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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

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

Plaintiffs,

v.

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

Defendants.

Case No. RG08379099

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER CLASS CERTIFICATION ORDER, AMEND, MODIFY OR DECERTIFY A CLASS ACTION; CCP § 1008 AND CAL. RULES OF COURT, RULE 3.764

Date: February 9, 2012
Time: 2:00 p.m.
Dept.: 20
Judge: Hon. Robert B. Freedman
Reservation Number: R-1249926

Trial Date: February 14, 2012

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I. INTRODUCTION

Plaintiffs filed this case as a putative class action on March 28, 2008. This Court certified a Class of "all drivers who performed work for Defendant out of its Oakland, California facility from the period of March 28, 2004 through the date of notice to the class ("Drivers")," on December 3, 2010. On February 4, 2011, the trial date was set for November 29, 2011. The Class Notice was mailed on March 15, 2011. In November 2011, the trial was rescheduled for February 14, 2012.

Over a year after class certification, and less than one month before the pre-trial conference, on January 12, 2012, Defendant filed its motion to decertify the class.

II. ARGUMENT

A. DEFENDANT'S MOTION PREJUDICES PLAINTIFFS AS IT COMES ON THE EVE OF TRIAL

1. Defendant may not in a motion for decertification ask the Court to rule on matters it should have raised in a demurrer or motion for summary judgment, but failed to do so.

Defendant's motion to decertify comes over a year after this Court certified the Class, and nearly a year after the class members received the Class Notice. The hearing set for this motion to decertify is concurrent with the pre-trial conference, only five calendar days before the first day of trial.

Since February 2011, Plaintiffs have been preparing for trial in November 2011. The last day to file a motion for summary judgment or adjudication in this case under California Code of Civil Procedure ("CCP") section 437c(a) was August 8, 2011 (service by overnight mail), as the last date to hear a motion for summary judgment was October 28, 2011.[1] Plaintiffs filed a motion for summary adjudication in an effort to streamline and narrow some of the issues in this case. Defendant filed neither a motion for summary judgment, nor adjudication.

The period of time in which to conduct discovery concluded. Now, relying primarily on the declaration of Defendant's president and owner, Defendant attempts to raise "new" issues to

[1] These calculations are made based on the November 29, 2011 trial date, which are the dates Plaintiffs were required to follow. CCP § 437c(a): "Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing."

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achieve decertification. A closer look reveals that these issues are not "new" under applicable standards, nor are they supported by reliable or admissible evidence.[2] Regardless, the "new" issues Defendant presents are irrelevant or non-determinative to a motion to decertify the class. At very best, the issues raised should properly have been addressed through a demurrer or summary judgment. Defendant has no right to bring a summary judgment motion at this late date disguised as a motion for decertification:

> When the substantive theories and claims of a proposed class suit are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved in the context of a formal pleading (demurrer) or motion (judgment on the pleadings, summary judgment, or summary adjudication) that affords proper notice and employs clear standards. Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims. Substantial discovery also may be required if plaintiffs are expected to make meaningful presentations on the merits. All of that is likely to render the certification process more protracted and cumbersome, … Such complications hardly seem necessary when procedures already exist for early merit challenges.

(*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440-441.)

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[2] Defendant's motion is based almost entirely upon the Declaration of Bill I. Aboudi. Plaintiffs object to the Declaration of Bill I. Aboudi in support of motion to decertify the class on several grounds. Paragraphs 1, 2: Mr. Aboudi's statements lack foundation; he lacks personal knowledge. (Evid. Code § 702(a).) Paragraphs 4, 5, 7-9, 12: contain improper legal conclusions (Permitting any witness, including a presumed *expert*, to give his or her opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant. (See *Communications Satellite Corp. v. Franchise Tax Bd.* (1984) 156 Cal.App.3d 726, 747 (expert precluded from giving his views on provisions of the Uniform Act); *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal.App.3d 650, 654). Mr. Aboudi is not an expert.) Paragraphs 10, 11: violate the secondary evidence rule, provide improper hearsay statements, and lack foundation as Mr. Aboudi was not designated the person most knowledgeable as to payroll. (Evid. Code § 1200.)

