DAVID A. ROSENFELD, Bar No. 058163
CAREN P. SENCER, Bar No. 233488
LISL R. DUNCAN, Bar No. 261875
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501-1091
Telephone 510.337.1001
Fax 510.337.1023

Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

IN THE 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. RG 08-379099 *CLASS ACTION* PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION Date: Time: Dept: 20 Judge: Robert Freedman Reservation No. 1006715

TABLE OF CONTENTS

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

FEDERAL STATUTES

FEDERAL REGULATIONS

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

STATE STATUTES

STATE REGULATIONS

OTHER AUTHORITIES

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

I. INTRODUCTION AND PROPOSED CLASSES

Plaintiffs Lavon Godfrey and Gary Gilbert are truck drivers formerly employed by Defendant Oakland Port Services Corp., d/b/a AB Trucking ("Defendant," "OPS" or "AB Trucking"), a transportation corporation doing business in California, who have brought this wage and hour action on behalf of themselves and all others similarly situated. Plaintiffs' claims are based upon practices that were generally applied to Defendant's driver employees, and therefore, Plaintiffs share a clear community of interest with the classes of workers proposed in this motion. Plaintiffs seek to represent a class in excess of fifty members who seek wages, restitution, penalties, and an injunction requiring AB Trucking to abide by California and municipal law. The inquiries at the heart of this lawsuit are uniform for all members of the proposed class, including the class representatives themselves. Five classes are readily defined as follows:

(1) The All Hours Worked Class[1]

All drivers employed by Defendant during the statutory period who were not paid for all hours worked in any work week.

(2) The Misclassified Employee or No Wages Received Class

All drivers employed by Defendant during the statutory period who were not paid for any hours worked in any work week.

(3) The Overtime Class

All drivers employed by Defendant during the statutory period who were not paid for hours worked over eight (8) in a day and/or forty (40) in a week at an overtime rate of time-and-one-half the regular rate.

(4) The Living Wage Class

All drivers employed by Defendant during the statutory period who were paid less than the Oakland Living Wage for any hour(s) worked.

(5) The Meal and Rest Period Class

All drivers employed by Defendant during the statutory period who were not provided rest breaks and/or meal periods as required by California law.

Plaintiffs' claims are exceptionally well-suited for determination on a class action basis and they satisfy each of the requirements pursuant to Code of Civil Procedure section 382. Resolution

[1] The statutory period ("statutory period") is March 1, 2004 through the present.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

through the class action device would be a substantial benefit to the court and to the parties, as it would be the most time and cost efficient way to resolve the issues. Plaintiffs hereby request the Court grant class certification on all claims.

II. RELEVANT FACTS

Defendant AB Trucking is a drayage company employing drivers who primarily drive trucks to be loaded and unloaded within the Port of Oakland. Defendant's yard is located within the "Port area." Driving time from the yard to the entrance of the Port is estimated to take between 5 and 15 minutes. Drivers also may be assigned trips throughout California. Due to Defendant's uniform lack of a policy on meal and rest periods, drivers are not paid for all hours worked. All drivers are commonly subject to Defendant's lack of a written meal and rest period policy. (See Declaration of Lisl R. Duncan ("Duncan Decl.")[2], Exh. B at 57:12-17; 58:16-59:12; 116:13-118:8; 118:12-25.) Drivers eat meals in the trucks while performing work functions. Nonetheless, under Defendant's single payroll system, drivers suffer thirty (30) minute deductions from wages for meal periods not taken. (See Exh. B at 171:24-173:7; 180:4-21; 189:6-13.) There is an automatic deduction of sixty (60) minutes of pay from each driver's pay per day for the meal periods. (See Exh. C at 35:10-36:17; 60:8-61:6; Exh. B at Exh. 2, Exh. 16) This automatic deduction occurs within the payroll process and is applied to all drivers. (See Exh. C at 35:10-36:17; 60:8-61:6; Exh. D at 176:6-177:11.) Defendant has a policy of not paying overtime to its drivers. Furthermore, Defendant pays its drivers at a rate less than the Oakland Living Wage rate. (See Exh. C at 68:2-5.) In addition, Defendant suffers and permits drivers it classifies as "trainees" to work; however these "trainees" are not paid at all for the work they perform and are not subject to a learner, or any other lesser, rate. (See Exh. E at 10:6-7.) Moreover, while trainees perform functions performed by drivers classified as employees, they do not receive any cognizable training.[3] These so-called trainees are not provided compensation as required by law and are misclassified as non-employees. (See Exh. C at 22:1-23:19.)

