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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated, Plaintiffs, v. OAKLAND PORT SERVICES CORPORATION d/b/a AB TRUCKING, and DOES 1 through 20, inclusive, Defendants.	CASE NO. RG 08-379099 **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Date: * Time: * Place: Department 20 Judge: Hon. Robert Freedman Action Filed: March 28, 2008

INTRODUCTION

By their complaint in this action, Plaintiffs Lavon Godfrey and Gary Gilbert seek "restitution," "equitable accounting," "statutory penalties," "damages," "declaratory and injunctive relief," "attorneys' fees," and "costs of suit." *See* First Amended Complaint ("FAC") at 1:24-25. Their "First Cause of Action" (FAC 9:6-11:9), for alleged unfair business practices, asserts that "injunctive and declaratory relief is necessary and appropriate to prevent the Defendant from repeating their [*sic*] wrongful business practices." (FAC 10:22-23.) Based on that first cause of action, plaintiffs ask the court "to enter an order requiring the Defendant to restore Plaintiffs and others [*sic*] all monies that are owed" (FAC 10:25-26) and to declare "that Plaintiffs are entitled to be paid for all hours worked, are entitled to be paid at least the living

wage rate, and be compensated for missed meal and rest periods." (FAC 11:2-4.)

By their "Second Cause of Action" (FAC 11:10-12:26), plaintiffs seek a Labor Code § 210 "civil penalty" (FAC 12:4), "wages" (FAC 12:7), "compensation" (FAC 12:12), "penalties under IWC Wage Order 16, section 20" (FAC 12:18-19), "wages under the Labor Code" (FAC 12:20-21), "interest on all dues and unpaid wages" (FAC 12:22-23), and "unpaid overtime wages" (FAC 12:23).

By their "Third Cause of Action" (FAC 13:1-23), plaintiffs seek "backpay, reinstatement, or injunctive relief" (FAC 13:11-12) and by the cause of action plaintiffs assert that "injunctive relief is necessary and appropriate to prevent Defendant from a continued violation of the Living Wage Charter Amendment." (FAC 13:20-21.)

By their "Fourth Cause of Action" (FAC 13:24-16:17), plaintiffs seek (1) "the compensation owed to them" (FAC 15:18-19) under IWC Wage Order 9, sections 11 (FAC 15:9-11) and 12 (FAC 15:12-14) and Labor Code § 226.7 (FAC 15:15-17); (2) "penalties available under Labor Code § 558 and IWC Wage Order 9-2001 section 20(A). (FAC 15:20-16:2.); and (3) "all wages due and applicable penalties" provided for by Labor Code §§ 204, 210, 218, and 218.6. (FAC 16:3-16.)

By their "Fifth Cause of Action" (FAC 16:18-17:17), plaintiffs seek "to recover all wages due and applicable penalties." (FAC 17:15.)

And by their "Sixth Cause of Action" (FAC 17:18-18:23), plaintiffs seek (1) Labor Code § 226.3 "civil penalties" (FAC 18:14-16), (2) unspecified "injunctive relief" (FAC 18:19), (3) "attorney fees and costs" (FAC 18:19), and (4) "all wages due and applicable penalties." (FAC 18:21.)

As to their prayer for injunctive relief, the plaintiffs pray "for preliminary, permanent and mandatory injunctive relief prohibiting the Defendants, its officers, agents, and all those acting in concert with them, from committing in the future those violations of law herein alleged." (FAC 19:3-5.)