Furthermore, there is nothing in the record to date to support the majority of Mr. Aboudi's conclusions. (See Duncan Declaration, *infra*, ¶¶ 2, 3.) This is the case despite the fact that Plaintiffs have asked for information pertaining to Plaintiffs' claims, both throughout discovery and most recently in September 2011, when Plaintiffs served Defendant with Plaintiffs' supplemental request for production of documents under CCP section 2031.050(a) and (b). (See Duncan Dec. ¶ 3, Exhs. B1-2.) For instance, Plaintiffs have repeatedly asked for records of meal and/or rest periods taken by drivers, including logs, but none have been provided. (*Id.*, Exhs. B1-4, see e.g. RFPD nos. 21, 23.) Finally, this is problematic because Defendant, the employer who presumably maintains complete control of evidence (documentary evidence, paperwork, photographs, etc.) ostensibly supportive of the conclusions made by Mr. Aboudi's declaration, does not produce any such best evidence.

Plaintiffs also note that Paragraphs 2-12: provide admissions that common questions predominate. Paragraphs 4, 7, 9: provide admissions that AB did not pay overtime, pay the OLW rate, or provide drivers 30-minute, uninterrupted, off-duty meal periods after 5 hours.

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Had Defendant raised any of its "new" factual issues (regarding overtime and the Oakland Living Wage ("OLW")) in early August 2011, it would have afforded Plaintiffs the 75 days in which to respond as required by statute. Defendant's timing prejudices Plaintiffs particularly because many of the factual allegations raised in the motion to decertify (though only supported in large part by the company owner and president's declaration without additional records) are not supported by information previously provided to Plaintiffs. For example, many of the specific allegations made by Defendant in the overtime section have not been raised before. (See Declaration of Lisl R. Duncan in support of Plaintiffs' opposition to motion for decertification ("Duncan Dec.") ¶ 2.) Mr. Bill Aboudi has provided several declarations over the course of this case, and these issues were not raised in his prior declarations. (See *id.* and Exhs. A1-3.) With regard to the defenses to the OLW claim raised in the decertification motion, factual disputes exist between the parties as will be discussed below. However, no evidence in support of what Defendant now raises regarding the OLW, other than Mr. Aboudi's limited testimony at his deposition, has been provided by Defendant throughout this case. (Duncan Dec. ¶ 2.)

If Defendant had raised these issues properly in a noticed motion for summary judgment, or other formal pleading, perhaps Plaintiffs would have conducted considerable supplemental discovery and engaged in extensive investigation and legal analysis in order to respond, or perhaps that would not have been necessary. But, the ability to make that determination and to engage in those processes, in response to a properly noticed motion, is Plaintiffs' right. Defendant cannot deprive the Class of this right.

In addition to prejudicing Plaintiffs due to its inappropriate timing, Defendant asks the Court essentially to make merits determinations in its decertification motion. This request is wholly improper: "Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims." (*Linder*, *supra*, at pp. 440-441.) Defendant's motion should be denied because it unfairly prejudices the Class and it seeks impermissible merits determinations.

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B. DEFENDANT ADMITS THAT COMMON QUESTIONS OF LAW AND FACT APPLY TO THE CLASS BY ITS OWN MOTION

As this Court's Order explained in granting class certification in this case on December 3, 2010, "the focus in a certification dispute is on what type of questions – common or individual – are likely to arise in the action, rather than on the merits of the case[.]" (*Sav-On Drug Stores, Inc. v. Super. Ct. (Rocher)* (2004) 34 Cal.4th 319, 327.)

> Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants. 'It would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues.' (citation).

(*Id.* at p. 340.) Defendant makes numerous admissions on the face of its motion as to the predominance of common questions of law and fact.