[2] All exhibits, unless otherwise noted, are to the declaration of Ms. Duncan.

[3] Defendant will argue job specific training occurred, such as trainings of locations inside the Port. On-the-job training, however, does not negate the employment relationship because the Industrial Welfare Commission Wage

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

III. APPLICABLE STATE WAGE AND HOUR PROVISIONS

A. CALIFORNIA LAW REQUIRES EMPLOYERS TO PAY EMPLOYEES FOR ANY AND ALL HOURS WORKED

1. All Hours Worked

California Labor Code ("Labor Code") section 510 and IWC Wage Order 9, which governs the transportation industry, require employers to pay each employee not less than the applicable minimum wage for all hours worked in the payroll period. Failure to provide meal and rest periods or to pay compensation in lieu of such breaks, creates a condition where employees do not receive minimum compensation for all hours worked. When an employee works instead of taking a meal or rest period, this is time worked for which the employee must be compensated. (See IWC Wage Order 9(3); Labor Code § 510.) The employer fails to pay at least minimum compensation for all hours worked when employees miss meal or rest periods yet have wages deducted.

Here, all drivers employed in the statutory period, including those who were misclassified, were not provided meal and rest periods as required by law. Drivers are told by Defendant not to take rest breaks away from their vehicles and to eat meals inside the vehicles. (See Exh. D at 157:7-158:11.) 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. (See Exh. D at 157:7-158:11; 159:9-160:15; 191:15-193:4; 193:11-14.)

Ms. Godfrey's claims are representative of those class members who Defendant failed to pay for *all hours worked* in violation of state and municipal law.

2. Misclassified or No Wages Received Class

IWC Wage Order 9(4) and Labor Code section 1194 require an employer to provide compensation for all hours worked. AB Trucking alleges certain employees, including Mr. Gilbert, were hired by AB Trucking not as employees, but as "trainees" and thus are not entitled to

---

Orders define learners as "employees." (See Industrial Welfare Commission ("IWC") Wage Order No. 9, section 4, subsection a, codified at 8 California Code of Regulations 11090.)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

any wages. An individual is an employee of an employer any time he or she is engaged in work for the benefit of the employer.[4] The facts of the situation determine the relationship, regardless of either party's intent to characterize the relationship as one other than an employment relationship. All time an employee is suffered or permitted to be worked must be compensated at no less than the state minimum wage.[5]

Here, "trainees" are suffered or permitted to work, but Defendant does not compensate these drivers for *any* hours at any wage rate. Not only are trainees suffered and permitted to work, performing functions that other compensated drivers perform, but trainees do not receive any non job-specific training. Defendant has no program or organized action for trainees, and it has no AB Trucking training manuals or materials. (See Exh. B at 144:13-21; 146:20-22; Duncan Decl. ¶ 8.) Trainees do, however, perform the job functions of employee drivers, regardless of the fact that they are accompanied by an employee driver while performing these functions.

Trainees were not paid for any hours they were suffered or permitted to work and were misclassified. (See Exh. E at 10:6-7) Pursuant to Labor Code sections 1194 and 1194.2, an employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover the unpaid balance of the full amount.

Mr. Gilbert's claims are representative of those class members who are subject to meal and rest period violations and Defendant's failure to pay for *any hours worked* as a result of misclassification in violation of state and municipal law.

---

[4] IWC Wage Order 9(2)(H) defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so": "The "suffered or permitted to work" language does not limit whether time spent "subject to the control of an employer" is compensable." (See *Morillion v. Royal Packing Co.*["*Morillion*"] (2000) 22 Cal.4th 575, 582.) Further, the definition of "hours worked" is expanded by, rather than limited to, the time spent when an employee is "suffered or permitted to work" . . . "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. . . . The employer knows or has reason to believe that he is continuing to work and the time is working time. [Citations.]" (29 C.F.R. § 785.11 (1998).) "In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed." (29 C.F.R. § 785.13 (1998).)." (*Id.* at pp. 584-585.)