By their FAC, the two named plaintiffs in this proposed class action seek to represent six "classes" (*see* FAC at 5:24-6:12½), referring to them both as "classes" (in the plural) (*see* FAC

5:25) and, all together, as a "class description" (in the singular) (see FAC 6:15), purporting to reserve the right to amend or modify "the class description" (FAC at 6:15) with "*further* division into *sub*-classes." (*See* FAC 6:15, emphasis here supplied.) By their Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Class Certification ("Memo"), the two named plaintiffs describe *five* "classes" (*see* Memo at 1:12-24) but request that the court certify this case as a class action for "the *three classes* as defined above" (Memo at 20:21½-22½, emphasis here supplied), without specifying which *three* defined "classes" they speak of. Their motion evidently seeks certification of *five* "classes." (*See* Memo at 3:3½-21 ("all hours worked class"); 22½-4:19 ("misclassified or no wages received class"); 5:2½-7:15 ("overtime class"); 7:16-8:9 ("living wage class"); 8:10-10-19 ("meal and rest period class").) They cite "Rule 1855(b)" of the California Rules of Court (as authority to "amend or modify the class description"); no doubt they intend that to be a reference to Rule 3.765(b). (*See* Reverse Rules Conversion Table (at http://www.courtinfo.ca.gov/rules/documents/rules_conversion_table_reverse_06.06.06.pdf).) The named plaintiffs never, either in the FAC or in the Motion, describe the one class they purport to represent. They refer to five purported "classes" both as "classes" and as "subclasses" (which they claim they may further subdivide). They reduce the number of such purported classes (or subclasses) from six to five. On the one hand, they use in the FAC (FAC 5:26-6:12½) language of one variety to describe the classes (or subclasses)—language upon which discovery to this point in the litigation has been founded—and, on the other hand, in the Motion they have filed for class certification they change that to language of a different variety to describe the classes (or subclasses) (Motion at 1:12-24½, using the word "defined" to say what they are doing when discussing the "classes"). No order has issued from this court allowing the plaintiffs to certify, amend, or modify the class descriptions set forth in the FAC. *See* Rule 3.765(a).

Without citing *any* evidence in support, plaintiffs assert (1) Ms. Godfrey is representative of the "all hours worked class" (Memo at 3:20-21); (2) Mr. Gilbert is representative of the "misclassified or no wages received class" (Memo at 4:17-19); and (3) that both Ms. Godfrey and Mr. Gilbert are representative of the "meal and rest period [class]." (Memo at 9:17-18.) And Plaintiffs fail *even to assert* that either of the named plaintiffs is representative either of the

"overtime class" (*see* Memo at 5:3) or of the "living wage class" (*see* Memo at 7:16-8:9).

As shown below, the two named plaintiffs in this case lack standing to seek injunctive relief; the claims of the two named plaintiffs are not typical of possible claims by proposed members of the proposed classes; the two named plaintiffs cannot adequately represent the proposed classes, have not been shown to be adequate representatives of the proposed classes, and can positively be shown to be inadequate representatives of the proposed classes; they as named plaintiffs do not adequately represent the interests of absent class members; class certification in this case is not advantageous either to the judicial process or to the litigants; no class can be certified in this case because common questions of law and fact do not predominate, and have not been shown to predominate, over individualized questions; 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 it can be shown that they cannot meet, the numerosity requirement to qualify this action as a class action; and plaintiffs misconstrue the law applicable to the purported "overtime class" they purport to represent.

I. THE TWO NAMED PLAINTIFFS IN THIS CASE LACK STANDING TO SEEK INJUNCTIVE RELIEF

At the time this lawsuit was filed (March 28, 2008), Plaintiff Lavon Godfrey no longer worked for AB Trucking, having ended her work for AB Trucking in or about July of 2007. (*See* Deposition of Lavon Godfrey ("Godfrey Depo") at 398:22-400:24, attached as Exhibit "A" to the Declaration of Jay Ian Aboudi ("JIA Decl.").) Plaintiff Gary Gilbert, too, did not work for AB Trucking at that time. (*See* Deposition of Gary Gilbert ("Gilbert Depo") at 190:10-17, attached as Exhibit "B" to JIA Decl.)