1. Whether Drivers are exempt from California overtime laws is a common question of law and fact.

Defendant admits that the question of whether or not the Class is exempt from California overtime laws is one that must be addressed for all class members. For example, in attempting to argue that Plaintiffs' overtime claim is not appropriate for class treatment, Defendant instead concedes the classes' commonality: "AB Trucking drivers and trainees have always …" (Def. mot. at p. 4:25), "AB Trucking drivers have always been required …" (*id.* at p. 5:6), "AB Trucking drivers and trainees haul tractor trailers loaded with containers …" (*id.* at p. 5:9-10), and "Because all drivers and trainees of AB Trucking were … it was AB Trucking's good faith understanding that such employees are deemed exempt from the California overtime laws" (*id.* at p. 5:17, 23.) Even AB's ignorance of the law defense recognizes that common issues of law or fact predominate over potential issues unique to individuals. Wholly unchanged by Defendant's motion, there is but one question of law and fact before the Court: are AB drivers and trainees entitled to overtime under California overtime laws? Once the Court answers this question for one class member, it will have answered the question as to all, with only a question of damages remaining.

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2. Whether AB Trucking is covered under the Oakland Living Wage Ordinance is a common question of law and fact.

As it did in raising its ill-timed defenses to the overtime claim, Defendant accepts that the question of whether or not the Class is covered by the OLW Ordinance is one that must be addressed for all class members. Defendant makes no reference, in either its facts or argument sections, as to *why* proceeding as a class on this claim will cause the class action to "splinter into individual trials," nor does it make any argument that "common questions do not predominate and litigation of the action in the class format is inappropriate." (Def. mot. at p. 12, citing *Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732, though not offering facts that would apply it to the instant case.) This is precisely the type of claim well-suited for adjudication on a classwide basis. (See *Sav-On*, *supra*, at p. 340.) A common question of law and fact as to all class members exists: were AB drivers and trainees covered by the OLW at any time during the statutory period? Once the Court answers this question for one class member, it will have answered the question as to all, but for any measure of damages.

3. Defendant's argument that it "complied with meal and rest period rules" is improper at the class certification or decertification stage.

Defendant's arguments with regard to meal and rest periods are addressed in more detail below, regardless however, the Court should not consider Defendant's arguments regarding the merits of this case in deciding a motion for decertification. The "proper legal criterion" for deciding whether to decertify a class is simply whether the class meets the requirements for class certification. (See *Sav-on*, *supra*, at p. 332.) Whether or not Defendant "complied" with meal and rest period rules is a merits inquiry, improper for this motion and at this stage: "Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims." (*Linder*, *supra*, at p. 441.) The California Supreme Court has held that "not only does federal law generally bar preliminary merit assessments for certification purposes, but a significant number of our sister states impose similar restrictions." (*Id.* at p. 443 citing seven cases from other states.)

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Although meal and rest period law is somewhat unsettled, whether the California Supreme Court determines that employers have an "affirmative obligation to ensure that workers are actually relieved of all duty" (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962) or that they "need only provide [meal breaks] and not ensure they are taken" as the court held in *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, 31 [currently on review], Defendant failed to comply with its obligation, as it did nothing to even "provide" meal periods to Drivers, yet automatically deducted one hour for meal periods whether taken or not. It is undisputed that AB made no effort to comply with the Wage Order requirement that employers keep accurate daily records of meal periods and hours worked.[3] (*Cicairos*, *supra*, at p. 962 [citing 8 Cal. Code Regs. §11090].) AB did not track actual meal periods, did not schedule meal periods, and did not "monitor compliance." (*Ibid.*)

Instead, AB deducted one hour of pay from every driver for every day worked *automatically*. Mr. Aboudi's most recent declaration states: "TimeCalc, the computer software program, may have an 'automatic setting'" – which Plaintiffs again point out that AB's person most knowledgeable as to payroll testified *was the setting AB used* – "but AB Trucking does not have an automatic policy with regard to deducting one hour's pay for meal or rest breaks." (See Aboudi Dec. ¶ 11.) Not only is this statement absurd, but Mr. Aboudi lacks the personal knowledge to make it as he was not designated person most knowledgeable with regard to payroll. Simply because he signs a declaration, presenting no other evidence, stating "on occasion" he would instruct payroll "to not deduct," in no way even begins to meet the standard required under the Labor Code and Wage Order, measured by any legal standard, but particularly when also contradicted by various other sources, including his own prior declarations. (See Duncan Dec. ¶ 2, Exh. A3 at ¶ 15: "Employees who did not report they had not taken a lunch break were presumed to have taken their lunch break"; Duncan Dec. ¶ 4, Exh. C, Wellemeyer

