B. CLASS CERTIFICATION IS THE MOST ADVANTAGEOUS METHOD OF**
4 **RESOLUTION**

5 All of the drivers work out of a common facility, report to the same supervisors and
6 managers, are paid pursuant to identical payroll practices, are subject to the same work rules and
7 policies, and receive wage statements with the same information.³ Defendant does not dispute the
8 number of individuals who would be members of each class; instead, Defendant opposes
9 certification by claiming Plaintiffs do not prove such individuals exist. (Opp. 18:15-18).
10 Defendant's payroll records and time cards conclusively show the number of individuals hired as
11 drivers and working as trainees, the hours worked, the failure to record meal periods and automatic
12 deductions for meal periods from hours worked. (See Exhs. 2-4, 10 to Exh. B).

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

18 The putative class members here are truck drivers. Many of them have criminal records;
19 due to the nature of the job, driving a truck is one of the few professions that can accommodate
20 such a record. Many of the current and former employees of AB Trucking are and were low-wage
21 workers making approximately \$11.00 per hour. (See Exh. 2 to Exh. B.) These individuals do not
22 have the luxury of pouring money into legal fees in pursuit of the vindication of their rights under
23 the Labor Code. Indeed, many may not come forward in fear that they will cause more trouble for
24 themselves or incur a negative reputation with other potential employers in the truck driving
25 employer community.⁴ There is a particular interest in bringing this type of class action under the

26 ³ See Plaintiff's Memorandum of Points and Authorities ("Memo") for more analysis of this issue
27 and specific legal conclusions and evidence that will be common to the resolution of this case.

28 ⁴ Following Defendant's analysis to its illogical conclusion, to maintain a class action, the
Plaintiffs would be required to present evidence regarding the situation of each individual class
member and why they have not brought individual suit. (See Opp. 18:18-21). This would negate

1 Labor Code for these very reasons. That concern certainly exists here. Defendant's Opposition
2 falsely states Plaintiffs make no mention of relevant factors, "much less analyze the case in light of
3 them." (Opp. at 18:24-19:3.) Plaintiffs direct Defendant to pages 3-5 of its Memo where Plaintiffs
4 set forth the importance of bringing this type of lawsuit.⁵ Considering the extensive overlapping
5 legal and factual determinations, the class mechanism is the most efficient way to seek a
6 resolution. This is exactly why class actions are utilized to protect low wage workers from being
7 cheated.

8 Defendant specifically seeks information regarding the four factors outlined in *Basurco v.*
9 *21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120-121. In *Basurco*, an insurance recovery
10 case, the court noted individuals would have a strong interest in controlling their own cases
11 because the resolution would affect repairs on each class member's home. (*Id.* at p. 121.) The
12 court further noted 1,800 other pieces of pending litigation regarding the same facts and events.
13 (*Id.* at p. 122.) In contrast, no such concerns arise here as all class members would seek wages
14 based on actual work performed. No difficulties in managing a class action of this nature have
15 been identified by Defendant and a review of relevant case law supports the concept that wage and
16 hour claims are manageable in a class action format. There is no known litigation, other than this
17 case, involving the same controversy. The desirability of consolidating claims in a single action is
18 addressed above.

19
20
21 the purposes behind common resolution through the class action procedure. (See *Sav-On Drug,*
22 *supra*, at pp. 334-339 ["Courts seeking to preserve efficiency and other benefits of class actions
23 routinely fashion methods to manage individual questions"]; see e.g. *Reyes v. Board of Supervisors*
24 (1987) 196 Cal.App.3d 1263, 1278 ["the necessity for class members to individually establish
25 eligibility and damages does not mean individual fact questions predominate"]; *Daar v. Yellow*
26 *Cab Co.*, (1967) 67 Cal.2d 695, 707 ["Nor is a common recovery necessary in order to establish a
27 community of interest"]; *Los Angeles Fire & Protective League v. City of Los Angeles* (1972) 23
28 Cal. App. 3d 67, 74 ["differences in sub-groups as to assignments and ranks" among firefighters
"in no way detract from" common issues in overtime class action].)

⁵ 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.)

1 **C. SUBSTANTIAL EVIDENCE HAS BEEN PROVIDED IN SUPPORT OF EACH OF**
2 **THE CLASSES TO BE CERTIFIED**

3 Defendant argues Plaintiffs have failed to provide evidence in support of each of the classes
4 they seek to represent. Review of the moving papers negates this claim.

