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**FILED**  
ALAMEDA COUNTY  
OCT 20 2010  
CLERK OF THE SUPERIOR COURT  
By M. Flores

5 Attorney for Defendant  
6 OAKLAND PORT SERVICES CORPORATION  
7 d/b/a AB TRUCKING (erroneously sued as AB  
8 TRUCKING, INC.)

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF ALAMEDA

11 LAVON GODFREY and GARY GILBERT, on  
12 behalf of themselves and all others similarly  
13 situated,

CASE NO. RG 08-379099

13 Plaintiffs,

**MEMORANDUM OF POINTS AND  
14 AUTHORITIES IN SUPPORT OF  
15 DEFENDANT'S DEMURRER TO  
16 PLAINTIFFS' SECOND AMENDED  
17 COMPLAINT**

14 v.

15 OAKLAND PORT SERVICES  
16 CORPORATION d/b/a AB TRUCKING, and  
17 DOES 1 through 20, inclusive,

Date: December 3, 2010  
Time: 10:00 a.m.  
Place: Department 20  
Judge: Hon. Robert Freedman  
Action Filed: March 28, 2008  
Reservation No.: R-1117196

17 Defendants.

18  
19  
20 **1. EACH SUBCLASS FAILS TO INDEPENDENTLY MEET ALL THE**  
21 **REQUIREMENTS OF RULE 23(A) AND FAILS TO MEET AT LEAST**  
22 **ONE OF THE CATEGORIES SPECIFIED IN RULE 23(B); THE**  
23 **"NUMEROSITY" ALLEGATION IS INSUFFICIENT IN THE SAC**

24 The second amended complaint ("SAC") now properly alleges subclasses (*see* SAC at  
25 7:14-8:12). Hence, the plaintiffs who seek to represent those subclasses must successfully allege  
26 numerosity, commonality, and typicality as to each subclass. Rule 23(c)(4), provides in pertinent  
27 part: "When appropriate (A) an action may be brought or maintained as a class action with  
28 respect to particular issues, or (B) a class may be divided into subclasses and each subclass  
treated as a class, and the provisions of this rule shall then be construed and applied

1 accordingly.” Subclasses must satisfy the same class action requirements as any class before they  
2 may be certified. *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 599 (7th Cir.  
3 1993). That is, each subclass must independently meet all the requirements of Rule 23(a) and at  
4 least one of the categories specified in Rule 23(b). *Roby v. St. Louis Southwestern Ry. Co.*, 775 F.  
5 2d 959, 961 (8th Cir. 1985). However, the “numerosity” allegation is insufficient in the SAC.  
6 The plaintiffs use language taken from paragraph 32 of the original complaint and paragraph 32  
7 of the FAC, alleging in paragraph 40 of the SAC only that “The members of the proposed class  
8 are so numerous that joinder of all the members of the class is impracticable. Plaintiffs are  
9 informed and believe that Defendant employed well over fifty drivers during the relevant  
10 period.” (Emphasis added.) That says nothing about the numerosity of the so-called “all hours  
11 worked subclass,” nothing about the numerosity of the so-called “misclassified employee or no  
12 wages received subclass,” nothing of the numerosity of the so-called “overtime subclass,”  
13 nothing of the numerosity of the so-called “living wage subclass,” nothing of the numerosity of  
14 the so-called “meal and rest period subclass,” nothing of the numerosity of the so-called wages  
15 owed at discharge or quitting subclass,” and nothing of the numerosity of the so-called  
16 “inaccurate wage statement subclass.” The plaintiffs thus fail to make the necessary allegations  
17 regarding numerosity. *See Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985), cert.  
18 denied, 478 U.S. 1172, 106 S.Ct. 2896 (1986) (affirming denial of class certification where  
19 subclass had a maximum of 49 members for failure to satisfy numerosity requirement).