A plaintiff has standing to seek declaratory relief only when he can show a likelihood that he will be harmed in the future if the relief is not granted, and it is immaterial that he has been injured in the past. (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal. App. 4th 993, 1004; *Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal. App. 4th 6, 17.) Because all injunctive and declaratory relief is prospective (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal. App. 4th 1388, 1404; *California Union Ins. Co. v. Trinity*

River Land Co. (1980) 105 Cal. App. 3d 104, 110), a plaintiff who no longer has any business relationship with a defendant does not have standing to seek declaratory relief, notwithstanding that he might be entitled to damages for past injuries. (*Application Group, Inc. v. Hunter Group*, Inc. (1998) 61 Cal. App. 4th 881, 894; *and see Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 210 211.) *See also Los Angeles Fire & Police Protective League v. Rodgers* (1970) 7 Cal. App. 3d 419 (protective league lacked standing to maintain a class action on behalf of its police members because it was not employed by the city and therefore did not share a community of interest with the police officers).

The two named plaintiffs in this case both lack standing to seek injunctive relief.

II. THE CLAIMS OF THE TWO NAMED PLAINTIFFS ARE NOT TYPICAL OF, AND HAVE NOT BEEN SHOWN TO BE TYPICAL OF, POSSIBLE CLAIMS BY PROPOSED MEMBERS OF THE PROPOSED CLASSES

When the trial court determines the propriety of class action treatment, "the issue of community of interest is determined on the merits and the plaintiff must establish the community *as a matter of fact*." (*Hamwi v. Citinational Buckeye Inv. Co.* (1977) 72 Cal. App. 3d 462, 472, emphasis here supplied.) "The crucial inquiry centers upon whether the plaintiffs are truly representative of the absent, unnamed class members." (*Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal. App. 3d 435, 438.) This court can properly determine plaintiffs are or are not truly representative of the class only upon substantial evidence in the record that establishes "as a matter of fact the requisite community of interest for class certification." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 654.

Plaintiffs have not met their burden to establish *as a matter of fact* that their claims are typical of the "classes" they seek to represent. (*Hamwi v. Citinational Buckeye Inv. Co., supra*, 72 Cal. App. 3d at pp. 471 472.) They have not shown by *any evidence in the record* either that AB Trucking failed to pay any other employees for all hours worked in a work week, or that it failed to provide to any other employees any rest breaks or meal periods, or that it failed to pay to any other employees minimum compensation required by the Oakland Charter, or that it failed to provide to any other employees itemized wage statements, or that it failed to pay any other

employees in a timely basis upon termination of employment, or that it failed to pay to any other employees a minimum wage as required by California law. Plaintiffs have not shown by any evidence in the record that any other employees were damaged by AB Trucking in the manner they allege they themselves were damaged. Further, plaintiffs themselves present evidence that they themselves did not suffer actual damage. For example, Mr. Gilbert testified that if he himself were simply successful in "finding gainful employment" (Gilbert Depo. at 253:6-22), he would simply dismiss this present lawsuit. Mr. Gilbert is not truly representative of the absent, unnamed class members. (*Bartlett v. Hawaiian Village, Inc., supra*, 87 Cal. App. 3d at p. 438.) Thus, based upon application of correct legal criteria and substantial evidence in the record this court properly can conclude that Mr. Gilbert's claims are not typical. Such determination alone is sufficient to defeat class certification on all of Mr. Gilbert's causes of action. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704; *Petherbridge v. Altadena Fed. Sav. & Loan Assn.* (1974) 37 Cal. App. 3d 193, 199, fn. 2.)

Plaintiffs present a litany of *supposed* "events," "practices," and "courses of conduct" (Memo at 18:15-16) that supposedly would establish typicality. But in reciting the litany (Memo at 19:7-16), plaintiffs cite to absolutely nothing in the record to substantiate or support their assertions. They leave it to the court and to the opposition to surmise that if they, the plaintiffs, have stated it, it must be so. But that is not how the burden of producing evidence is carried. To the extent the plaintiffs cite to the deposition testimony of Bill Aboudi (Exh. "B" to Duncan Decl.) and the deposition testimony of Jovi Aboudi (Exh. "C" to the Duncan Decl.), the citations are ineffectual and misleading. Plaintiffs assert in their Memo (at 2:9-10) that "all drivers are commonly subject to Defendant's lack of a written meal and rest period policy." Yet nowhere do plaintiffs supply any citation to any law, or even mention any law, that requires either that a meal policy or that a rest period policy be in writing.