[5] IWC Wage Order 9 allows for a learner rate of no less than 85% of the minimum wage for the first 160 hours of work if the employee has no previous similar or related experience. As of January 1, 2008, this rate was $6.80 per hour. (Available at http://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm) The Oakland Living Wage does not provide a separate learner rate. (See Plaintiff's Request for Judicial Notice ("RJN") filed herewith as Exhibits 1 and 4.)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

B. CALIFORNIA AND MUNICIPAL LAW REQUIRE EMPLOYERS TO PAY EMPLOYEES AT THE APPROPRIATE WAGE RATE

1. The Overtime Class

Labor Code section 510 and IWC Wage Order 9(3) provide that employees shall be compensated at the rate of one and one-half times such employee's regular rate of pay for hours worked beyond eight (8) in a workday and forty (40) in a week. AB Trucking's payroll records for the statutory period show that despite working more than 40 hours in a week, the employees never received more than the regular rate for any hours worked. (See Exh. B at Exh. 2-4.) The depositions of AB Trucking's two persons most knowledgeable, confirm that overtime compensation at the rate of 1 ½ times the regular rate was not paid to drivers. (See Exh. B at 119:20-120:4; Exh. C at 19:10-15.)

Further, if employees miss a meal and/or rest period in a full work shift such that it causes their work shifts to extend past eight hours, the employer is required to compensate the employees for the hours worked in excess of eight hours, at the overtime rate. For example, if an employee works through her meal period, but the employer assumes a meal period has been taken and thus does not pay the employee for this thirty minutes of time worked, the employer has failed to pay the employee for all time worked. Assuming a scheduled 8 ½ hour day (if there was a ½ hour lunch), the employee must be compensated for the thirty minutes worked but not compensated at an overtime rate. (Labor Code § 510.)

The Motor Carrier Act ("MCA")[6] creates an exemption to the Fair Labor Standards Act ("FLSA") requirement to pay overtime if the employee is a driver regulated by the Department of Transportation ("DOT"). The requirement to pay time and one-half to all employees working beyond 40 hours in a work week, does not apply to any employee for whom the Secretary of Transportation ("Secretary of DOT") has the power to establish maximum hours of service, this constitutes the MCA exception. (See 29 U.S.C. § 213(b)(1).) The DOT exemption to the FLSA has limitations including two applicable in this situation. First, there is an exception to this

[6] Codified at 49 U.S.C. § 31131, et seq.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

exemption for a category of drivers referred to as "spotters," and, second, overtime must be paid in California if the DOT is not *actually* regulating the drivers; if the DOT has not actually taken jurisdiction over the drivers, then they fall under regular California overtime law as California law is more protective of workers' rights.

The Secretary of Transportation can take jurisdiction over drivers as allowed for under the MCA. Even if a driver falls under the Secretary of DOT's jurisdiction, for that driver to be exempt, it must also be shown that the driver is engaged in activities that directly affect the operational safety of motor vehicles and that those vehicles transport property in interstate commerce. (See 29 C.F.R. § 782.2) Drivers are engaged in activities of a character affecting safety so as to be subject to the power of the Secretary of DOT, if the drivers are "required to complete U.S. Department of Transportation logs regarding the time spent driving, pass DOT written and driving tests, complete various DOT forms, and pass a DOT physical and drug test." (Fair Labor Standards Act 336 (Ellen C. Kearns ed., BNA 1999).) Because California law is more protective, for a California driver to be exempt, she must "actually be engaged in performing tasks that affect the safety of vehicles operating in interstate commerce" such that the Secretary of Transportation has taken jurisdiction. The exemption applies to any week in which those exempt tasks are performed. (*Reich v. American Driver Serv.* (9th Cir. 1994) 33 F.3d 1153.)