20 **2. THE ALLEGATIONS IN THE SAC ABOUT MR. GILBERT AND MS.**  
21 **GODFREY ARE INADEQUATE AND EVASIVE AND DO NOT NAME**  
22 **THESE PLAINTIFFS AS OBJECTS OF ANY OF DEFENDANT’S ALLEGED**  
23 **VIOLATIONS, FAILING TO SHOW THAT MR. GILBERT ACTUALLY HAS**  
24 **STANDING EVEN TO SUE AS A SO-CALLED UNCOMPENSATED**  
25 **TRAINEE AND FAILING TO SHOW THAT HE HAS THE ABILITY TO**  
26 **REPRESENT OTHERS AS A CLASS REPRESENTATIVE OF PERSONS**  
27 **WHO ASSERTEDLY WERE UNCOMPENSATED TRAINEES, THUS**  
28 **FAILING TO STATE A CAUSE OF ACTION IN MR. GILBERT AS A**  
**PLAINTIFF ON THAT ACCOUNT**

26 The allegations in the SAC about Mr. Gilbert are very sparse, alleging only that “at all  
27 relevant times herein” he “was suffered and permitted to work as a truck driver by Defendant at  
28 the Port of Oakland in California, although Defendant classified him as a non-employee

1 "trainee." The SAC alleges little about Ms. Godfrey, too, other than that "at all relevant times  
2 herein" she was "employed by Defendant as a truck driver at the Port of Oakland in California."  
3 The only other factual allegations about Mr. Gilbert and Ms. Godfrey are set forth in the  
4 conjunctive as follows:

5 a. "Plaintiffs worked for Defendant for hours which they were not compensated."  
6 (See SAC at 4:11 and 4:14.)

7 b. "Plaintiffs worked for Defendant more than eight (8) hours in any workday  
8 and/or more than 40 hours in any workweek for hours which they were not compensated  
9 at a rate of one and one-half (1½) times their regular rate of pay." (See SAC at 5:2-4.)

10 c. "The Defendants regularly failed to provide Plaintiffs and others their right to  
11 the state mandated ½ hour off-duty meal period and failed to authorize uninterrupted rest  
12 periods." (See SAC at 6:7-8.)

13 d. "Plaintiffs and others have not been compensated one additional hour for each  
14 day a meal and/or one additional hour for each day a rest period has not been provided."  
15 (See SAC at 6:9-10.)

16 e. "The Defendant failed to provide Plaintiffs and others similarly situated with  
17 their final paychecks until after the termination of the employment relationship." (See  
18 SAC at 6:13-14.)

19 Other allegations in the SAC are simply evasive and do not actually name these plaintiffs as  
20 objects of any of defendant's alleged violations. For example, paragraphs 11, 12, 16, 17, 19, 21,  
21 23, 24, 25, 26, 29, 31, and 32 of the SAC simply allege what certain laws purportedly provide.  
22 Paragraph 13 alleges merely that "plaintiffs allege" that defendant "did not pay employees for  
23 time worked at the appropriate rates," not naming and not saying anything at all specifically  
24 about these two plaintiffs. And regarding the supposed uncompensated trainees, paragraph 15  
25 expressly refers to "some drivers" but not to plaintiff Gilbert; it refers to "these 'trainees'" but  
26 not to plaintiff Gilbert; it refers to "'trainees'" but not to plaintiff Gilbert. In short, the SAC fails  
27 to show that Mr. Gilbert actually has standing even to sue as a so-called uncompensated trainee  
28 must less has the ability to represent others as a class representative of persons who assertedly