Plaintiffs fail to show that their claims are typical of possible claims by possible class members. For example, they point to the fact that Mr. Aboudi testified that the company has an *oral* meal-period policy. (Exh. "B" to the Duncan Decl. at 117:15-24.) That fact alone militates against a finding that questions of law or fact common to the purported "meal and rest period

class" *predominate* over the questions affecting individual members. A class action may be maintained even if each member must individually show eligibility for recovery or individually show the amount of damages. But 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. (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal. App. 4th 385, 397; *accord Vasquez v. Superior* Court (1971) 4 Cal. 3d 800, 809; *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal. App. 4th 746, 756.) "[I]f a class action 'will splinter into individual trials,' common questions do not predominate and litigation of the action in the class format is inappropriate." (*Hamwi v. Citinational Buckeye Investment Co.* (1977) 72 Cal. App. 3d 462, 471; accord *McCullah v. Southern California Gas Co.* (2000) 82 Cal. App. 4th 495, 501 502.) Here, each class member in the potential "meal and rest period class" would have to testify what allegedly was (or was not) communicated to him or her regarding the policy.

III. THE TWO NAMED PLAINTIFFS CANNOT ADEQUATELY REPRESENT THE PROPOSED CLASSES, HAVE NOT BEEN SHOWN TO BE ADEQUATE REPRESENTATIVES OF THE PROPOSED CLASSES, AND CAN POSITIVELY BE SHOWN TO BE INADEQUATE REPRESENTATIVES OF THE PROPOSED CLASSES

Named plaintiffs Godfrey and Gilbert have not been shown to be adequate representatives of the proposed classes. Although their counsel declares under penalty of perjury that the declarations of the two named plaintiffs "have been provided in support of the Motion for Class Certification" (*see* Declaration of Lisl R. Duncan in Support of Plaintiffs' Motion for Class Certification ("Duncan Decl.") at 5:4-5), the movants have presented *no party or percipient witness declarations at all, not even of themselves.* (*See* Proof of Service at 2:11 and 3:2-9.) Mr. Gilbert is held out as representative both of the "misclassified or no wages received class" (Motion at 4:17-19) and of the "meal and rest period [class]" (Motion at 9:17-18). Yet, the only testimony offered from named plaintiff Gary Gilbert presented in support of the Motion is the transcript of his deposition testimony concerning *a statement he once made to his brother* to the effect that he purportedly had driven at AB Trucking "for roughly two months or so without getting paid." (*See* Duncan Decl. at 2:12-13 and at Exhibit "E" thereto, at 10:4-7.) While that

may be evidence of the asserted fact that Mr. Gilbert *stated something to his brother to that effect*, it is not presented as evidence that he actually *did* work for AB Trucking for that amount of time without getting paid. Nothing else from Mr. Gilbert is proffered on that issue.

And while Mr. Gilbert also is held out as representative of the "meal and rest period [class]" (Motion at 9:17-18), no declaration from him is presented to the court and no testimony by him or anyone else deals with meal periods or rest periods. In fact, he himself testified in his deposition conducted by defendant's counsel that he has *no information whatsoever* either about any other drivers or trainees not getting their lunch or meal breaks (Gilbert Depo. at 247:10-248:2) or about any other drivers or trainees not getting their rest periods (Gilbert Depo. at 248:3-11).

Thus, while Mr. Gilbert is held out to be representative both of the "misclassified or no wages received class" (Motion at 4:17-19) and of the "meal and rest period [class]" (Motion at 9:17-18), in support of his purported ability to represent the former "class" the evidence presented is comprised solely of Mr. Gilbert's very weak testimony about a tangential comment he once made to a brother, and in support of his purported ability to represent the latter "class" no evidence is presented at all, either by him or by anyone else. Named plaintiff Gilbert has not been shown to be an adequate representative of the proposed classes he is said to represent.