5 **1. Failure to Pay for All Hours Worked Class**

6 Plaintiffs allege that Defendant failed to pay for all hours work, in part, by making
7 automatic deductions from employee wages for meal periods that were not taken. The time cards
8 kept by the employer along with the admitted common practice of the employer provide evidence
9 of this harm. The time cards do not have a place to indicate a meal period and no other meal
10 period records have been kept. (See Exh. 2 to Exh. B; Exh. B 118:9-13). Notwithstanding the
11 absence of meal period records or any evidence of meal periods actually being taken, the
12 employer's payroll documents uniformly show a deduction for 1 hour a day (5 hours a week) as
13 compared to the time sheets. As a result, it is clear that all employees paid by the employer have
14 been denied payment for all hours worked. Time cards, wage statements and deposition testimony
15 regarding the common practice have been provided. (See Exhs. 2-4, 10 to Exh. B; Exh. B 118:9-
16 13; Exh. C 36:9-17). Whether this practice, as a matter of law, denies employees wages earned,
17 will need to be resolved on a class-wide basis. Ms. Godfrey, as an individual undisputedly
18 subjected to this practice, is an adequate representative of this class.

19 **2. Misclassified or No Wages Received Class**

20 Individuals who were classified as trainees received no wages as AB Trucking did not
21 believe them to be employees. Whether the individuals, identified on the employer's time sheets,
22 were actually employees is a question of law. The evidence in support of this claim is the
23 deposition testimony of W. Aboudi surrounding the program and the "trainee" agreement. (Exh. B
24 138:17-24; 142:23-144:21; Exh. 1 to Exh. E). Mr. Gilbert's declaration and deposition, as well as
25 Ms. Godfrey's declaration, indicate the duties performed by the so-called trainees. (See Gilbert
26 Decl. ¶¶ 9-13; Godfrey Decl. ¶¶ 4-8). The deposition testimony of J. Aboudi shows that, as a
27 practice, trainees are not paid and are not added to payroll without the explicit instruction of W.
28 Aboudi. (Exh. C. 22:1-23:20). It is undisputed that AB Trucking used the services of a group of

1 trainees and no argument has been made that any trainees were treated differently.

2 The record shows Mr. Gilbert was a "trainee" and that he drove around in Defendant's
3 vehicles with another driver, sometimes taking the wheel and other times riding with the other
4 driver. (See Exh. E-2 at 100:10-12.) Defendant admits it has a trainee system. (See Exh. B at
5 138:1-24, Exhs. 4 at bate stamp nos. 49, 54, 48, 57.) Defendant admits Mr. Gilbert was one of
6 these "trainees," in fact, Defendant cites to the "agreement" signed by Mr. Gilbert entitled
7 "Oakland Port Services Corporation Truck Driver Training Program: Trainee Participation and
8 Release of Liability Agreement." (See Exh. 1 to Exh. E.) Defendant admitted it does not
9 compensate trainees for the "training" process. (See Exh. C at 22:1-23:20.)

10 **3. The Overtime Class**

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

18 Plaintiffs allege drivers, as a class, were not provided with overtime required by law.
19 Employees in California are generally entitled to overtime after 8 hours of work in a given work
20 day. In some circumstances, drivers of commercial vehicles are excluded from this requirement
21 (as well as overtime after 40 hours in a work week). Drivers are excluded if they perform work
22 that is regulated by the federal Secretary of Transportation. This is known as the Motor Carrier
23 Exemption to the Fair Labor Standards Act. (See 29 U.S.C. § 213(b)(1); 49 U.S.C. § 31131 *et*
24 *seq.*). There are exclusions from the Motor Carrier Exemption for drivers engaged in spotting
25 work. (29 CFR § 782.3(b).). There are drivers who perform work that are not regulated by the
26 Motor Carrier Act and thus not subject to the exemption. There are drivers that fall between the
27 cracks of state and federal regulation and are entitled to overtime under California state law. (*Reich*

