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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By *Trisha Hill* Deputy

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

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,

CASE NO. RG 08-379099

Plaintiffs,

**DEFENDANT OAKLAND PORT
SERVICES CORPORATION'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY ADJUDICATION**

v.

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

Date: October 28, 2011
Time: 2:00 p.m.
Place: Department 20
Judge: Hon. Robert Freedman
Action Filed: March 28, 2008
Trial Date: November 29, 2011
Reservation No.: R-1204995

Defendants.

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I. INTRODUCTION

Plaintiffs' Second Amended Complaint alleges eight (8) purported causes of action. They bring their motion for summary *adjudication* only as to the sixth and second purported causes of action. Win or lose on their motion, the case continues; success by the plaintiffs on their motion does not and cannot entirely resolve the matter; success by the defendant does not and cannot entirely resolve the matter. The sixth cause of action alleges defendant violated Labor Code §§ 226.7 and 512 and Wage Order 9, subdivisions 11 and 12, by purportedly failing, as plaintiffs characterize it, "to provide and/or authorize and permit" meal and rest periods for employee drivers. The second cause of action alleges defendant purportedly violated Labor Code §§ 1182.12, and 1194 and Wage Order 9, subdivision 4, by purportedly failing to pay for all hours worked by employee drivers.

II. ISSUES PRESENTED

1. Is there a triable issue of material fact as to whether defendant failed to provide employee drivers with meal periods in violation of Labor Code §§ 226.7 and 512 and Wage Order 9, subd. 11?

2. Is there a triable issue of material fact as to whether Defendant failed to authorize and permit rest periods for employee drivers in violation of Labor Code § 226.7 and Wage Order 9, subd.12?

3. Is there a triable issue of material fact as to whether Defendant failed to pay employee drivers for all hours worked in violation of Labor Code §§ 1182.12 and 1194, and Wage Order 9, subd.4?

III. FACTS

AB hired employee drivers. However, when work volume was high, AB also obtained the services of independent contractors. Drivers generally but not always worked eight-hour shifts. Occasionally, depending on work volume, drivers' shifts were either shorter or longer than eight hours. (*See* Declaration of William Aboudi ("Aboudi Decl.") at ¶ 2.)

1 Employee drivers for AB did not always report to the same small group of supervisors.
2 Depending on work load, drivers were contracted to other companies or to customers directly for
3 special projects. Until 2007, Oakland Port Services had two dispatchers, one in Vallejo and one
4 in Oakland. The Vallejo dispatcher, Bill Snyder, supervised 2 dedicated Baymodal drivers. On
5 occasion, Bill Snyder supervised up to 4 employee drivers (2 Baymodal employee drivers plus 2
6 AB Trucking employee drivers). When Bill Snyder resigned, Oakland Port Services reverted to
7 having one dispatcher, located in Oakland. (Aboudi Decl. at ¶ 3.)

8 Mr. William Aboudi made all hiring and firing decisions. Dispatchers were authorized to
9 fire drivers who came to work obviously intoxicated. Control and direction was delegated to the
10 dispatchers in the sense that the dispatchers were required to know when a driver was taking
11 breaks and would dispatch drivers accordingly. (Aboudi Decl. at ¶ 4.)

12 Employee drivers used time sheets that changed in format over time. AB started keeping
13 track of unpaid trainees' time on time sheets both in order to satisfy DOT regulations and to
14 satisfy specific requests from parole and probation officers regarding certain individuals. The
15 time sheets were used for no other purpose with respect to unpaid trainees. The time sheets also
16 were adapted to other operational needs as the needs arose; for example: (1) a space for the truck
17 number was added; (2) office staff and drivers were separated from one another on the sheets; (3)
18 a space to tally hours worked was added; and (4) "employee drivers and paid hired trainees"
19 were distinguished from "unpaid trainees." (Aboudi Decl. at ¶ 5.)

20 The payroll processing system changed approximately four times between 2004 and
21 2011. Early on the payroll was called in or faxed to the payroll company. After that, it was done
22 online through a web interface. Each payroll service provider used varying web interface systems
23 over the time. (Aboudi Decl. at ¶ 6.)