Ms. Godfrey is held out as representative both of the "all hours worked class" (Motion at 3:20-21) and of the "meal and rest period [class]" (Motion at 9:17-18). As with Mr. Gilbert, so too with Ms. Godfrey: no declaration by her is presented in support of the motion (notwithstanding counsel's false assertion to the contrary) and no declaration by any other percipient witness is presented. And while the testimony that the plaintiffs provide from Ms. Godfrey's deposition does bear on meal and rest periods, she presents no evidence that there exists a class of AB Trucking employees that constitute members of an all hours worked class" or of a "meal and rest period class" or that she has any personal knowledge of facts about them.

Curiously in their Motion papers the plaintiffs correctly characterize the dilemma with which both the plaintiffs and the defendant are confronted:

Much of the work performed by drivers consists of lining up to enter and exit

> terminals at the Port of Oakland. As a result, drivers *cannot take breaks, because they may lose their place in the queue and there is no area to legally and safely pull the truck over. It is common practice for drivers to eat in their trucks while waiting in queues to enter Port terminals.*

(Memo at 3:15-18.) Thus it is that drivers generally and routinely ate their food while in their trucks while waiting in line. This was, as plaintiffs themselves characterize it, something dictated by the way in which the Port of Oakland operates its facility, not by any policy dictated by AB Trucking. In *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal. App. 4th 949 (*Cicairos*), upon which plaintiffs rely (*see* Memo at 10 and 17) the issue was whether an employer of truck drivers had violated section 512, subdivision (a) and an IWC wage order relating to meal periods. The employer argued that since the truck drivers were constantly on the road, the employer could not regulate the meal periods and left the decision to take meal periods to the driver's discretion. However, the evidence showed that the *employer managed and scheduled the drivers in such a way that prevented the drivers from taking their meal periods.* Therefore, the court rejected the employer's argument and found that the employer had "'an affirmative obligation to ensure that workers are actually relieved of all duty,'" so that it was possible for the drivers to have a meal. (*Cicairos*, at p. 962.) 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. Notably, of course, the *Cicairos* court did not find that the employer had to ensure that employees actually took the meal period.

In their Memo, the plaintiffs assert that "Drivers [*plural*] are told by Defendant not to take rest breaks away from their vehicles and to eat meals inside their vehicles." (Memo at 3:13-14, bracketed observation here added.) In support of that assertion, plaintiffs cite "Exh. D at 157:7-158:11." However, nothing at that citation deals with anything that was told to any other driver and deals with what was told only by an otherwise unidentified "Jeff" to Ms. Godfrey alone. It therefore does not support either the assertion that "drivers" (plural) were told not to take rest breaks or the assertion that "drivers" (plural) were told to eat meals inside their vehicles or that it was AB Trucking that told that to them. It supports only the notion that "Jeff" told Ms.

Godfrey something. And that something is only what Ms. Godfrey says it was, namely, that "Jeff" told her on one occasion, "We just eat on the go. We eat in our truck, in line. We eat in our truck." (Exh. D at 157:22-24.) That does not constitute evidence that AB Trucking told drivers "not to take rest breaks away from their vehicles and to eat meals inside the vehicles."

Indeed, neither Mr. Gilbert's nor Ms. Godfrey's deposition testimony constitutes substantial evidence that common inquiries predominate the meal breaks claim. On their face, the statements made in the deposition testimony presented fail to establish, for example, that any of the meal breaks were sought within the first five hours of a shift. Thus, AB Trucking's practices regarding meal and rest breaks are simply not shown by substantial evidence to be the predominant common factual issues on the meal and rest break claims.