First, the MCA exemption does not apply here because Defendant did not adhere to DOT standards. No driver, including those making out of state deliveries are required by Defendant to maintain DOT log books or adhere to other DOT standards including hours of service, DOT physicals or the like. (See Exh. B at 33:12-35:3.) Further, there is no evidence that the drivers are subject to random drug testing, pre-employment physicals or any other DOT requirement. Mr. Aboudi indicated in his deposition that the drivers did not have to keep logs because they work within 100 miles of the facility but nonetheless, Defendant had the right, under the DOT exemption, to not pay overtime. (See Exh. B at 33:12-35:3; 119:20-120:4.)

Secondly, even if the MCA applied here, then the "spotter" exception would apply. There is a category of drivers engaged in interstate commerce who are not covered by the MCA or the

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

FLSA exemption. Known as "spotters" these individuals drive either (1) empty trucks up to docks to be loaded or (2) loaded trucks to a location in or about the premises of the trucking terminal where they will be picked up by another driver to be delivered to their ultimate destination are generally not covered by the motor carrier exemption." (See Fair Labor Standards Act, *supra*, at p. 338; *see* 29 C.F.R. § 782.3(b); *Keegan v. Ruppert* (S.D.N.Y. 1943) 2 F.R.D. 8; but see *Walling v. Silver Fleet Motor Express* (W.D. Ky. 1946) 67 F.Supp. 846.)

Lastly, because the drivers here are not actually regulated by the Secretary of Transportation, the default is that California overtime law applies.[7] The FLSA exemption for overtime applies if the Secretary of DOT *could* take jurisdiction over the driver. Under California law, the exemption from overtime only applies if the Secretary of DOT *actually* takes jurisdiction over the driver.[8]

Here, the Secretary of DOT has not taken jurisdiction over the drivers, the Employer does not consider the drivers to be under DOT jurisdiction (as evidenced above), and the drivers are most likely spotters. Under any of these formulations, the drivers are entitled to overtime at one and one-half times the regular rate.

2. The Living Wage Class

Plaintiffs also plead failure to abide by the Oakland Living Wage.[9] Oakland City Charter

---

[7] Under California law, if a truck is less than 10,000 lbs, then the federal exemption does not apply and overtime is due when sufficient hours are worked (over 8 hours in a day and/or 40 hours in a workweek). (See IWC Wage Order 9.) If the truck is more than 26,000 lbs, then the driver is subject to DOT regulations and is exempt from overtime under both state and federal law. If a two-axle truck is less than 26,000 pounds but does not exceed 40 feet in length and does not tow a trailer or semitrailer of more than 10,000 pounds, California overtime laws apply. (See 49 C.F.R. §395.1-.13; 13 C.C.R. §1200, *et seq*.

[8] "California has the power to adopt a narrower exemption from its overtime laws than the Motor Carrier Act exemption under the FLSA. Every appellate court to consider the question has concluded that state overtime laws are not preempted by the Motor Carrier Act exemption under the FLSA. *See Agsalud v. Pony Express Courier Corp. of Am.* (9th Cir. 1987) 833 F.2d 809, 810; *see also Overnite Transp. Co. v. Tianti* (2d Cir. 1991) 926 F.2d 220, 221-22; *Pettis Moving Co. v. Roberts* (2d Cir. 1986) 784 F.2d 439, 441; *Williams v. W.M.A. Transit Co.* (D.C. Cir. 1972) 472 F.2d 1258, 1263; *Dep't of Labor and Indus. of the State of Wash. v. Common Carriers, Inc.* (1988) 111 Wash.2d 586. Because there is no federal preemption, the words "are regulated" in Wage Order 9 may be read (so far as federal law is concerned) to mean that the Motor Carrier Act exemption applies to California overtime laws only to the extent that the Secretary actually regulates the hours of the drivers in question." *Watkins v. Ameripride* (9th Cir. 2004) 375 F.3d 821, 830.

[9] See Plaintiff's RJN at Exhibits 1, 3 and 4 filed herewith.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

section 728 requires that all Port-Assisted Businesses provide compensation not less than the Oakland Living Wage. The July 2007-June 2008 minimum compensation was $11.58 without benefits and $10.07 with benefits according Oakland Municipal Code section 2.28. The current minimum compensation is $12.45 without benefits and $10.83 with benefits. Under any of these formulations, the drivers are entitled to overtime at 1 ½ times the regular rate. AB Trucking's facility is located within the Port area on City property. (See Exh. B at 35:4-6.) AB Trucking's payroll records for the statutory period show that drivers were paid less than the Oakland Living Wage rate and that the vast majority of drivers did not receive health benefits. (See Exh. B at Exh. 2-4.)

