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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

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

Plaintiffs,

vs.

OAKLAND PORT SERVICES CORPORATION dba 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: August 20, 2010
Time: 10:00 a.m.
Place: Department 20
Judge: Hon. Robert B. Freedman

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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 vioaltion 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 and seek certification of either one class or five proposed subclasses. (*See* Memo at 1:13-2:9 and 21:5-6.) The five subclasses are: (1) an "all hours worked subclass" (*see* Memo at 1:13-15); (2) a "misclassified employee or no wages received subclass" (*see* Memo at 1:16-18); (3) an "overtime subclass" (*see* Memo at 2:1-3); (4) a "living wage subclass" (*see* Memo at 2:4-6); and (5) a "meal and rest period subclass" (*see* Memo at 2:7-9). The one class is characterized as "all drivers [defined] who performed work for AB out of its Oakland, California facility from the period of March 28, 2004 through March 28, 2008." (Motion at 1:9-11.) This is nowhere stated in the FAC.

In their FAC, the two named plaintiffs cite "Rule 1855(b)" of the California Rules of Court (*see* FAC at 6:14-16), citing it 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).) Yet, in the FAC, they gave no class description for modification or division, for never in the FAC do the named plaintiffs describe the one class they purport to represent. Only now, in their

second motion to certify a class, do they for the first time attempt to do so.

And in their motion they reduce the number of such purported "classes" or "subclasses" from six (FAC 5:26-6:12½) to five (Memo 1:13-2:9). On the one hand, they use in the FAC (FAC 5:26-6:12½) language of one variety to describe what they there call the "classes"—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 subclasses (Memo at 1:13-2:9, using the word "defined" to say what they are doing when discussing the subclasses). 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 that Ms. Godfrey's "claims are representative of" the "all hours worked class." (Memo at 8:2-3 (statement made with no citation to any evidence).) In support of their assertion that Mr. Gilbert "is representative of" the "misclassified or no wages received class" (Memo at 9:21-22), plaintiffs cite Mr. Gilbert's declaration at ¶¶ 17, 19 (Memo at 9:21). Yet paragraph 17 mentions only Mr. Gilbert's own experience in allegedly not being paid; he mentions nothing about anyone else having not been paid. And a paragraph 19 does not exist in the Gilbert declaration.

In support of their assertion that Mr. Gilbert and Ms. Godfrey both are "representative either of" the "overtime class" (*see* Memo at 11:23-24), plaintiffs cite Mr. Gilbert's declaration at ¶¶ 18, 19 (even though, again, there is no ¶ 19 in his declaration). Paragraph 18 pertains solely to Mr. Gilbert; it says nothing at all about any other trainee or employee of Oakland Port Services Corporation ("OPS").

In support of their assertion that Mr. Gilbert and Ms. Godfrey both are "representative of" the "living wage class" (*see* Memo at 13:14-15), plaintiffs cite "Exh. C at 68:2-5" (attached to the Duncan Decl.). That is a citation to a passage of text that is unintelligible and without context, cited to support the assertion that "AB pays its drivers at a rate less than the OLW rate" (even though the passage does not mention who it is that supposedly was not receiving an OLW rate).

In support of their assertion that "Plaintiff Gilbert earned $0.00 per hour" (Memo at 13:16), plaintiffs cite "Exh. C at 22:1-23:20," a passage of text that does not mention Mr. Gilbert.

In support of their assertion that "Plaintiff Godfrey earned $11.00 per hour" (Memo at 13:17), plaintiffs cited "Exh. B, Ex. 3." (Memo at 13:17.) That is a compilation of eight pages of documents, the second page of which shows that Ms. Godfrey (*see* bottom right-hand corner, "2007 Godfrey 0003") earned $17,642.78 in wages for 1391.63 hours of work (which comes to $12.67 per hour), contradicting the argument plaintiff otherwise sets forth at Memo at 13:18-22.