Finally, "[a] class action is simultaneously an action by a plaintiff to recover upon his own claim and an action to recover upon behalf of those whom he represents. In representing himself the plaintiff is no different position from a plaintiff in a nonclass action..." (*Alpine Mutual Water Company v. Superior Court* (1968) 259 Cal. App. 2d 45, 53.) The named plaintiffs' individual credibility goes both to their suitability as class representatives as well as to the truth of their claims and those of the class they purport to represent. Felony convictions may be used to cast doubt on the credibility of the named plaintiffs (Evidence Code § 788). Mr. Gilbert testified to an extensive criminal record that included more than one felony conviction (Gilbert Depo. at 131:12-148:10). Ms. Godfrey, on the other hand, testified to a felony conviction for assault with a deadly weapon (Godfrey Depo. at 209:17-212:17); such testimony is inconsistent with discovery responses she submitted under oath (*see* JIA Decl. at ¶ 5). Such evidence demonstrates that the named plaintiffs lack credibility, and sufficiently establishes that neither Mr. Gilbert nor Ms. Godfrey is suitable as class representatives of the class they purport to represent.

IV. CLASS CERTIFICATION IN THIS CASE HAS NOT BEEN SHOWN TO BE ADVANTAGEOUS TO THE JUDICIAL PROCESS AND THE LITIGANTS

"[O]ne must not lose sight of the fact that the class action statute 'is based upon the equitable doctrine of virtual representation, which " 'rests upon considerations of necessity and

paramount convenience, and was adopted to prevent a failure of justice.' " ' " (*Reese v. Wal Mart Stores, Inc.* (1999) 73 Cal. App. 4th 1225, 1234.) Accordingly, a class action should not be certified unless " ' "substantial benefits accrue both to litigants and the courts" ' " (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435), and the moving party proves a class action is "superior" to separate lawsuits by class members. (*Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2009) ¶ 14:15:1, p. 14 13 (rev. # 1, 2009).) "[E]ven if [common] questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal. App. 4th 110, 120 (*Basurco*).)

"In general, a class action is proper where it ' " 'provides small claimants with a method of obtaining redress' " ' and ' "when numerous parties suffer injury of insufficient size to warrant individual action." ' ... [¶] In deciding whether a class action would be superior to individual lawsuits, 'the court will usually consider [four factors]: [¶] [(1)] The interest of each member in controlling his or her own case personally; [¶] [(2)] The difficulties, if any, that are likely to be encountered in managing a class action; [¶] [(3)] The nature and extent of any litigation by individual class members already in progress involving the same controversy; [and] [¶] [(4)] The desirability of consolidating all claims in a single action before a single court.' " (*Basurco, supra*, 108 Cal. App. 4th at 120–121.) Plaintiffs mention none of these factors, much less analyze the case in light of them.

It is not sufficient simply to mention a procedural tool; "the party seeking class certification must explain how the procedure will effectively manage the issues in question." (*See Block v. Major League Baseball* (1998) 65 Cal. App. 4th 538, 545 (court not required to consider subclasses when not given "a concrete proposal describing . . . how they would be administered, or how they would help the court deal with the complexities inherent in the proposed class"); *see generally Sav On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326 (party seeking certification bears burden of establishing predominance of common questions); *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal. App. 4th 29, 34 (moving party bears burden of demonstrating that substantial benefits will result from class certification).)

V. NO CLASS CAN BE CERTIFIED IN THIS CASE BECAUSE COMMON QUESTIONS OF LAW AND FACT DO NOT PREDOMINATE, AND HAVE NOT BEEN SHOWN TO PREDOMINATE, OVER INDIVIDUALIZED QUESTIONS

A class may be certified only when common questions of law and fact predominate over individualized questions; "to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 916.) A class action "'will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law.'" (*Block v. Major League Baseball* (1998) 65 Cal. App. 4th 538, 542.) "'The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well defined community of interest among the class members.'" (*Lockheed Martin Corp. v. Superior* Court (2003) 29 Cal. 4th 1096, 1104.)