C. CALIFORNIA LAW REQUIRES EMPLOYERS TO PROVIDE EMPLOYEES WITH MEAL PERIODS AND PAID REST BREAKS

State law requires employers to provide employees with meal periods and paid rest breaks. Employers must provide employees who work more than five hours in one day with at least a 30-minute, off-duty meal period and an additional 30-minute meal period when employees work more than 10 hours in one day. (Labor Code § 512(a); IWC Wage Order 9(11).) Furthermore, IWC Wage Order 9(7) requires employers to record and retain accurate information with respect to each employee, including information regarding employees' meal periods. (IWC Wage Order 9(7)(A)(3), (7)(C).)

The Labor Code and the IWC Wage Order require an employer to pay an employee one hour of pay at the employee's regular rate as compensation for each workday that a meal period is not provided. (Labor Code § 226.7(b); IWC Wage Order 9(11)(D).) The remedy provided by Labor Code section 226.7 constitutes a wage or premium pay, and is subject to a three-year statute of limitations. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.)[10]

In addition, IWC Wage Order 9(12), states that employers must authorize and permit employees with a minimum of 10 minutes of rest for every four hours worked in a day, or any

[10] Plaintiffs also plead violation of the Bus. & Prof. Code § 17200 *et seq.*, which extends the statute of limitations for restitution, including wages, from 3 years to 4. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179.)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

major fraction thereof. Rest breaks are counted towards hours worked and must be paid. (IWC Wage Order 9(12)(A).) Where an employer fails to provide a required paid rest break, the employer must pay the employee one hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided. (Labor Code § 226.7(b); IWC Wage Order 9(12)(B).)

Under the terms of IWC Wage Order 9(11), employees are required to receive a ½ hour unpaid, off-duty meal period during each eight (8) hour shift. Employees working beyond ten (10) hours in a day are entitled to a second ½ hour unpaid, off-duty meal period. Under the terms of IWC Wage Order 9(12), employees are entitled to two uninterrupted ten minute rest periods during each eight hour shift. As noted above, this is a wage payment. (*Murphy, supra* at p. 1102-1115.) Plaintiffs allege, on behalf of themselves and other drivers similarly situated, that AB Trucking systematically failed to provide drivers employed at its facility at the Port of Oakland 30-minute, off-duty meal periods and paid rest breaks. Plaintiff Godfrey was told by another driver employee designated as responsible for her initial training, "Here we just eat on the go. We eat in our truck, in line. We eat in our truck." (Exh. D at157:23-4.) Mr. Aboudi's testimony and the documents produced show no written policy on meals or rest periods and thus cannot support that any training was given on meals and rests periods. Plaintiffs Godfrey and Gilbert are representative as to the meal and rest period claims.

1. Certification of the Meal and Rest Period Class is not affected by *Brinker*-like Analysis

Currently pending before the California Supreme Court is an appeal from *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25. There are at least five issues on appeal to the Supreme Court including questions on the timing of meal and rest periods and the efforts the employer must use to provide meal and rest periods to employees. This appeal, which results in the appellate decision being depublished, creates uncertainty as to certain meal and rest period claims.

However, for certification of the proposed meal and rest period class, *Brinker*, and cases following its analysis, do not prevent certification because the violation here is caused by the