In support of their assertion that both Ms. Godfrey and Mr. Gilbert are representative of the "meal and rest period [class]" (Memo at 14:21½-22½), plaintiffs cite both "Godfrey Decl at ¶¶ 13-16" and "Gilbert Decl at ¶¶ 14, 15," each of them as supposed evidence of the notion that "all drivers were commonly subject to AB's lack of a written meal and rest policy period" (even though the cited passages in the Godfrey and Gilbert declarations do not mention any other drivers, much less what they may have been "subject to").

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 becuase 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 show 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.

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

Plaintiffs apparently have abandoned their request for class status regarding the issuance of any injunction. The only mention in the Memo to an injunction is a simple description of the fact that "plaintiffs seek to represent a class . . . who seek . . . an injunction." (*See* Memo at 1:7.) No other mention is made (much less evidence adduced in support) of the request for injunctive relief or how it is that either of the plaintiffs has standing to seek an injunction or how it is that any other proposed class member is entitled to an injunction.

Moreover, 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 ("Jay Ian Aboudi 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 Exh. "B" to Jay Ian Aboudi 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 plaintiffs 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 whether 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. The key point here is that the "substantial evidence" must establish a "community." It is one thing for a plaintiff in a lawsuit to state that he or she has been mistreated somehow and it is entirely another thing for a plaintiff to establish as a matter of fact, supported by substantial evidence, that others along with the plaintiff constitute a "community" of persons who share the same grievance. The plaintiffs in this case have simply fallen woefully short of meeting this requirement. They testify about themselves, it is true, but neither are they competent to testify about any others in the purported communities that supposedly form the subclasses they hope to represent nor have they proffered substantial evidence that any other persons join them in any communities of individuals aggrieved in the same manner in which they claim to be aggrieved. In short, the two plaintiffs in this case simply have not met their burden to establish *as a matter of fact* that their claims are typical of the subclasses they seek to represent. (*Hamwi v. Citinational-Buckeye Inv. Co., supra*, 72 Cal. App. 3d at pp. 471-472.)

The Duncan Declaration. Ms. Duncan presents a declaration. She is not a percipient witness to facts concerning training manuals and policies concerning meal and rest periods. Yet she purports to interpret documents and discovery responses to assert, herself, that OPS "has no training manuals or materials related to meal and rest periods or written policy on meal and rest periods." (Duncan Decl. at 2:15-16.) In support, she cites Exhibits F, G, H, and I, attached to her

declaration. (*See* Duncan Decl. at 2:18-22.) Exhibit F is a copy of "Plaintiff's Request for Production of Documents (Set One)," not evidence of anything. Exhibit G is "Defendant's [OPS's] Supplemental Response to Plaintiff's Request for Production of Documents, Set One." Ms. Duncan refers the court to requests numbers 33, 34, and 36. (*See* Duncan Decl. at 2:17.) Response number 33 tells only that OPS found no documents "relating, pertaining, and/or referring to [OPS's] practices and policies for *setting or providing meal periods* for ANY DRIVER during the period of March 2004 through the present." (*See* Exh. G, Request No. 33 and Response to Request No. 33, emphasis provided.) Such a reference to an absence of documents "setting or providing meal periods" is not the same as a reference to the purported fact that OPS "has no training manuals or materials related to meal and rest periods or written policy on meal and rest periods." Response number 34 tells only that OPS found no documents "relating, pertaining, and/or referring to *rest breaks provided* to ANY DRIVER during the period of March 2004 through the present." (*See* Exh. G, Request No. 34 and Response to Request No. 34, emphasis provided.) Such a reference to an absence of documents "relating, pertaining, and/or referring to *rest breaks provided*" is not the same as a reference to the purported fact that OPS "has no *training manuals or materials* related to meal and rest periods or written *policy* on meal and rest periods." If the plaintiff had desired to ask for training manuals or policies, it should have asked for them; instead, Request No. 34 asked for documents about "rest breaks provided." That is different. Citation to that response is not helpful to plaintiff's cause. And Response No. 36 tells only that OPS found no documents "relating, pertaining, and/or referring to [its] practices and/or policies *for setting or providing* rest breaks for ANY DRIVER during the period of March 2004 through the present." (*See* Exh. G, Request No. 36 and Response to Request No. 36, emphasis provided.) Such a reference to an absence of documents "*setting or providing* meal periods" is not the same as a reference to the purported fact that OPS "has no training manuals or materials related to meal and rest periods or written policy on meal and rest periods."