1 were uncompensated trainees. Therefore, defendant Oakland Port Services (“OPS”) contends  
2 that the SAC does not establish that plaintiff Gilbert has standing to sue as a so-called  
3 uncompensated trainee and OPS challenges the SAC by means of general demurrer for failure to  
4 state a cause of action in Mr. Gilbert as a plaintiff on that account. (*Charpentier v. Los Angeles*  
5 *Rams Football Co.* (1999) 75 Cal. App. 4th 301, 89 Cal. Rptr. 2d 115, 119; *County of Fresno v.*  
6 *Shelton* (1998) 66 Cal. App. 4th 996, 1009, 78 Cal. Rptr. 2d 272, 279. Individual standing is a  
7 prerequisite for all actions, including class actions. *See O’Shea v. Littleton* (1974) 414 U.S. 488,  
8 494; *Sierra Club v. Morton* (1972) 405 U.S. 727; *Fallick v. Nationwide Mutual Insurance*  
9 *Company* (6th Cir. 1998) 162 F. 3d 410. “A court must assess standing to sue based upon the  
10 standing of the named plaintiff and not upon the standing of unidentified class members.” *Adair*  
11 *v. Sorenson* (D. Mass. 1991) 134 F.R.D. 13, 16, *citing Warth v. Seldin* (1975) 422 U.S. 490, 502,  
12 95 S. Ct. 2197, 45 L. Ed. 2d 343. To have standing to sue as a class representative, it is essential  
13 that a named plaintiff be a member of the class and “possess the same interest and suffer the  
14 same injury shared by all members of the class” represented. *East Tex. Motor Freight Sys. Inc. v.*  
15 *Rodriquez* (1977) 431 U.S. 395, 403; *Schlesinger v Reservist Comm. to Stop the War* (1974) 418  
16 U.S. 208, 216, 94 S.Ct 2925, 41 L.Ed 2d 706; *Keele v. Wexler* (7th Cir. 1998) 149 F.3d 589. It is  
17 also well settled that the named class representative must be a member of the class at the time the  
18 class is certified. *East Texas Motor Freight System v. Rodriquez* (1977) 431 U.S. 395, 975 S.Ct  
19 1891, 52 L.Ed 2d 453; *Sosna v Iowa* (1975) 419 U.S. 393, 95 S.Ct 553, 42 L.Ed 2d 532; *Clay v.*  
20 *Miller* (4th Cir. 1980) 626 F.2d 345.

21 **3. THE SAC LACKS SUFFICIENT ALLEGATIONS TO SUPPORT THE**  
22 **NOTION OF COMMONALITY**

23 The SAC lacks sufficient allegations to support the notion of commonality. The plaintiffs  
24 are not shown in the SAC to be representative of some of the subclasses. A fundamental  
25 prerequisite to the maintenance of any class action is that there is an identifiable class and the  
26 named plaintiff be a member of that class. *Bailey v. Patterson* (1962) 369 U.S. 31, 33, 7 L. Ed.  
27 2d 512, 82 S. Ct. 549; *Roman v ESB, Inc.* (4th Cir. 1976) 550 F.2d 1343, 1348; *McGlothin v*  
28 *Connors* (W.D. Va. 1992) 142 F.R.D. 626, 632. For example, nothing in the SAC alleges that

1 either Ms. Godfrey or Mr. Gilbert was not paid the minimum wage for all hours worked; nothing  
2 in the SAC alleges that either Ms. Godfrey or Mr. Gilbert was not paid the minimum wage for  
3 any hours worked as a result of misclassification of drivers' employment status"; rather, the only  
4 allegation concerning misclassification is regarding Mr. Gilbert and as to him it is alleged only  
5 that he "was suffered and permitted to work as a truck driver by Defendant at the Port of  
6 Oakland in California, although Defendant classified him as a non-employee 'trainee,'" not that  
7 he was not paid as a result of the alleged misclassification. Nothing in the SAC alleges that either  
8 Ms. Godfrey or Mr. Gilbert was not paid overtime. Nothing in the SAC alleges that either Ms.  
9 Godfrey or Mr. Gilbert was not paid an Oakland living wage. Nothing in the SAC alleges that  
10 either Ms. Godfrey or Mr. Gilbert was not paid all wages due at the time of termination of  
11 employment. Nothing in the SAC alleges that either Ms. Godfrey or Mr. Gilbert was not  
12 provided accurate itemized wage statements. Hence, there is nothing in the SAC to support the  
13 assertion that these two plaintiffs share issues common with the subclasses they seek to  
14 represent.