1 v. *American Driver Serv.* (9th Cir. 1994) 33 F.3d 1153). Which set of regulations the drivers of
2 AB Trucking fit into is a common question of law. Defendant argues that Plaintiffs fail to note the
3 separate potential exclusion from overtime created by title 13 of the California Code of
4 Regulations section 1200. (See Opp. 21:16-22:19). The resolution of the appropriate methodology
5 of paying hours worked beyond 8 in a day and/or beyond 40 in a week is a merit issue not
6 addressed in class certification. The issue to be addressed during class certification is whether all
7 drivers were subject to the same practice such that resolution of the overtime issue is manageable
8 on a class-wide basis. This is clearly established. Both AB's PMKs testified that drivers receive
9 only straight time for all hours worked. (See Exh. B at 119:20-120:4; Exh. C at 19:10-15.) As a
10 result, drivers share a community of interest regarding this overtime claim.

11 **4. The Living Wage Class**

12 Through requests for judicial notice previously granted, it has been established that the
13 living wage in Oakland during the period of July 2007-June 2008 was \$11.58 without benefits and
14 \$10.07 with benefits. Defendant's PMK J. Aboudi testified that all employees started at \$11.
15 (Exh. C at 68:2-5). The majority of drivers were not given health benefits: frequently only 1 driver
16 out of, for instance, 12 drivers received health benefits. (Exh. B at Ex. 2 at bate stamp nos. 20-21
17 [showing 2 drivers receiving health benefits]; Ex. 3 at bate stamp nos. 5-6 [showing 1 driver
18 receiving health benefits]; Ex. 4 at bate stamp nos. 34-35 [showing 1 driver receiving health
19 benefits]; Ex. 10 at bate stamp nos. 492-493 [showing 2 drivers receiving health benefits]).
20 Admitted payments of \$11.00 a hour, an amount 58¢ less per hour than the living wage, shows a
21 violation of the Oakland living wage, if the Living Wage Ordinance applies.

22 Defendant's opposition presumes that Ms. Godfrey was paid \$12.67 per hour based on
23 document 2007 Godfrey 0003. This is simply a misread of the document. The total wage of
24 \$17,642.78 is the payroll for 21 employees working in the payroll period of 1/08/07 through
25 1/19/07. Ms. Godfrey's wages for the same period, shown on 2007 Godfrey 0005, show Ms.
26 Godfrey, like the vast majority of AB Trucking employees, received \$11.00 an hour for 75.5 hours
27

1 of work.⁶

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

3 The employer has no policy regarding meal and rest periods. The drivers do not regularly
4 take meal and rest periods. It is the employer's obligation to ensure meal periods are actually
5 taken. Here, both Mr. Gilbert and Ms. Godfrey were subjected to work without meal and rest
6 breaks (Gilbert Decl. ¶¶ 14-15; Godfrey Decl. ¶¶ 13-15; 17). Further, when teamed with other
7 drivers, both Gilbert and Godfrey noted the lack of meal periods and rest breaks (Gilbert Decl. ¶¶
8 14-15, Godfrey Decl. ¶ 13).

9 Defendant argues Plaintiffs cannot show the lack of a written policy on meal and rest
10 periods. The failure to produce documents in response to requests for production of documents is
11 an admission that no such documents exist. Here, Plaintiffs specifically requested the policies
12 related to meal and rest periods. (See Duncan Decl., ¶ 8 and Exhs. F [requests 31, 33, 34 and 36],
13 G [responses to requests 31, 33, 34 and 36], H [interrogatories 41 and 43] and I [responses to
14 interrogatories 41 and 43].) Defendant did not produce any and when questioned, referred only to
15 an oral policy. (Exh. B, 116:13-118:8)⁷ This is sufficient to show no such written policy exists.⁸
16 Given the breadth of the discovery requests, Defendant's protest to "the purported fact that OPS
17

18 ⁶ This is a generous calculation given the automatic deduction of 5 hours for meal periods,
19 regardless of whether the meal period was taken.