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

Defendant's admitted scheduling practice. Plaintiffs and the class have been denied the opportunity to take off-duty meal periods of at least 30 minutes, as required by law, nor are they permitted paid rest periods as provided by law. (See Exh. D at 157:7-158:11, 159:9-160:15, 48:8-10). Defendant has no policy on meal and rest periods, it gives no training on meal and rest breaks and provides no enforcement of any policy on meal and rest periods. (See Exh. B at 57: 12-17, 58:16-59:12, 116:13-118:8, 118:12-25) Time keeping documents produced by AB Trucking confirm deposition testimony of AB Trucking's person(s) most knowledgeable that Defendant does not maintain records of when drivers take meal and rest periods. (See Exh. B, Exh. 2-4) Instead, Defendant maintains a policy of automatically deducting one hour each day for a meal period in its payroll records, regardless of the fact that it would have no corresponding record showing that the employee actually received a one hour meal period. (See Exh. C at 35:10-36:17, 60:8-61:6; Exh. B at Exh. 2, 16; Exh. D at 198:20-199:5.) No assumption of meal periods taken may be made. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 ["*Cicairos*"]) Defendant has failed to pay drivers for the time improperly deducted. (See Exh. B at Exh. 2-4.) Missed meal and rest periods during this time period do not turn on the question of why the meal and/or rest period was not taken; the fact is quite simply, the employer did not make those breaks available as required by law. All employees in the statutory period were subjected to the same treatment. Like the other classes, this proposed class meets all requirements for certification purposes.

IV. ANALYSIS

A. CLASS CERTIFICATION IS SUPERIOR

Proceeding with this case as a class action allows drivers to collectively seek relief for modest individual monetary claims based on largely identical facts and legal theories. Class treatment will further judicial economy, sparing the Court "separate, duplicative proceedings [with] the same or essentially the same arguments and evidence." (See *Sav-On Drug Stores, Inc. v. Super. Ct.* ["*Sav-On*"] (2004) 34 Cal.4th 319, 340). The Supreme Court described the proper considerations that guide class certification in California:

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

> Many of the issues likely to be most vigorously contested in this dispute ... are common ones. 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.*)

The Supreme Court again stressed the value of class action litigation in adjudicating wage and hour claims in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 ("*Gentry*") because of the importance of the class action device in assuring the effective enforcement of statutory policies. (See *Vasquez v. Superior Court* (*Karp*) (1971) 4 Cal.3d 800, 808.) The court underscored the role of the class action in benefiting not only the individual litigant, but "the public interest in the enforcement of legal rights and statutory sanctions." (*Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 741.) In evaluating the importance of the class action device, the court held that trial courts must consider "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right[s]." (*Gentry, supra,* at p. 463.) As the Court of Appeals recently observed, "it is no accident that 'wage and hour disputes (and others in the same general class) routinely proceed as class actions.' [Citation.]" (*Ghazaryan v. Diva Limousine, LTD.* (2009) 169 Cal.App.4th 1524, 1538.) "By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (*Sav-On, supra,* at p. 340.)

All these factors weigh in favor of class certification in this case. The recovery of any single driver would be dwarfed by the costs of litigation from discovery through trial. Here, the wrong-doing by the employer is particularly egregious as it denied workers breaks, day in and day out, totaling thousands of breaks. Not only do drivers work without meal and rest periods, but one hour is automatically subtracted from their pay each day for a meal period, regardless of whether a

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

one hour lunch is taken or not. This cavalier disregard for drivers' rights is not permissible and clearly warrants class certification. (See e.g. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 446 ("*Linder*") [emphasizing that concerns over wrongful retention of benefits by defendants and thwarting continued wrong-doing with "impunity" outweighs concerns over management of class action suits].)

The danger of retaliation and intimidation is also present. As there are class members presently employed by AB Trucking, individual drivers may be reluctant to step forward and file a separate suit to enforce their rights. (Cf. *Bell, supra,* at p. 745 ["For current employees, a lawsuit means challenging an employer in a context that may be perceived as jeopardizing job security"]; *Linder, supra,* at p. 446.) In addition, denial of class treatment could very likely mean that AB Trucking will benefit from its ill-gotten gains. (See *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 715 [finding that "absent a class suit, defendant will retain the benefits from its alleged wrongs."]) The importance of class actions as a means of Labor Code enforcement, particularly claims relating to the payment of minimum wage and overtime compensation is a reoccurring statement of California Courts.[11] Any doubt as to whether a class action is appropriate should be resolved in favor of certification.[12] (See *Richmond v. Dart Industries, Inc.* ["*Dart*"] (1981) 29 Cal.3d 462, 473 [emphasizing that, so long as class members' rights are protected, class certifications should not be denied].)