15 4. **THE "TYPICALITY" ALLEGATIONS ARE WOEFULLY INADEQUATE,**  
16 **SAYING NOTHING ABOUT THE TYPICALITY OF THE CLAIMS OF**  
17 **THE SUBCLASSES**

18 The "typicality" allegations of the SAC are also woefully inadequate. They address the  
19 supposed typicality of the claims of the "proposed class" but say nothing about the typicality of  
20 the claims of the subclasses. Rule 23(a)(3) requires that "the claims or defenses of the  
21 representative parties" must be "typical of the claims or defenses of the class." Fed.R.Civ.P.,  
22 23(a)(3). In other words, there must be a nexus between the class representative's claims or  
23 defenses and the common questions of fact or law that unite the class. *See Kornberg v. Carnival*  
24 *Cruise Lines, Inc.* (11th Cir. 1984) 741 F.2d 1332; *Pickett v. IBP, Inc.* (MD Ala. 1998) 182  
25 F.R.D. 647-49. A sufficient nexus is established only if the claims or defenses of the class and  
26 the class representatives arise from the same events or pattern or practice and are based on the  
27 same legal theory. *Kornberg, supra*, 741 F.2d at 1337. Lacking allegations that these two named  
28 plaintiffs are actually members of some of the subclasses, there is a failure properly to allege  
typicality.

1           Moreover, in general, typicality is established if the claims of all members arise from a  
2 single event or share the same legal theory. *Paxton v. Union Nat'l Bank* (8th Cir. 1982) 688 F.2d  
3 552, 561-62. If the legal theories of the representative plaintiffs are the same or similar to those  
4 of the class, slight differences in fact will not defeat certification. *Alpern v. UtiliCorp United,*  
5 *Inc.* (8th Cir. 1996) 84 F.3d 1525, 1540. Here, however, the plaintiffs seek to allege that they and  
6 the proposed subclass members share the same legal theory and thus the named plaintiffs  
7 allegedly have claims that are typical of the subclasses they supposedly represent. This does not  
8 establish typicality. "The presence of a common legal theory does not establish typicality when  
9 proof of a violation requires individualized inquiry." *Elizabeth M. v. Montenez* (8th Cir. 2006)  
10 458 F.3d 779, 787 (citing *Parke v. First Reliance Std. Life Ins. Co.* (8th Cir. 2004) 368 F.3d  
11 999, 1004-05). "[I]n situations where claims turn on individual facts, no economy is achieved,  
12 and the typicality requirement cannot be met." *Mahoney*, 204 F.R.D. at 154 (citing *Guillory v.*  
13 *American Tobacco Co.* (N.D. Ill. Mar. 20, 2001) No. 97 C 8641, 2001 WL 290603, at \*5)  
14 (finding typicality requirement not satisfied where claims inconsistent from one plaintiff to  
15 another).

16           **5. THE SAC FAILS TO ESTABLISH FACTS THAT MEET THE**  
17 **REQUIREMENT THAT THE NAMED PLAINTIFFS CAN ADEQUATELY**  
18 **REPRESENT THE SUBCLASSES BECAUSE FACTS ARE NOT ALLEGED**  
19 **TO SUPPORT THE NOTION THAT THE NAMED PLAINTIFFS HAVE**  
**INTERESTS COMMON WITH, AND NOT ANTAGONISTIC TO, THOSE OF**  
**ABSENT CLASS MEMBERS**

20           Lacking specific allegations that these named plaintiffs are even members of some of the  
21 subclasses that are identified, there is nothing in the SAC that meets the requirement that they  
22 can adequately represent those subclasses. The adequacy standard is met only if: (1) the named  
23 plaintiff has interests common with, and not antagonistic to, those of absent class members (and  
24 the plaintiffs here fail to show they are members of some of the subclasses); and (2) the  
25 plaintiff's attorney is qualified, experienced and generally able to conduct the litigation (which  
26 the defendant does not challenge). *Sosna v. Iowa* (1975) 419 U.S. 393, 403, 95 S.Ct 553, 42 L.Ed  
27 2d 532 . See also *Taylor v. Flagstaff Bank* (N.D. Ala. 1998) 181 F.R.D. 509; *Kuper v. Quantum*  
28 *Chemical Corp.* (S.D. Oh. 1992) 145 F.R.D. 80, 82 (both attorney and representative are

1 considered on question of adequacy); *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.* (2d  
2 Cir. 2000) 2000 U.S. App. LEXIS 22162 at \*22; *In re Drexel Burnham Lambert Group, Inc.* (2d  
3 Cir. 1992) 960 F.2d 285, 291.