Ms. Duncan also asserts that "there were no written training materials provided to the drivers." (*See* Duncan Decl. at 2:27-28.) She cites the transcript of the deposition of Mr. William

Aboudi (Exh. B to the Duncan Decl.), at 57:12-17; 58:16-59:12; 116:13-118:8; and 118:12-25. (*See* Duncan Decl. at 2:27.) Page 57 of the Wiliam Aboudi Declaration is not attached to the Duncan Declaration. Page 58 of the William Aboudi Declaration is not attached to the Duncan Declaration. The William Aboudi Decl. at 116:13-118:8 attests to the fact that the company does have an oral policy on meal periods that is communicated to drivers when hired and as needed after hire. (*See* William Aboudi Decl. at 116:13-118:24, attached as Exh. B to the Duncan Decl.) The William Aboudi Decl. at 118:12-25 does not pertain at all to whether there was or was not any "written training materials provided to the drivers" (Duncan Decl. at 2:27-28.) Rather, the transcript of the William Aboudi Decl. at 118:12-25 pertains to whether "there are any *records of meal periods taken*" (*see* William Aboudi Decl. at 118:12, emphasis added), who it is that "makes sure meal periods are taken" (*see* William Aboudi Decl. at 118:14), whether Mr. Aboudi had "ever asked any of the drivers whether or not they're taking one-hour meal periods" (*see* William Aboudi Decl. at 118:16-18), when it was that Mr. Aboudi had last "asked a driver if they [*sic*] were taking one-hour meal periods" (*see* William Aboudi Decl. at 118:19-20), and whether Mr. Aboudi recalled "any specific conversation, since 2004, in which [he had] asked a driver whether or not they were taking meal periods." (*See* William Aboudi Decl. at 118:22-24). None of this is evidence supporting Ms. Duncan's incompetent testimony that "there were no written training materials provided to the drivers." (*See* Duncan Decl. at 2:27-28.)

Ms. Duncan asserts that "Mr. Aboudi's deposition testimony confirms that AB Trucking uses the same payroll processing system for all the drivers and produces earnings statements that are identical in form." (*See* Duncan Decl. at 3:1-3.) In support, Ms. Duncan cites "exhibits 2-4, 10 to Exhibit B." (*See* Duncan Decl. at 3:3.) She does not cite to "Mr. Aboudi's deposition testimony" but only to exhibits attached to excerpts of the transcript of that testimony. The exhibits themselves, of course, state whatever they state, but they do not constitute testimony of Mr. Aboudi. Further, nowhere in any of the pages of the transcript of the deposition of William Aboudi that Ms. Duncan attaches to her declaration is mention made of Exhibit 2. Although we and the court have no obligation to search out what Ms. Duncan has not cited (namely, we are not shouldered with the burden of finding "Mr. Aboudi's testimony" on this topic, we can do so and

in doing so we find his testimony does not state what she states it says. The only testimony of William Aboudi found attached to Ms. Duncan's declaration that pertains either to Exhibits 2 or 3 or 4, is the testimony found at page 180, lines 6 to 25 (pertaining to Exhibit 3) and at page 189, lines 6-25 (pertaining to Exhibit 4). Exhibit 3 was described by Ms. Sencer, plaintiff's counsel who was at the time was taking Mr. Aboudi's deposition, as a "payroll-confirmation receipt," not as Ms. Duncan states in her declaration here a "payroll processing system." Thus, the actual testimony of Mr. Aboudi, not itself cited by Ms. Duncan, concerning Exhibit 3, does not at all pertain to a "payroll processing system." And Exhibit 4 was described by Ms. Sencer, plaintiff's counsel who was at the time was taking Mr. Aboudi's deposition, as "payroll information associated with 1/22/07 through 2/2/2007," not as Ms. Duncan states in her declaration here a "payroll processing system." Thus, the actual testimony of Mr. Aboudi, not itself cited by Ms. Duncan, concerning Exhibit 4, does not at all pertain to a "payroll processing system." None of the testimony pertains to "all drivers" and none of the testimony pertains to the production of "earnings statements" or that they are "identical in form" to anything, as Ms. Duncan otherwise purports to testify. (*See* Duncan Decl. at 3:1-3.)