24 Although it is true it could take as many as 8 hours to get through the terminal at the Port
25 of Oakland, this is in fact an extremely rare occurrence. Mr. William Aboudi witnessed it only
26 during the 2002 lockout of the longshoremen. (Aboudi Decl. at ¶ 7.)
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1 No one gate per se provides access to the Port of Oakland. The Port is accessed via a
2 number of public streets from which numerous entrances to the port's many terminals are
3 provided and lines of varying lengths exists at these entrances to the different terminals. Some
4 such lines are long, some such lines are short. The length of a wait depends on whether the
5 terminal has a long or a short line. Any drivers who work for AB Trucking who leave the line
6 and thus lose their place in the line are situated similarly to those of all other companies whose
7 drivers leave the line and thus lose their place in the line. (Aboudi Decl. at ¶ 8.)

8 "The Port of Oakland" covers miles of space from the Bay Bridge to the San Leandro
9 border, the Maritime Facilities cover 1,210 acres of Marine Terminals, Intermodal Rail Facility
10 and Maritime Support Area, all designed to make sure trucks exit the freeway system onto streets
11 serving the Port. (Aboudi Decl. at ¶ 9.)

12 **A. PURPORTED FAILURE TO PROVIDE, AUTHORIZE, AND PERMIT MEAL**
13 **AND REST PERIODS**

14 Employee drivers were verbally informed about meal breaks, and depending on the
15 driver's dispatch and type of load, drivers were instructed to stop every two hours to check on
16 the load and take a break. (Aboudi Decl. at ¶ 10.)

17 Meal period policy was given to the employee drivers verbally at the time of hire and on
18 an ongoing basis thereafter, based on the driver's work experience. A Department of
19 Transportation book was issued to each employee driver and that book defines the meal break.
20 (Aboudi Decl. at ¶ 11.)

21 Employee drivers were provided with one hour lunch breaks. (Aboudi Decl. at ¶ 12.)

22 Beginning on April 21, 2009, AB started providing a place for employee drivers to record
23 their meal periods each shift. (Aboudi Decl. at ¶ 13.)

24 AB does have a record of meal periods taken by employee drivers beginning on April 21,
25 2009. (Aboudi Decl. at ¶ 14.)

26 Employees who did not report they had not taken a lunch break were presumed to have
27 taken their lunch break. No deduction was made for any shift shorter than 5 hours. A deduction
28

1 simply means that a lunch was taken. AB had a policy regarding how to treat lunch breaks,
2 whether reported or not reported, and that was to always take lunch breaks when possible. AB
3 treated all employee drivers in the same manner under that policy. (Aboudi Decl. at ¶ 15.)

4 Lavon Godfrey is the only person who has said that she did not receive a 10-minute, off-
5 duty paid rest period for every four hours worked, but she said that at the same time she also
6 claimed she never took more than a one-minute bathroom break, if any. (Aboudi Decl. at ¶ 16;
7 Deposition of David Blythe at 27:1-16, 28:20-24, 29:16-25; Deposition of Jose Luis Navarro at
8 25:7-15, 26:7-25.)

9 Beginning on November 27, 2009, a written policy on rest periods was provided to
10 employee drivers. (Aboudi Decl. at ¶ 17.)

11 Beginning on April 21, 2009, AB Trucking maintained records showing rest periods
12 taken by employee drivers. (Aboudi Decl. at ¶ 18.)

13 **B. PURPORTED FAILURE TO PAY FOR ALL HOURS WORKED**

14 Employees who did not report they had not taken a lunch break were presumed to have
15 taken their lunch break. No deduction was made for any shift shorter than 5 hours. A deduction
16 simply means that a lunch was taken. AB had a policy regarding how to treat lunch breaks,
17 whether reported or not reported, and that was to always take lunch breaks when possible. AB
18 treated all employee drivers in the same manner under that policy. (Aboudi Decl. at ¶ 15.)

19 Employee drivers did receive compensation of an additional hour of pay for a missed
20 meal or rest period. (Aboudi Decl. at ¶ 19.)

21 Employee drivers took their one-hour meal period unless they notified AB Trucking
22 otherwise. (See Deposition of David Blythe at 25:1-24, 64:14-20, 78:20-25; Deposition of Jose
23 Luis Navarro at 20:24-25, 21:2 – 25:15, 31:11-25.)

24 **IV. ARGUMENT**

25 Plaintiffs rely extensively on *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th
26 949 (*Cicairos*) to argue employers must ensure meal breaks are taken. While it may be true that
27 employers must provide meal periods to employees but do not have an additional obligation to
28

1 ensure that such meal periods are actually taken. As the federal court in *Brown v. Federal*
2 *Express Corporation* explained:

3
4 It is an employer's obligation to ensure that its employees are free from its control
5 for thirty minutes, not to ensure that the employees do any particular thing during
6 that time.