4 **6. THE SAC FAILS TO ALLEGE FACTS UPON WHICH THE COURT CAN**  
5 **FIND THAT QUESTIONS OF LAW OR FACT COMMON TO THE**  
6 **MEMBERS OF THE CLASS PREDOMINATE OVER ANY QUESTIONS**  
7 **AFFECTING ONLY INDIVIDUAL MEMBERS**

8 The SAC fails to allege facts upon which the court can find that questions of law or fact  
9 common to the members of the class predominate over any questions affecting only individual  
10 members. To evaluate predominance, the court must examine the type of evidence needed to  
11 establish a plaintiff's case. *Dumas v. Albers Med., Inc.*, No. 03-0640-CV-W-GAF, 2005 WL  
12 2172030, at \*3 (W.D. Mo. Sept. 7, 2005). If, to make a prima facie showing on a given question,  
13 the members of a proposed class must present evidence that varies from member to member,  
14 then it is an individual question for purposes of Rule 23(b)(3); if the same evidence will suffice  
15 for each member to make a prima facie showing, then it becomes a common question. *Id.*; *see*  
16 *also Castano v. Am. Tobacco* (5th Cir. 1996) 84 F.3d 734, 744 (“a court must understand the  
17 claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful  
18 determination of the certification issues”).

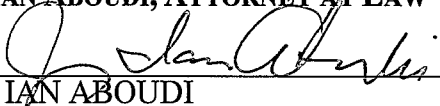
18 **CONCLUSION**

19 Wherefore, defendant respectfully requests that the court sustain its demurrer to the  
20 second amended complaint on the grounds stated in the notice of demurrer.

21 Dated: October 20, 2010

Respectfully submitted,

22  
23 **JAY IAN ABOUDI, ATTORNEY AT LAW**

24   
25 **JAY IAN ABOUDI**  
26 Attorney for Defendant  
27 OAKLAND PORT SERVICES  
28 CORPORATION d/b/a AB TRUCKING  
(erroneously sued as AB TRUCKING, INC.)

3 **PROOF OF SERVICE**

4 I am a resident of the State of California, over the age of eighteen years, and not a party  
5 to the within action. My business address is: 1855 Olympic Blvd., Ste. 210, Walnut Creek, CA  
6 94596. On the date below, I served the within documents:

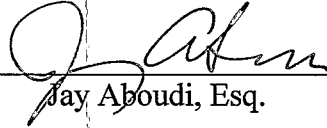
- 7 **1) DEFENDANT'S DEMURRER TO PLAINTIFFS' SECOND AMENDED**  
8 **COMPLAINT; and**  
9 **2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
10 **DEFENDANT'S DEMURRER TO PLAINTIFFS' SECOND AMENDED**  
11 **COMPLAINT.**

12 by placing the documents listed above in a sealed envelope and caused the same to be personally  
13 delivered by hand to the persons at the address set forth below:

14 Lisl Duncan, Esq.  
15 Weinberg, Roger & Rosenfeld  
16 A Professional Corporation  
17 1001 Marina Village Parkway, Suite 200  
18 Alameda, CA 94501-1091

19 I am readily familiar with the firm's practice of collection and processing correspondence  
20 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same  
21 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
22 motion of the party served, service is presumed invalid if postal cancellation date or postage  
23 meter date is more than one day after the date of deposit for mailing in affidavit.

24 I declare under penalty of perjury under the laws of the State of California that the above  
25 is true and correct. Executed on October 20, 2010 at Walnut Creek, California.

26  
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28  
  
Jay Aboudi, Esq.