The Gilbert Declaration. Plaintiff Gary Gilbert, too, presents a declaration. It consists of eighteen (18) substantive paragraphs. Not once does Mr. Gilbert mention any facts from which the court can glean there is a community of interest between what he feels aggrieves him and any other member of any community of persons who may share the same grievances. He talks about his participation in a Teamsters Truck Driving School (¶ 2), his "Class A" licence (¶ 3), his application and interview with AB Trucking (¶¶ 4-5), his drive test (¶ 6), a promise of employment allegedly made to him by an unnamed person (¶ 7), the beginning of his training (¶ 8), his having signed a document wherein he acknowledged he was not an employee (¶ 9), his having been given a weekly schedule for training (¶ 10), his impression that he was required to train for 40 hous per week (¶ 11), his experiences as a passenger and sometimes as a driver in trucks driven by "Mark" and "Erik" (¶¶ 12-13), his assertion there was "no pattern to the 'meal and rest periods' [he himself] took (¶¶ 14-15), his having filled out a weekly time sheet (¶ 16), his having not been paid for the 8 weeks of training (¶ 17), and his having not been "advance[d]"

to a paid position. (¶ 18.) Nowhere does Mr. Gilbert supply any testimony (nor would he necessarily be competent to supply any such testimony) that attests to anyone else in his proposed community of subclass companions sharing any of these experiences or any grievances associated with them.

The Godfrey Declaration. Plaintiff Lavon Godfrey, too, supplies a declaration.[1] As with Mr. Gilbert's declaration, so too with Ms. Godfrey's. Not once does Ms. Godfrey mention any facts from which the court can glean there is a community of interest between what she feels aggrieves her and any other member of any community of persons who may share the same grievances. She talks about her application with AB Trucking for a driving position and her "Class A" license (¶ 2), her having begun "working" for AB Trucking (¶ 3), her experiences as a passenger and sometimes as a driver in trucks driven by "another driver" (¶ 4, 6), her acknowledgement that she was "paid for the time [she] was 'training' at AB Trucking" (¶ 5), her assertion there were "two other drivers," unnamed, "where were being trained like [her]" at to whom she states she did "not know whether these two other trainees were being paid for their time" (¶ 7), her having been given her "own truck to drive" after about three weeks of training (¶ 8), her having never signed any one-page agreement entitled "Oakland Port Services Corporation Truck Driving Traineed Program: Trainee Participation and Release of Liability Agreement" (¶ 9), her having been given a "weekly schedule" when she began her training (¶ 10), her having filled out a weekly time sheet during training and "when [she] was driving for AB Trucking" (first ¶ 11), her having performed trucker's duties "as a driver with AB Trucking" (second ¶ 11), her having limited her driving "with AB Trucking" to driving "back and forth within the Port of Oakland" and having not driven "to different cities" (¶ 12), her assertion there was "no pattern to the 'meal and rest periods' [she herself] took (¶¶ 13-14), her experience "the majority of the time" in eating her lunch and her experience on one occasion being sent to her truck in the line of trucks "at the Port" to eat her lunch (¶ 15), her having not "receive[d]" any "additional

[1] Please note that the footer for the Declaration of Plaintiff Lavon Godfrey erroneously states that it is the declaration of Gary Gilbert. The caption on the fist page and the signature on the last page, however, attest to this being her declaration, not his.

orientation or training" when she "converted from a paid trainee to a driver," her having not been told by anyone that she "could take meal periods or rest breaks" and her having never been given "a written policy on meal periods or rest breaks, or given an employee handbook" (¶ 16), her having realized that she "never received a one hour meal period when [she] worked for AB Trucking" (¶ 17), and her having worked more than 8 hours in a day at times (¶ 18). Nowhere does Ms. Godfrey supply any testimony (nor would she necessarily be competent to supply any such testimony) that attests to anyone else in her proposed community of subclass companions sharing any of these experiences or any grievances associated with them.