7 (249 F.R.D. 580, 585 (C.D.Cal. 2008)). In addition, numerous, other federal courts in California
8 have similarly held that employers are not obligated to ensure that their employees take meal
9 periods. They include *White v. Starbucks* (N.D.Cal. 2007) 497 F.Supp.2d 1080; *Perez v. Safety-*
10 *Kleen Systems, Inc.* (N.D.Cal. July 28, 2008) 2008 WL 2949268; *Kenny v. Supercuts* (N.D.Cal.
11 June 2, 2008) 2008 WL 2265194, *Salazar v. Avis Budget Group* (S.D.Cal, July 2, 2008) 251
12 F.R.D. 529; *Kimoto v. McDonald's Corp.* (C.D.Cal. August 28, 2008) 2008 WL 4069611; and
13 *Gabriella v. Wells Fargo Financial, Inc.* (N.D.Cal August 4, 2008) 2008 WL 3200190.

14 In *Cicairos v. Summit Logistics, Inc.*, the California Court of Appeal stated that
15 employers have "an affirmative obligation to ensure that workers are actually relieved of all
16 duty." (*Cicairos v Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962). It has been
17 contended that this means that employers have an affirmative obligation to force employees to
18 take their meal periods and that employees cannot refrain or refuse to take their meal periods.
19

20 For several reasons, this interpretation of California's meal period requirements is not
21 compelling. First, as noted above, the question of whether employers have an affirmative
22 obligation to ensure that employees take their meal period is now squarely before the California
23 Supreme Court in the *Brinker* case, and definitive guidance on this issue is expected from the
24 Court. Second, there is recent, substantial, and persuasive authority from many federal trial
25 courts which have interpreted *Cicairos* that the appellate court in that case did not hold as a
26 matter of binding law that employers have a statutory or regulatory obligation to ensure that
27 employees actually take their meal periods. These cases include *Perez, supra*, 2008 WL 2949268
28

1 ["*Cicairos* is not authority for the proposition that an employer violates its duty to "provide"
2 meal breaks any time an employee misses a meal break, regardless of the employee's reason for
3 missing the break or the employer's policies regarding breaks."'] (*Id.*, at p. 5), *White, supra*, 497
4 F.Supp.2d 1080 [Court rejected the argument that *Cicairos* imposes a strict duty on employers to
5 enforce meal break requirements, finding that "the employee must show that he was forced to
6 forego his meal breaks as opposed to merely showing that he did not take them regardless of the
7 reason."'] (*Id.*, at p. 1089); *Brown, supra*, 249 F.R.D. 580 [Court held that the language in
8 *Cicairos* that "employers have 'an affirmative obligation to ensure that workers are actually
9 relieved of all duty'" is "consistent with an obligation to make breaks available, rather than to
10 force employees to take breaks."'] (*Id.*, at p. 586) and *Kenny, supra*, 2008 WL 2265194
11 ["*Cicairos* is not persuasive authority for the proposition that employers must ensure that their
12 employees take meal breaks... "] (*Id.*, at p. 5). Third, this interpretation is consistent with the
13 characterization by the California Supreme Court in *Murphy v. Kenneth Cole Productions, Inc.*
14 of circumstances when an employee is entitled to the additional hour of pay for a meal period
15 violation. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094) Describing Labor
16 Code section 226.7, the court explained "an employee is entitled to the additional hour of pay
17 immediately upon being forced to miss a rest or meal period." (*Id.*, at p. 1104). Lastly, as was
18 demonstrated in meal period forums held by Labor Commissioner Bradstreet in Summer, 2007
19 and in subsequent written submissions, the lack of clarity in this area is resulting in harm to
20 workers because employees are being disciplined and even terminated for choosing not to take
21 their full 30 minute meal periods.

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25 In her declaration in this present case, attorney Caren P. Sencer asserts that in discovery
26 in this case, "no 'memos' to drivers regarding meal periods or rest periods were produced." (*See*
27 Declaration of Caren P. Sencer in Support of Plaintiff's Motion for Summary Adjudication, at
28

1 page 2, lines 21-22.) She also avers that "AB Trucking did not provide any training manuals or
2 materials related to meal and rest period or written policy on meal and rest periods." (*Id.* at 2:20-
3 21.)