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[3] The Declaration of William Aboudi in support of Defendant's opposition to Plaintiffs' motion for summary adjudication (Duncan Dec. ¶ 2, Exh. A3, ¶ 13), states: "Beginning on April 21, 2009, AB started providing a place for employee drivers to record their meal periods each shift." Plaintiffs have never seen any of these records, despite Plaintiffs' supplemental request for production of documents under CCP section 2031.050(a) and (b) sent to Defendant on September 16, 2011. (See Duncan Dec. ¶ 3, Exh. B1, B2.) And, in any event, this is an admission of failure to comply from March 2004 to April 2009.

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Dec. ¶¶ 8-10; Duncan Dec. ¶ 10, Exh. I, Cooper Dec. ¶¶ 13-17, 20-22; Bryant Dec., Exh. 4, Blyth Depo. at 23:2-20; 25:1-2; 26:22-27:5;[4] 30:25-31:10; Bryant Dec., Exh. 5, Navarro Depo. at 20:21-21:10 (this lawsuit filed March 2008); see also Duncan Dec. in support of Plaintiff's motion for class certification, on file with the Court, at ¶8 and Exh. B at 116:13-15; 99:14-100:13, Exh. C at 35:10-36:17, 60:8-61:6; Godfrey Decl. at ¶¶ 13-16; Gilbert Decl. at ¶¶14, 15.)

Defendant attempts to raise a question of whether California meal and rest period law applies, and, if so, which interpretation of California law applies – all common questions of law and fact, which are not grounds for decertification. Legal precedent establishes that whether the automatic deduction occurred is a common factual and legal inquiry properly determined on a classwide basis. (See e.g., *Jaimez v. Daiohs USA, Inc.*, (2010) 181 Cal.App.4th 1286, 1303-1304 certifying a meal and rest period class and finding that the class certification determination could be made without addressing the merits of the meal and rest period claims: "… we are not, at this stage, charged with adjudicating the legal or factual merits of Jaimez's causes of action.) Common questions of law and fact are before the Court: are AB drivers and trainees entitled to meal and rest periods? Did AB provide drivers and trainees with meal and rest periods? Once the Court answers these questions for one class member, it will have answered the question as to all, with only the damages question remaining.

C. NO GROUNDS FOR DECERTIFICATION EXIST

1. Defendant presents no new facts that alter the predominance of common questions.

For the defenses it raises to both the overtime and OLW claims, Defendant relies only upon self-serving conclsuory statements, and/or unreliable or unsupported evidence.

a) Overtime claim

Defendant's motion makes broad, sweeping legal conclusions without providing any permissible evidence or other support. For instance, Defendant claims that all drivers and

[4] "Q: When you were a driver, did anyone at AB Trucking ever inform you about AB Trucking's policy on meal periods? A: No. Q: Did you have an understanding of what AB Trucking's policy was on meal periods? A: Yes … eat when you can."

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trainees of AB Trucking "were engaged in interstate commerce," had "Class A commercial driver's licenses," drove vehicles that "weighed in excess of 10,000 pounds," and "were regulated" by the DOT, Federal Motor Carrier Safety Administration and Federal Highway Administration. Yet, Defendant offers scant support for these claims. (See Def. mot. at p. 5:17-23; see also Duncan Dec. ¶ 3, Exhs. B1-4; see generally Duncan Dec. ¶¶ 4, 10, Exh. C, Wellemeyer Dec. and Exh. I, Cooper Dec.)