The above three declarations (the Duncan Decl., the Gilbert Decl., and the Godfrey Decl.) are the only evidence that the plaintiffs cite in support of their motion for class certification. (*See* Memo at 2:18-19.) They otherwise 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 plaintiffs' claims are not typical of others. Such determination alone is sufficient to defeat class certification on all of plaintiffs' 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 19:3-4) that supposedly would establish typicality. But in reciting the litany (Memo at 19:20-20:1), plaintiffs cite to absolutely nothing in the record that actually substantiates or supports their assertions. While they begin their litany with the phrase "like the putative class members," they actually present, as shown above, absolutely no evidence whatsoever that pertains to any other potential class member. 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 William 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. For example, plaintiffs assert in their Memo (at 2:21-22) that "All drivers perform essentially the same job duties." In support, citation is made to the Godfrey and Gilbert declarations (Memo at 2:22-23), which do not mention what all other drivers' duties are. Plaintiffs assert in their Memo (at 2:23-24) that "All drivers report to the same small group of supervisors." In support, citation is made to the transcript of the deposition of William Aboudi (Memo at 2:25), which does not mention anything about any drivers reporting to anyone, let alone "all drivers."

Plaintiffs assert in their Memo (at 3:2-3) that "AB maintains a policy of not compensating all drivers for hours worked over eight-in-a day and forty-in-a-week, at a time-and-one-half rate." In support, citation is made to transcripts of the depositions of William Aboudi and Jovi Aboudi. (Memo at 3:3-4.) William Aboudi does testify that it is company policy, communicated to drivers when they are hired, that the company does not pay overtime to drivers. (Exhibit B at 120:3-11.) However, plaintiffs are seeking to certify a class (never defined in the FAC but first defined in the present motion) that consists of "drivers who performed wotk for AB out of its Oakland, California facility from the period of March 28, 2004 through March 28, 2008," defining "driver" to mean "an employee" or an "individual operating a 'motor vehicle.'" (*See* Memo at 1:10-11, 21.) Yet, in defining the so-called "overtime subclass," plaintiffs limit that subclass to "all drivers *employed* by Defendant."

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Plaintiffs assert in their Memo (at 3:13-14) that "All drivers missed most or all of their meal breaks and many ate while driving." In support, citation is made to the Godfrey and Gilbert declarations (Memo at 3:14-15.) Yet, those declarations do not mention anything about "all drivers" much less that other drivers missed meal breaks much less that all drivers missed "most or all of their meal breaks" or that any ate while driving (the declarations mention nothing about eating "*while driving*"; at best, the Gilbert declaration states that "Erik" and Mr. Gilbert "almost always ate our lunch in the truck with the motor running while we were *waiting in line* at the Port." (Gilbert Decl. at 3:17-18.) That says nothing about "many" drivers who may have eaten while driving and says nothing about "all drivers" having "missed most or all" of their meal breaks."

Plaintiffs assert in their Memo (at 3:20-21) that "AB follows a payroll policy applicable to all drivers of automatically deducting one hour from each driver's shift reported-time for a meal period." In support, citation is made to "Exh. C at 35:10-36:17, 60:8-61 :6; Exh. B at Exh. 2, 16." Those citations do not support the assertion. Exh. C at 35:10-36:17 pertains to testimony concerning some document under discussion at the time of the deposition but nowhere is that document described in that testimony; hence, the testimony is meaningless on this account. Moreover, the testimony at "Exh. C at 35:10-36:17" simply states that "TimeCalc would do . . . its own calculation for the hour break." Plaintiffs offer nothing to support the illogical jump from the phrase used by Mr. Jovi Aboudi ("do . . . its own calculation for the hour break") to the interpretation of that phrase by the plaintiffs in their Memo (at 3:20-21) that AB has a policy of "automatically deducting one hour from each driver's shift reported-time for a meal period." The two phrases are not the same; the testimony does not support the assertion.