20 ⁷ Defendant indicates pages 57 and 58 of W. Aboudi's deposition were not attached to the
21 declaration of Ms. Duncan. These pages were attached to the original declaration of counsel in
22 support of class certification filed with Plaintiffs' original motion. (See page 37 and 38 of the
23 document on the Court's Register of Actions 12/15/09 "Motion for Class Certification filed for
24 Plaintiff.") Additionally, page 58 is attached to the supplemental declaration of Ms. Duncan filed
25 on June 11, 2010. Defendant indicates that "Exhibit 16" is not supplied for the Court, but this is
26 incorrect. (Opp. at p. 13:23-14:10.) The exhibits referenced in Jovi Aboudi's deposition were the
27 same exhibits entered into evidence at William Aboudi's deposition, as they are Defendant's
28 designated person(s) most knowledgeable. As a result, Exhibit 16 was attached to Exhibit B (W.
Aboudi's depo), and not to Exhibit C (J. Aboudi's deposition). Exhibit 16 (1 page) to W. Aboudi's
deposition is attached to the Declaration of Ms. Duncan filed July 19, 2010, though it was
inadvertently placed out of order, in between Exhibits 2 and 3. For the Court's convenience, pages
57 and 58 of W. Aboudi's deposition, as well as Exhibit 16 to his deposition are supplied as
exhibits to the Supplemental Declaration of Lisl R. Duncan filed herewith.

⁸ Defendant's verified discovery response indicates there are "no documents responsive" to the
request seeking documents "relating, pertaining, and/or referring to YOUR practices and policies
for setting or providing meal periods." (Exh. G [response to request 33].) The same response is
provided to a parallel request regarding rest breaks (*Id.* at response 36.)

1 'has no *training manuals or materials* related to meal and rest periods or written *policy* on meal
2 and rest periods'" is simply misplaced. (Opp. p. 7:15-19). Clearly, a training manual or written
3 policy would have been responsive to a request for documents relating, pertaining or referring to
4 policies and practices for meal and rest periods.

5 Defendant points to its oral policy as support that individual issues predominate on meal
6 and rest period issues (Opp. 14:19-15-5). However, no evidence is produced to show any
7 differences from Mr. Gilbert's and Ms. Godfrey's experiences or the experiences of those they
8 drove with. Further, the testimony of W. Aboudi shows no regular communication of this
9 supposed "oral policy" and Defendant's position that the Port, not the employer, drives the
10 problem is tacit recognition of the reality faced by drivers on a daily basis.

11 Defendant's Opposition suggests that it can shirk its statutory obligation to provide meal
12 and rest periods to its employees by shifting blame on to the Port of Oakland. (Opp. 17:7-20.) The
13 court in *Cicairos* has already found attempts to avoid liability, like AB Trucking's, unavailing.
14 Despite the fact the employees hold the occupation of truck drivers, the obligation to ensure meal
15 and rest periods remains with the employer. (See *Cicairos v. Summit Logistics, Inc.* (2005) 133
16 Cal.App.4th 949, 962.) Defendant is blatantly incorrect regarding the holding of *Cicairos*.
17 *Cicairos* stands for the proposition that an employer must *ensure* meal periods are taken and
18 cannot simply assume such breaks occur and the recent decision in *Jaimez* supports this
19 proposition. (*Id.*; see also, *Jaimez, supra*, at p. 1303.)

20 Here, Defendant's time keeping and payroll practices assume meal periods are taken by all
21 drivers. (Exh. C at 35:10-36:17, 60:8-61:6; Exh. B at Exh. 2, 16.) All drivers are treated the same.
22 For instance, Defendant's time keeping system does not provide for a place for drivers to record
23 their meal periods each shift. (See Exh. B, Exhs. 2-4.) Defendant's records show *on their face* that
24 drivers enter their start time and end time with no indication of a meal period. There can be no
25 meal period assumed from this documentation by the drivers; this documentation indicates only the
26 start time and end time for the driver's shift. Defendant presents nothing to refute what its records,
27 combined with the testimony of its PMKs, shows.

28 This is not sufficient under *Cicairos* to establish compliance with Wage Order 9.

1 Regardless, whether meal periods and rest breaks were provided as a matter of law is a question on
2 the merits to be decided on a class-wide basis. However, it is clear that all drivers were subject to
3 common practices and policies from the employer on this issue.

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

6 1. The Scope of the Complaint

7 Defendant argues that certain classes were not stated on the face of the First Amended
8 Complaint and, as such, Plaintiffs should be barred from asserting these classes. (See Opp. p. 19-
9 20). The FAC clearly provides the basis for each of the subclasses now more clearly defined. The
10 second cause of action seeks wages for all hours worked, including at overtime rates. (See FAC,
11 pp. 11-12) Defendant admits as much through its recitation of the causes of action in which it notes
12 Plaintiffs assert claims of failure to pay minimum wage and overtime. (See Opp. p. 1:15-16; 19:
13 25-20:2). The failure to pay for any hour worked is a subset of the failure to pay minimum wage
14 for all hours worked. The failure to pay overtime at the appropriate rate is a subset of the failure to
15 pay all wages due at the required minimum rate.