4 However, notwithstanding in the second and sixth purported causes of action of their
5 Second Amended Complaint ("SAC"), the plaintiffs quote or paraphrase Labor Code § 1182.12
6 (SAC at 14:5-8), Labor Code § 1194 (SAC at 15:6-12 and 17:1-3), Wage Order 9, subd. 4 (SAC
7 at 14:9-11 and 16:9-11), Labor Code § 226.7 (SAC at 20:12-17), Wage Order 9, subd. 12 (SAC
8 at 21:12-18), Labor Code § 512 (SAC at 20:18-23), and Wage Order 9, subd. 11 (SAC at 20:25-
9 21:10), none of those provisions under which plaintiffs attempt to state their second and sixth
10 purported causes of action, at all mentions either a "memo" or a "training manual" or "training
11 materials" related to meal or rest periods and none mentions a "written policy on meal and rest
12 periods." None of those statutory provisions and none of those Wage Order provisions makes it a
13 violation to not give any of these written materials to the plaintiffs. The Second Amended
14 Complaint does not allege that any supposed failure to give such written materials to the
15 plaintiffs constitutes a violation either of any of these legal provisions or of any other legal
16 provisions. The absence of such a "memo" or "training manual" or "training materials" or
17 "written policy" does not make for a violation of those cited laws under which plaintiffs sue.
18 The absence of any such documents is not germane to the question whether defendant actually
19 provided or authorized or permitted rest periods.

20 Plaintiffs asked William Aboudi whether he had a meal policy and a rest policy. (*See*
21 SUF ¶¶ 10, 11 ("Do you have a set policy?" and "Do you provide any information to the drivers
22 at this orientation regarding meal periods and rest periods?").) Mr. Aboudi answered "Yes" and
23 "We talk about everything," respectively, to the two questions. (*Id.*) Somehow, plaintiffs seek to
24 "contrast" that testimony with the testimony of unnamed "drivers" who "testified clearly that
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1 they never received full, 30-minuted meal periods." (See Plaintiffs' Memorandum of Points and
2 Authorities in Support of Motion for Summary Adjudication ("Pls.' Memo") at 7:8-9.) First of
3 all, of course, the two concepts do not "contrast"; conveying the information about meal and rest
4 periods orally as opposed to written form has nothing to do with whether the meal and rest
5 periods were provided or authorized or permitted.
6

7 Second, and more importantly, the supposed "clear" testimony by the drivers regarding
8 whether they actually or were not given 30-minute meal periods is supposedly supported by
9 "SUF 12." (See Pls.' Memo at 7:9.) Plaintiffs' SUF 12 reads as follows: "During the relevant
10 period, employee drivers were not provided 30-minute, off-duty meal periods within every five
11 hours worked. (J. Aboudi Depo. at 35:10-36:17, 60:8-61:6 ; W. Aboudi Depo. at Exhs. 2 and 16;
12 Godfrey Decl. at ¶¶13-17; Deposition of Lavon Godfrey ("Godfrey Depo.") at 157:7-158:11;
13 Gilbert Decl. at ¶¶14, 15.)" In response, defendant avers: "Employee drivers were provided with
14 one hour lunch breaks." (See DEFENDANT OAKLAND PORT SERVICES CORPORATION'S
15 SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN OPPOSITION TO
16 PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION at item 12, citing Declaration of
17 William Aboudi ¶ 12.)
18

19 Moreover, the references that the plaintiffs make to "Exhs. 2 and 16" accompanying the
20 W. Aboudi Depo. that they cite to say nothing whatsoever about whether there was or was not
21 provided a 30-minute lunch break (or lunch break of any other duration). The reference to the
22 testimony of Jovi Aboudi that they cite to (citing "35:10-36:17" and "60:8-61:6") leads to
23 testimony that does not even mention the word "meal" or otherwise discuss meal or meal times.
24

25 The reference to the Declaration of Lavon Godfrey (citing paragraphs 13-17 thereof),
26 leads to evidence that is not at all "clear" like the plaintiffs promise. (Pls. Memo at 7:8.) Rather,
27 Ms. Godfrey testifies that she and another driver "would eat our lunch" (Godfrey Decl. at 2:27),
28

1 they would "stop to eat" (*Id.* at 3:2), "we almost always ate our lunch in the truck" (*Id.* at 3:3),
2 testifying that "the majority of the time I ate my lunch in the truck with the motor running while
3 waiting in line at the Port" (*Id.* at 3:13.) Her complaint is that "there was no pattern to the 'meal
4 and rest periods.'" (*Id.* at 2:26-27 and 3:5-6.) That is not testimony (much less "clear" testimony)
5 that there were no meal periods; on the contrary, it is testimony that there *were* meal periods.
6

7 Ms. Godfrey testifies that "at times, I would grab a burrito from the taco truck near the
8 yard or go inside the AB Trucking office to warm my food in the microwave, but these breaks
9 never lasted a full thirty (30) minutes." (*Id.* at 3:13-15.) Absent from Ms. Godfrey's testimony is
10 any mention of why she did not take the full thirty minutes. She does not state that someone else
11 limited her break to less than thirty minutes.