Here, AB Trucking's alleged liability is premised on the theories (1) that it failed to pay employees for all hours worked in a work week (FAC 5:26-28); (2) that it failed to provide rest breaks or meal periods (FAC 6:1-3); (3) that it failed to pay minimum compensation required by the Oakland Charter (FAC 6:3-5); (4) that it failed to provide itemized wage statements (FAC 6:6-8); (5) that it failed to pay in a timely basis upon termination of employment (FAC 6:8-10), and (6) that it failed to pay minimum wage as required by California law (FAC 6:11-13). Nothing in the FAC justifies the purported creation of those two newly-minted "classes" referred to in the Motion as the "misclassified or no wages received class" (Motion at 22½-4:19) and the "overtime class" (Motion at 5:2½-7:15); they are not mentioned in the FAC and their new appearance in the motion violates due process. The fourth purported "class" itemized in the FAC, one consisting of employees who purportedly were denied itemized wage statements, is a "class" that apparently has been abandoned; it is not mentioned in the Motion.

The named plaintiffs have utterly failed to meet their burden of showing the predominance of common questions of fact as to any of these "classes" mentioned in the FAC. Although their counsel declares under penalty of perjury that the declarations of the two named plaintiffs "have been provided in support of the Motion for Class Certification" (*see* Declaration

of Lisl R. Duncan in Support of Plaintiffs' Motion for Class Certification ("Duncan Decl.") at 5:4-5), the movants have presented *no party or percipient witness declarations at all.* (See Proof of Service at 2:11 and 3:2-9.) Whereas in a case such as *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal. App. 4th 1333—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," which both the trial and appellate courts found had "amply support the finding"—here, this court is presented with *no percipient witness declarations whatsoever*, even of the two named plaintiffs themselves.

VI. 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

As shown from the Declaration of William I. ("Bill") Aboudi, filed and served concurrently herewith, AB Trucking presently employs six (6) employee truck drivers. (See Declaration of William I. Aboudi in Opposition to Motion to Certify Class ("Aboudi Decl.") at ¶ 5.) That number surely does not satisfy any numerosity requirement for any "class" upon whose behalf an injunction should issue. Nothing stands in the way of naming any one of the six current employees, or all of them. But as also shown from the Aboudi Decl., AB Trucking currently employs no employee driver who is "not paid for any hours worked in any work week" (Aboudi Decl. at ¶ 2); AB Trucking currently employs no employee driver who is "not paid for hours worked over eight in a day or over forty in a week at time and a half pay" (Aboudi Decl., at ¶ 3); and AB Trucking currently employs no employee driver who is "not provided rest breaks or meal periods" (Aboudi Decl. at ¶ 4). 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.

VII. 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

As shown from the Declaration of Jay Ian Aboudi in Opposition to Motion for Class

Certification, 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. The only statement that plaintiffs make that is even remotely germane to the question of the applicability of the Oakland Living Wage requirement, is a statement they make in their Memo, unsupported by any evidence and made without citation to anything in the record to substantiate it, and it is the following statement: "AB Trucking's facility is located within the Port area on City property." (*See* Memo at 8:5-6.) They do not substantiate this statement. They do not cite anything in the record to support it. They do not establish that it is true. And even if it is true, they do not cite any law or regulation that makes location of a trucker's facility the criterion upon which a determination is made whether a business does or does not constitute a Port-Assisted Business.

Section 728((1)(B) of the Charter of the City of Oakland (set forth in Exhibit 3 of the Plaintiffs' Request for Judicial Notice) clearly states that a:

> "Port-Assisted Business" or "PAB" means (1) any person involved in a Port Aviation or Port Maritime Business receiving in excess of $50,000 worth of financial assistance from the Port, or (2) any Port Contractor involved in a Port Aviation or Port Maritime Business if the person employs more than 20 persons per pay period, unless in the prior 12 pay periods this person has not had more than 20 such employees and will not have more than 20 persons in the next 12 pay periods. A PAB shall be deemed to employ more than 20 persons if it is part of an 'enterprise' as defined under the Fair Labor Standards Act employing more than 20 persons. "Port Contractor" means any person party to a Port Contract as herein defined.