"Exh. C at 60:8-61:6," too does not support the assertion. That testimony concerns an "Exhibit 16" (see Exh. C at 60:8) but that Exhibit is neither attached to the Exh. C deposition transcript of Jovi Aboudi nor otherwise explained. And in any event, the testimony concerns two unnamed people in Vallejo (60:12) who had a "personal problem" (60:13-14), and how Jovi Aboudi does *not* deduct an hour break (61:1) and when something (unidientified) "happens automatically" (which plaintiffs assert is testimony about a "deduction"), Mr. Aboudi would

"just *add it back in*" in any event. (61:5-6, emphasis added.) This is not substantial evidence of the assertion that "AB follows a payroll policy applicable to all drivers of automatically deducting one hour from each driver's shift reported-time for a meal period." Indeed, the testimony concerning that unidentified document is that none of the AB Trucking time shees look like it (61:10-12) and it is not used as part of Mr. Aboudi's role "as payroll." (61:13-15.) The testimony does not support the assertion.

And the citation to "Exh. B at Exh. 2, 16," likewise, does not support the assertion. Whatever it is that plaintiffs hope to have the court glean from "Exh. B at Exh. 2, 16" is unclear. Plaintiffs do not say. Plaintiffs do not point to what it is in either Exh. 2 (11 pages) or Exh. 16 (not attached as a part of Exh. B) that supports the assertion.

Plaintiffs assert that "all drivers were commonly subject to Defendant's lack of a written meal and rest period policy." (Memo at 14:22½.) This is factually and legally unsupported. 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 must be in writing. And in support of the assertion that "all drivers were commonly subject to Defendant's lack of a written meal and rest period policy," plaintiffs cite "Exh. B at 117:15-118:25." Yet, that testimony by William Aboudi simply supports the fact that the company does have an oral policy on meal periods that is communicated to drivers when hired and as needed after hire.

Pointing 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) does not establish that the plaintiffs' claims are typical of possible claims by possible class members. Indeed, that fact actually 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. While Mr. Gilbert is held out as representative of the "meal and rest period [class]" (Motion at 9:17-18), 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).

Ms. Godfrey is held out as representative both of the "all hours worked subclass" (Motion at 8:2-3) and of the "meal and rest period subclass" (Motion at 14:21½-22½). As with Mr. Gilbert, so too with Ms. Godfrey: nothing in her declaration evidences that there exists a class of AB Trucking employees that constitute members of an "all hours worked subclass" or of a "meal and rest period subclass" or that she has any personal knowledge of facts about them.

Curioiusly in their Motion papers the plaintiffs characterize a 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 8:24-9:1.) Note how the characterized dilemma speaks repeatedly of "drivers" generally. In support of their statement of the dilemma, plaintiffs cite "Godfrey Decl. at ¶¶ 13-17; Gilbert Decl. at ¶¶ 14, 15; Exh. D at 157:7-158:11; 159:9-160:15; 191:15-193:4; 193:11-14."