b) Oakland Living Wage claim

Attached to Duncan Dec. ¶ 5 as Exhibit D, is a "Standard Tariff Assignment" signed by the Port of Oakland and Oakland Maritime Support Services ("OMSS"). Though Mr. Bill Aboudi refused to answer questions regarding OMSS at his deposition, on information and belief Plaintiffs allege Mr. Bill Aboudi is the president and an owner of OMSS. (Duncan Dec. ¶ 6, Exh. E; Exh. F at 35:18-36:5; 234:13-17; and Exh. D, OMSS Tariff Assignment signed by "Bill Aboudi, President.") The Tariff Assignment was produced in response to Plaintiffs' subpoena for business records from the Port of Oakland. (Duncan Dec. ¶ 6.) The Tariff Assignment states:

> The area has 222 container spaces … 74 tractor truck spaces … The *tenant* will *sub-lease* the storage spaces to owner operators and/or trucking companies using owner operators. The *tenant* will be billed the fixed amount *monthly* … The Port of Oakland Tariff No. 2A space charges to the sub-tenant will be $75.74 for a container space and $59.67 for a tractor truck space … [emphasis added].

(Duncan Dec. ¶ 6, Exh. D.) According to the Tariff Assignment, the total amount per period (equaling "SQ. FT/MONTH") is $17,721.99. The OMSS Tariff Assignment is signed by "Bill Aboudi, President."

Defendant has admitted that at all times during the statutory period, AB Trucking d/b/a Oakland Port Services leased its operating space in the Port area from OMSS. (See Duncan Dec. ¶ 6, Exh. F at 36:10-22; 37:23-38:12.) AB holds and/or has held a "sublease" with an entity that pays the Port $50,000 or more by means of a lease. [5] (See Oakland City Charter section 728.)

[5] If payments of $17,721.99 are made monthly for 12 months, for example, the total amount equals $212,663.88.

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Based on Plaintiffs' review of the documents produced by Defendant in discovery, payroll and time records, Plaintiffs count 10 drivers employed by AB in 2004, 18 drivers employed in 2005, 29 drivers employed in 2006, and 36 drivers employed in 2007. (Duncan Dec. ¶ 7.) There are also "office" employees who appear on the payroll records produced by AB for these years. Most of the information for the office employees is redacted, however, it is possible by dividing the total number of hours worked by drivers *and* office employees to estimate that there were at times 5.6 individuals[6] working full-time (40 hours per week) as AB "office" employees. (Duncan Dec. ¶ 7.) In any event, common questions exist as to the OLW claim exist for all class members. (See generally Duncan Dec. ¶¶ 4, 10, Exh. C, Wellemeyer Dec. and Exh. I, Cooper Dec.)

c) Testimony of the two opt-outs: David Blyth and Jose Luis Navarro

Defendant cites to the testimony of Blyth and Navarro generally. Both provide more support for Plaintiffs' position than Defendant's. For instance, Blyth admitted he would eat in his truck while in line outside and inside the Port of Oakland, and the he considered that to be a "meal period." (Duncan Dec. ¶ 8, Exh. G, Blyth Depo. at 80:1-13; 81:9-14.) Navarro testified that he took meal periods, but when he explained this in detail he explained that his "meal periods" were likewise taken while "waiting" in the Port, and thus when he was not "off-duty" as required by law. (Duncan Dec. ¶ 9, Exh. H, Navarro Depo. at 30:18-24; 33:1-25.) Defendant concedes its violation of the law because it admits these meal periods were not "off-duty." Navarro also admitted he does not take rest breaks in the last four hours of his shift each day and that he has never been compensated by AB for missing a rest break. (*Id.* at 36:1-4; 36:19-21.)

Moreover, Blyth and Navarro both hold unique relationships with Bill Aboudi and/or his son Jay Aboudi. Blyth lived on AB Trucking property for a number of months in exchange for watching and cleaning up the grounds, and at the time of his deposition he was renting a space to park his truck from OMSS. (Duncan Dec. ¶ 8, Exh. G, Bylth Depo. at 52:17-53:4; 54:2-6; 60:9-10.) Jay Aboudi accompanied Navarro in a separate legal proceeding regarding a ticket. (Duncan

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[6] Plaintiffs recognize that 5.6 individuals is an impossibility, however, this is the total when the total number of hours worked by office employees is divided by 80 hours (for a two week period). (See e.g., bates stamp no. 2005 Godfrey 0195.) Plaintiffs cannot speculate as to whether there were more than 5.6 employees working part-time, or less than 5.6 employees working overtime.