Plaintiffs fail to even discuss, much less show and substantiate by evidence, that any of the above-mentioned criteria have been met so as to make AB Trucking a "Port-Assisted Business" subject to the Oakland Living Wage. Plaintiffs' argument to that effect (Memo at 7:16-8:9) thus is baseless. Plaintiffs' unsubstantiated assertion that "AB Trucking's facility is located within the Port area on City property" simply does not answer the factors mentioned in Section 728((1)(B) of the Charter of the City of Oakland and does not constitute evidence upon which this court can conclude that AB Trucking is subject to the Oakland Living Wage provision.

Moreover, substantial evidence does exist to establish that AB Trucking simply is not a

Port-Assisted Business. The Declaration of Jay Ian Aboudi in Opposition to Motion for Class Certification shows that defendant AB Trucking does not have contracts with the Port of Oakland and the Declaration of William I. ("Bill") Aboudi in Opposition to Motion for Class Certification shows that defendant AB Trucking does not employ more than 20 persons per pay period. Simply put, 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.

VIII. PLAINTIFFS MISCONSTRUE THE LAW APPLICABLE TO THE PURPORTED "OVERTIME CLASS" THEY PURPORT TO REPRESENT

Regarding overtime, "the only legally relevant issue to alleged misclassification is whether the exemption in fact applies." Arenas v. El Torito Restaurants, Inc. (March 15, 2010) 2010 Cal. App. LEXIS 474 at *24 (citing *Campbell v. PricewaterhouseCoopers*, LLP (E.D.Cal. 2008) 253 F.R.D. 586, 603-604 and *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal. App. 4th 1440, 1461).

In *Collins v. Overnite Transp. Co.* (2003) 105 Cal. App. 4th 171, truck drivers brought a class action against their employer, seeking compensation for unpaid overtime hours and other relief. The defendant employer demurred, raising an exemption for motor carriers contained in wage order No. 9 of the Industrial Welfare Commission (IWC). The trial court sustained the demurrer without leave to amend, and filed a judgment in favor of defendant. The Court of Appeal affirmed, holding that plaintiffs came within the motor carrier exemption of wage order No. 9. The Eight Hour Day Restoration and Workplace Flexibility Act of 1999 did not eliminate the motor carrier exemption, and did not bring motor carriers within the overtime rules of Lab. Code, § 510, and other provisions of the act. Specifically, the court held that the motor carrier exemption from the California overtime rules was not repealed by AB 60, the Eight Hour Day Restoration and Workplace Flexibility Act of 1999," and in doing so, it concluded that California's legislature gave the Industrial Welfare Commission the authority to review and retain non statutory exemptions in the Wage Orders and rejected the employees' argument that the motor carrier exemption was repealed by implication. The court recognized that the motor vehicle exemption was derived from a long standing statutory scheme, found in both state and

federal law, that reflects the peculiar circumstances of the trucking industry. The court determined that it should not be inferred that the Legislature intended to repeal the exemption without an expressed declaration of intent. Because the motor carrier exemption was one of the exemptions found in a valid 1997 Wage Order, the IWC had power to retain it and had in fact done so.

Subdivision (L) of section 3 of Industrial Commission Order No. 9 2001 provides:

> (L) The provisions of this section are not applicable to employees whose hours of service are regulated by:
>
> (1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or;
>
> (2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and the following sections, regulating hours of drivers.

Plaintiffs argue in their motion only that they are not exempt from overtime compensation because their hours of service are not regulated by "United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers"; plaintiffs do not argue that they are not exempt from overtime compensation because their hours of service are not regulated by "Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and the following sections, regulating hours of drivers."

IX. CONCLUSION

For the foregoing reasons, plaintiffs' class certification motion should be denied.

Dated: May 6, 2010

Respectfully submitted,

JAY IAN ABOUDI, ATTORNEY AT LAW

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