Yet, none of that cited material supports the characterized dilemma. "Godfrey Decl. at ¶¶ 13-17" sets forth Ms. Godfrey's comments about her own personal experience, not that of "drivers" generally. "Gilbert Decl. at ¶¶ 14, 15" sets forth Mr. Gilbert's comments about his own personal experience, not that of "drivers" generally. "Exh. D at 157:7-158:11" sets forth Lavon Godfrey's deposition testimony about her own personal experience during a two-week period and what she knew about the personal experience of a person named "Jeff" during those two weeks. And that testimony had to do not with whether those two persons could take breaks but whether they could "*sit and enjoy*" their ten-minute breaks. (Exh. D at 157:7-8, emphasis added.) To the extent that Ms. Godfrey's testimony asserts that neither "Jeff" nor her "got a full ten-minute break at any time during those first two weeks that [she was] training with Jeff" (Exh. D at 157:13-16), it is testimony about those two persons, not an entire subclass of persons. The testimony at "159:9-160:15" is testimony only about Ms. Godfrey herself; she otherwise repeatedly states that she knows nothing at all about "Jeff" (much less other purported members of the subclass). (*See* 159:22; 160:1; 160:4; 160:13; 160:20.) The testimony set forth at "191:15-193:4" does not support the notion that "drivers" generally "cannot take breaks." At best, the testimony is of Ms. Godfrey's own personal experience and insofar as it concerns any other drivers, the testimony was only that Ms. Godfrey was not aware of any drivers who "*ever called in* to take a break or *ever called in* to take lunch." (Exh. D at 193:5-9, emphasis added.) The only cited testimony that even remotely comes close to supporting the assertion that drivers generally "cannot take breaks," that drivers generally "may lose their place in the queue," that drivers generally have "no area to legally and safely pull the truck over," and that "[i]t is common practice for drivers to eat in their trucks while waiting in queues to enter Port terminals" (Memo at 8:24-9:1) is the testimony of Ms. Godfrey at "193:11-14" (cited in Memo at 9:2-3). Yet, that testimony is only the following:

> It was like you sort of take your break and lunch in your truck because you're in line. You could take it while you're in line. So that's how we took it, in line.

(193:11-14.) No mention of who is referred to by the words "you" or "we." This is *not*

substantial evidence of the existence of a community of proposed meal and rest period subclass members.

That drivers generally may have eaten their food while in their trucks while waiting in line (a point that is asserted by not supported by substantial evidence), it was not AB Trucking policy that prompted it. 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 truckdrivers had violated section 512, subdivision (a) and an IWC wage order relating to meal periods. The employer argued that since the truckdrivers 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.

Neither Mr. Gilbert's nor Ms. Godfrey's deposition or declaration testimony constitutes substantial evidence that common inquiries predominate the meal breaks claim. On their face, the statements made in the deposition and declaration testimony 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.

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

Lacking an evidentiary showing that either or both of the plaintiffs is representative of any of the subclasses, it is impossible for the court to conclude that there will be duplicative proceedings, arguments, or evidence involving any other potential plaintiffs. "[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*).) And while plaintiffs argue the principle of superiority and assert that class certification would be superior (Memo at 3:25-5:28), they fail at all points to establish that other people are members of any such class or subclass that they would purport to represent. For example, they assert that "there are class members presently employed by AB" who "may be reluctant to step forward and file a separate suit to enforce their rights." (Memo at 5:9-10.) They cite no evidence to support that assertion. (*See* Memo at 5:9 et seq.)

"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).) Plaintiffs do none of this.

V. NO CLASS CAN BE CERTIFIED IN THIS CASE BECUASE 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 Caliifornia law (FAC 6:11-13). Nothing in the FAC justifies the purported creation of those two newly-minted subclasses referred to in the Motion as the "misclassified or no wages received subclass" (Memo at 1:16-18 and 9:14-1:12) and the "overtime subclass" (Memo at 2:1-3 and 11:13-13:7); they are not mentioned in the FAC and their new appearance in the motion violates due process. And, to boot, as discussed at length above, nothing in the Duncan, Godfrey, or Gilbert declarations and nothing in the transcripts of the depositions cited in the Memo serve to support with substantial evidence that the plaintiffs can adequately represent those classes or that, indeed, there are any members of those classes. The fourth purported "class" itemized in the FAC, one consisting of employees who purportely were denied itemized wage statements, is a "class" that apparently has been abandoned; it is not mentioned in the motion or in the Memo as a subclass and what amounts only to inapposite argument about it (Memo at 17:18-18:2) is presented.

The named plaintiffs have utterly failed to meet their burden of showing the predominance of common questions of fact as to any of the "classes" mentioned in the FAC. 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 "amply support the finding"—here, this court is presented with *no declarations whatsoever from any putative class members.*

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. 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 requlated 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."

CONCLUSION

Wherefore, defendant respectfully requests that the court deny the plaintiffs' motion for class certification.

Dated August 11, 2010.

Respectfully submitted,
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