12 And the reference to the Deposition of Lavon Godfrey ("Godfrey Depo.") at 157:7-
13 158:11 leads only to testimony that Ms. Godfrey did not "enjoy" eating while waiting in line in
14 the truck. The reference to the Declaration of Gary Gilbert (citing Gilbert Decl. at ¶¶14, 15)
15 leads only, again, to his complaint there was "no pattern" to the "meal and rest periods" (*id.* at
16 3:9 and 3:12), not that there were no meal and rest periods.

17 All the witness testimony seems to "kick against the pricks," as it were, fighting against
18 the realities of port geography (there are no taco shops in line, as it were), fighting against the
19 realities of port entrance lines (either you stay in line or you lose your place in line, regardless of
20 how long it takes for a line to accommodate entrance), fighting against the realities of diesel
21 engines (that must remain on); complaining that there was no "pattern" to lunch breaks (while
22 admitting that lunch breaks were taken), complaining that lunch breaks were sometimes less than
23 30 minutes (without stating why they were less than 30 minutes), complaining that the truck
24 motor was running while they ate (and this by drivers who well know that in their industry truck
25 drivers keep their motors running when they *sleep* in their cabs overnight at rest stops),
26 complaining that they would eat while driving (without stating why they did not pull over and
27 eat), surely is not at all "clear" testimony whether they actually or were not given 30-minute meal
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1 periods. The assertion (Pls.' Memo at 7:8) that "drivers testified clearly that they never received
2 full, 30-minute meal periods" certainly is not at all supported by the evidence cited in "SUF 12."

3 And this says nothing whatsoever about the members of the class that these two plaintiffs
4 purport to represent. Neither Godfrey nor Gilbert even mentions other drivers in the class and no
5 declaration or deposition testimony of any other member of the class is proffered.

6 It is true that employers must *provide*, i.e., *authorize* and *permit*, employees to take rest
7 and meal breaks, but "the California Supreme Court has described the interest protected by meal
8 break provisions, stating that '[a]n employee *forced* to forgo his or her meal period ... has been
9 deprived of the right to be free of the employer's control during the meal period." (*Murphy v.*
10 *Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1104. No evidence cited in plaintiffs' SUF 12
11 avers any force imposed by defendant requiring plaintiffs to forego meal or rest periods. While it
12 may be an employer's obligation to ensure that its employees are *free* from its *control* for thirty
13 minutes, it is not an employer's obligation to ensure that the employees *do* any particular thing
14 during that time. Indeed, in characterizing violations of California meal period obligations in
15 *Murphy*, the California Supreme Court repeatedly described it as an obligation not to force
16 employees to work through breaks. [Citation.]" (*Brown v. Federal Express Corp.* (C.D.Cal.
17 2008) 249 F.R.D. 580, 585, fn. omitted.)

18 Consistent with the purpose of requiring employers to provide employees with meal
19 breaks, the Labor Code and the IWC use mandatory language (*e.g.*, Lab. Code, § 226.7, subd. (a)
20 ["No employer shall *require* any employee to work during any meal or rest period"])
21 precluding employers from *pressuring* employees to skip breaks, *declining* to schedule breaks, or
22 *establishing* a work environment discouraging or preventing employees from taking such breaks.
23 Nothing in the evidence supplied in plaintiffs' SUF 12 even remotely hints, much less
24 establishes, that AB Trucking has established the work environment of the trucking industry at
25 the Port of Oakland, with its lines, entrances, waiting periods, and the like. The mandatory
26 language does *not* mean employers must ensure employees actually take meal breaks. California
27 appellate courts interpret the meal break requirement by reference to the definition of the word
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1 “provide” as used in Labor Code sections 226.7, subdivision (b), and 512, subdivision (a), as
2 well as California Code of Regulations, title 8, section 11050, subdivisions 11 and 12. (See fns. 4
3 & 5, ante.) “Provide” means “to supply or make available.” (Webster's 9th Collegiate Dict.
4 (1986) p. 948.)