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Dec. ¶ 9, Exh. H, Navarro Depo. at 54:13-16; 55:2-16.) These individualized arrangements are not a problem to proceeding as a class action because Blyth and Navarro are opt-outs; they are no longer in the class. Blyth and Navarro's relationships with the Aboudis, however, do call into question the veracity of their testimony as relied upon by Defendant because both have an incentive to paint AB in the most favorable light.[7]

2. <u>Defendant presents no new law that would change the predominance of common questions.</u>

As defense counsel stated in his email to the Court of January 12, 2012, a significant portion of Defendant's argument is eliminated because the California Supreme Court depublished and granted review of *Tien v. Tenant Healthcare Corp.* (2011) 192 Cal.App.4th 1055. (See *Tien (Kevin) v. Tenet Healthcare Corporation* (2011) 251 P.3d 941.) Defendant offered *Tien*, as the foundation for its entire motion, in an attempt to change the legal standard set forth in *Linder*. (See Def. mot. at p. 11:18-12:10.) As *Linder* continues to govern, the standard used throughout Defendant's moving papers is inaccurate. Any other "new" case law Defendant presents going to the merits is improperly raised in this motion to decertify. Plaintiffs show below that common questions continue to predominate.

d) California law regarding meal and rest periods is not preempted, but in any event, this presents a common question of law and fact

States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety are only a few examples. (See, e. g., *Day-Brite Lighting, Inc. v. Missouri* (1952) 342 U.S. 421.) The standard for preemption by the Federal Aviation Authorization Act ("FAAA Act")[8] is that state regulation in an area of traditional state

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[7] Navarro is also currently employed as a driver. In his deposition he hinted at a fear of causing trouble with his employer if he were to remain in the lawsuit. (Duncan Dec. ¶ 9, Exh. H, Navarro Depo. at 39:22-40: 2; 40:11-12; 42:1-4.) Mr. Bill Aboudi was present at both Blyth and Navarro's depositions.

[8] Section 601 of the FAAA Act became federal law in 1995. "As a general matter, this section preempts a wide range of state regulation of intrastate motor carriage. It provides:

> (c) Motor carriers of property.
>
> (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a

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power having no more than an indirect, remote, or tenuous effect on a motor carriers' prices, routes, and services are not preempted. (*Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1188.)

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca, in which the Ninth Circuit held that the language and structure of the FAAA Act does *not* evidence a clear and manifest intent on the part of Congress to preempt California's Prevailing Wage Law (Labor Code §§ 1770-80) ("CPWL"), governs here. While CPWL "in a certain sense" is "related to" the employer's "prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous … We do not believe that CPWL frustrates the purpose of deregulation by *acutely* interfering with the forces of competition." (*Mendonca*, *supra*, at pp. 1185, 1189.) Plaintiffs recognize that prevailing wage laws are not identical to meal and rest break laws. However, the reasons offered by the employer (also of drivers) in *Mendonca* in support of preemption under the FAAA Act were nearly identical to the concerns raised by Penske in *Dilts v. Penske Logistics, LLC* (2011) 2011 U.S. Dist. LEXIS 79378.[9] The California appellate court in *Fitz-Gerald v. Skywest, Inc.* (2007) 155 Cal.App.4th 411, found that actions to enforce California's minimum wage laws and labor laws governing meal and rest breaks are not preempted by the Airline Deregulation Act ("ADA"). The preemption language used in the ADA and the FAAA Act is identical.[10] The district court in *Dilts v. Penske Logistics, LLC* is alone in its holding.

In addition, the Court should be aware that the California Supreme Court granted review of *The People ex rel. Harris v. Pac Anchor* (2011) 195 Cal.App.4th 765, on August 10, 2011. In *Pac Anchor*, the Court of Appeal had determined that the action was not related to the price,

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> law, regulation, or other provision *having the force and effect of law related to a price, route, or service of any motor carrier* . . . with respect to the transportation of property."