16 There is no rule of procedure prohibiting the refinement of the class definition at the class
17 certification stage, and for this reason Defendant is unable to cite any precedent for its position.
18 Rule of Court 3.764 explicitly provides that any party may move to certify a class, determine and
19 certify subclasses, and/or amend or modify an order certifying a class. (Cal. Rule of Court
20 3.764(a); see also *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 134.) The Rule
21 clearly contemplates that the class(es) may be defined or refined from classes alleged in a
22 complaint. Plaintiffs do not now assert a different class claim than what has been pled and
23 litigated. Rather, the Complaint and the First Amended Complaint have always alleged wage and
24 hour violations applicable to a class of employees and former employees.

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1 **2. Injunctive Relief**

2 Defendant raises an irrelevant issue at this stage by claiming the named Plaintiffs lack
3 standing to seek injunctive relief. (Opp. pp. 5 & 20-21.) Relief is not an issue at the class
4 certification stage. Although Plaintiffs themselves do not work for AB Trucking any longer, they
5 stand in the place of all current and former employees of AB Trucking. The named Plaintiffs
6 adequately represent the class, and this is the appropriate standard for inquiry at this stage.
7 Defendant's Opposition cites several cases to support its argument, but the cases do not deal with
8 standing in the context of a class certification motion and are consequently irrelevant.⁹ The total
9 number of drivers employed by AB Trucking, in this moment in time, has no bearing on whether
10 injunctive relief is appropriate.

11 **3. The Named Plaintiffs as Representative of the Class as a Whole**

12 Defendant appears to argue that because Mr. Gilbert is not litigious by nature, he is not an
13 adequate class representative. (Opp. p. 11:20-23). This argument does not relate to any known
14 criteria on the adequacy of class representatives. Defendant cites *Bartlett v. Hawaiian Village, Inc.*
15 (1978) 87 Cal.App.3d 435, 438) in support of this contention. The issue on review in *Bartlett* was
16 limited to whether class allegations can be challenged by demurrer. (87 Cal.App.3d at p. 437).
17 Nonetheless, the analysis in *Bartlett* showed that the individual circumstances regarding ejection or
18 exclusion from the bath house is an individualized inquiry (*Id.* at p. 438). There is no reference to
19 *Bartlett's*, or any other named plaintiff's, reason for pursuing a class action and no instructive
20 parallel can be drawn to the pending case.

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22
23 ⁹ The court in *Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993,
24 determined: "Blumhorst's pleading allege he had suffered domestic violence in the past, not at the
25 time he made the test calls to shelters. Thus, he do not allege he was a victim of shelters" alleged
26 unlawful discriminatory practices. Accordingly, Blumhorst lacks in that he was not personally
27 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.)

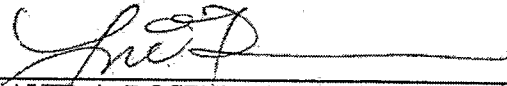
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III. CONCLUSION¹⁰

Plaintiffs have established substantial evidence in support of each of the five classes to be certified and have provided sufficient evidence to establish their appropriateness as class representatives. The claims of the Plaintiffs are common to all putative class members based on the standardized practices and policies of the employer as admitted through AB Trucking's persons most knowledgeable and documents. In light of these facts, Plaintiffs seek certification of the five classes.

Dated: August 16, 2010

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: 

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CAREN P. SENCER
LISL R. DUNCAN
Attorneys for Plaintiffs

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¹⁰ Plaintiffs make note but choose not to dwell on the excessive length of Defendant's Opposition or the failure to lodge federal authorities in compliance with California Rules of Court 3.764(c)(2) and 3.1113(i) respectively.

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 August 16, 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:

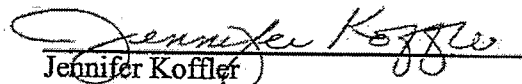
**PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION
FOR CLASS CERTIFICATION**

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

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 August 16, 2010.


Jennifer Koffler

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