5 Plaintiffs rely on *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949
6 (*Cicairos*) to argue employers must ensure meal breaks are taken. In *Cicairos*, an employer did
7 not schedule meal breaks for its truck driver employees, established a system whereby drivers
8 were pressured to make a certain number of trips during a workday, had a monitoring system to
9 track drivers, and did not include a code for rest stops in its computer system. (*Id.* at p. 962.)
10 These and other aspects of the work environment effectively deprived drivers of an opportunity
11 to take breaks. In reversing a summary judgment granted to the employer with regard to meal
12 break claims, the appellate court relied upon a January 28, 2002 opinion letter from the Division
13 of Labor Standards Enforcement (DLSE). *Cicairos* stated, “Under the facts presented ... the
14 [employer's] obligation to provide the plaintiffs with an adequate meal period is not satisfied by
15 assuming that the meal periods were taken, because employers have ‘an affirmative obligation to
16 ensure that workers are actually relieved of all duty.’ (Dept. of Industrial Relations, DLSE,
17 Opinion Letter No. 2002.01.28 (Jan. 28, 2002) p. 1.)” (*Cicairos, supra*, at pp. 962–963.) With
18 regard to rest breaks, *Cicairos* held “the [employer] could ... be liable if the plaintiffs did not
19 take their full 10-minute rest breaks because, as a practical matter, the defendant did not permit
20 the plaintiffs to take their rest breaks. (See Cal. Code Regs., tit. 8, § 11090, subd. 12(A)
21 [employer must authorize and permit rest period].) ... [¶] The defendant has not proven it
22 supplied the plaintiffs with their rest periods; therefore, summary judgment was improper.”
23 (*Cicairos, supra*, at p. 963.)

24 *Cicairos* does not assist plaintiffs. The DLSE has withdrawn the opinion letter upon
25 which *Cicairos* based its analysis. (Dept. of Industrial Relations, DLSE, Opn. Letter (Oct. 23,
26 2008) [“Court Rulings on Meal Periods”] See accompanying Request for Judicial Notice.) In
27 doing so, the division stated: “Taken together, the language of the statute and the regulation, and
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1 the cases interpreting them demonstrates compelling support for the position that employers must
2 provide meal periods to employees but do not have an additional obligation to ensure that such
3 meal periods are actually taken.” (Dept. of Industrial Relations, DLSE, Opn. Letter (Oct. 23,
4 2008) at p. 2.) Further, *Cicairos's* conclusion relating to meal breaks did not depend upon an
5 “ensure” standard. Rather, the facts in *Cicairos* were such that the employer's *business practices*
6 effectively deprived employees of the ability to take meal breaks. (Dept. of Industrial Relations,
7 DLSE, Opn. Letter (Oct. 23, 2008) at p. 5.) Nothing in the testimony adduced by plaintiff here
8 deals with defendant's business practices. What plaintiffs complain about is something that is
9 uniformly applicable to all drivers driving for all trucking companies that use the Port of
10 Oakland. This is an industry-wide situation, not something that is unique to any "business
11 practice" of AB Trucking.

12 Plaintiffs' position also is not practical. “Requiring enforcement of meal breaks would
13 place an undue burden on employers whose employees are numerous or who ... do not appear to
14 remain in contact with the employer during the day. (See *White v. Starbucks Corp.*, 497
15 F.Supp.2d 1080, 1088–89 (N.D. Cal. 2007).) It would also create perverse incentives,
16 encouraging employees to violate company meal break policy in order to receive extra
17 compensation under California wage and hour laws. [Citation.]” (*Brown v. Federal Express*
18 *Corp.*, *supra*, 249 F.R.D. at p. 585.)

19 As concerns pay for hours worked, employee drivers took their one-hour meal period
20 unless they notified AB Trucking otherwise. (Deposition of David Blythe at 27:1-16, 28:20-24,
21 29:16-25; Deposition of Jose Luis Navarro at 25:7-15, 26:7-25.)

22 CONCLUSION

23 The motion for summary adjudication should be denied.

24 Dated: October 14, 2011

Respectfully submitted,

JAY IAN ABOUDI, ATTORNEY AT LAW

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26 JAY IAN ABOUDI

27 Attorney for Defendant OAKLAND PORT
28 SERVICES CORPORATION d/b/a AB TRUCKING