(*Mendonca*, *infra*, at p. 1187.)

[9] The employer in *Mendonca* argued that CPWL "increases its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, [employer] alleges that its rates for "services" are based on: (1) costs, including costs of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, including prevailing wage requirements." (*Mendonca*, *supra*, at p. 1189.)

[10] One of the reasons Congress enacted the preemption provision in the FAAA Act, one identical to the existing provision deregulating air carriers in the ADA, was to "even the playing field" between air carriers and motor carriers. (See *Mendonca*, *supra*, at p. 1187.)

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route, or service of any motor carrier because the action was based on alleged violations of statutory obligations concerning employees, which was a matter falling within the broad authority of states under their police powers to regulate the employment relationship to protect workers. While the California Supreme Court's pending decision in *Pac Anchor* might bear some relationship to the facts of our case, it bears no more relationship than that of the Supreme Court's decision in *Brinker*. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* establishes that the language of the FAAA Act does not preempt Plaintiffs' statutory claims. Defendant has not addressed this precedent, and it has made no showing of how *Dilts* affects the specific facts of this case, or the suitability of Plaintiffs' claims for class treatment.

D. IGNORANCE OF THE LAW IS NO DEFENSE

Throughout its motion Defendant references "AB Trucking's good faith understanding" admitting that it did not pay overtime, did not pay the OLW rate to drivers, and did not take affirmative steps to ensure drivers were provided with uninterrupted, off-duty meal and rest periods. The Court is certainly familiar with the general rule that "ignorance of a law is not a defense to a charge of its violation." (See *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75.[11]) There is some question of the appropriate use of this defense with respect to the question of whether Defendant should be penalized for failing to provide accurate, itemized wage statements (Labor Code §§ 226, 226.3), or whether it "willfully" failed to pay discharged or quitting employees all wages owed (Labor Code § 203), but this defense is misplaced as to all other claims.

E. DEPENDENT CLAIMS ARE PROPERLY SUBJECT TO CLASS TREATMENT

Defendant concedes that the so-called derivative claims are also best adjudicated on a classwide basis by acknowledging their reliance on claims properly subject to class treatment as described above. For example, the evidence reflects that AB misclassified drivers as unpaid

[11] The court in *Heritage Residential Care, Inc.* determined that because an employer's subjective belief about the law was irrelevant to determining inadvertence, the hearing officer was not required to consider such evidence. The hearing officer considered the employer's proffered evidence and did not err in concluding that the employer's asserted good faith mistake of law did not constitute inadvertence. The failure to provide itemized wage statements was an intentional act, as to which there was no basis for exercising discretion to reduce or eliminate the penalty assessment.

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trainees, even those with Class A licenses. (Duncan Dec. ¶ 10, Exh. I, Cooper Dec., ¶ 2, 3, 5; see also Gilbert Dec. on file with Court, ¶¶ 2, 3, 6, 8, 17.) The common question before the Court remains: were drivers with Class A licenses who were classified as trainees and received no pay were *mis*classified as non-employees? There is no reason this question should be answered on a piecemeal basis. Likewise, common questions predominate as to Plaintiffs' remaining claims, which are also best addressed as class claims.

III. CONCLUSION

This Court's Order of December 3, 2010 certifying the Class should stand. By its own motion Defendant concedes questions of law and fact predominate. Plaintiffs request the Court deny Defendant's ill-timed motion in its entirety.

Dated: January 26, 2012

WEINBERG, ROGER & ROSENFELD
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By: _____
DAVID A. ROSENFELD
CAREN P. SENCER
LISL R. DUNCAN

Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

118212/651770

PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On January 27 2012, I served the following documents in the manner described below:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER CLASS CERTIFICATION ORDER, AMEND, MODIFY OR DECERTIFY A CLASS ACTION; CCP § 1008 AND CAL. RULES OF COURT, RULE 3.764

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☐ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jkoffler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Guy A. Bryant
Bryant & Brown
476 3rd Street
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 27, 2012, at Alameda, California.

Jennifer Koffler

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