B. THIS CASE SATISFIES ALL THE REQUIREMENTS FOR CLASS CERTIFICATION

Code of Civil Procedure section 382 authorizes class action suits when the question is one

[11] A sample of representative cases in this area include: *Gentry, supra,* 42 Cal.4th 443; *Morillion, supra,* 22 Cal.4th at p. 579 [class action proper for employees seeking compensation for all hours worked]; *Ghazaryan, supra,* 169 Cal.App.4th 1524; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1329; *Parris v. Superior Court* (2003) 109 Cal.App.4th 285; *Bell, supra,* 87 Cal.App.4th 805; *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403; *see also Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 [Labor Code section 2699 *et. seq.* is to supplement enforcement of the Labor Code which the state does not have adequate resources to enforce].)

[12] Reflecting the strong preference for class resolution of wage and hour claims, reported cases in which wage and hour claims were certified for class treatment include not only those cases noted in footnote 11, but also *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1; *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420; *Stephens v. Montgomery Ward & Co.* ["*Stephens*"] (1987)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. (See *Sav-on, supra*, 34 Cal.4th at p. 326.) The party seeking certification must 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.) To establish the requisite community of interest, the proponent of certification must show "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Id.*, citations omitted.) In light of these well-established principles, class wide treatment of this wage and hour suit is appropriate under section 382 and California case law.

1. The putative class is ascertainable and numerous.

In determining whether a class is ascertainable, courts "examine the class definition, the size of the class, and the means of identifying class members." (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1274.) As stated above, five classes are readily defined as the (1) All Hours Worked, (2) Misclassified or No Wages Received, (3) Overtime, (4) Living Wage and (5) Meal and Rest Period Classes. Identification of the class members will be readily accomplished through AB Trucking's personnel records, including wage statements and other payroll records. (See, e.g., *Vasquez, supra,* at p. 811 [names and addresses of class members may be ascertained from defendant's books]; *Rose, supra,* 126 Cal.App.3d at p. 932 [finding that identity of class is easily available through defendant's departmental records].) Code of Civil Procedure section 382 states that there must be "many" class members, a requirement that is "construed liberally." (*Rose, supra*, 126 Cal.App.3d at p. 934 [finding that 42 individuals is sufficient for class certification]; see also *Collins v. Roca* (1972) 7 Cal.3d 232 [upholding class action with 35 class members].) The potential class here consists of over fifty drivers, more than justifying class treatment.

2. Common questions of law and fact predominate.

To satisfy the community of interest requirement, common questions of law or fact must predominate over questions affecting individuals. (*Washington Mutual Bank v. Superior Court*

193 Cal.App.3d 411 (employment discrimination); *Rose v. City of Hayward* ["*Rose*"] (1981) 126 Cal.App.3d 926; and *Los Angeles Fire & Police Protective League v. City of Los Angeles* (1972) 23 Cal.App.3d 67.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

(Briseno) (2001) 24 Cal.4th 906, 913.) Common issues need only predominate such that they would be "the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." (*Karp, supra*, 4 Cal.3d at p. 810.) Class certification does not require that class members have uniform or identical claims. (*Sav-on, supra*, 34 Cal.4th at p. 338; see also *Classen v. Weller* ["*Classen*"] (1983) 145 Cal.App.3d 27, 46 [noting that it has never been the law in California that class representatives and class members share identical interests].) In *Medrazo v. Honda of North Hollywood* ["*Medrazo*"] (2008) 166 Cal.App.4th 89, 99-100, the court indicated "predominance is a comparative concept . . . individual issues do not render class certification inappropriate so long as such issues may effectively be managed."

California courts have frequently found that common issues predominate in employment cases where workers are similarly situated in terms of job duties and are subject to standardized policies by employers. (See, e.g., *Sav-on, supra*, 34 Cal.4th at p. 325 [granting class action certification where employer had a standardized policy of misclassifying managers as exempt employees so as to avoid overtime payments]; *Bell, supra*, 115 Cal.App.4th 715 [affirming class certification for former and current insurance representatives in suit against company for unpaid overtime compensation]; *Stephens, supra,* 193 Cal.App.3d at pp. 420-421 [class action appropriate where employer's centralized personnel practices overcame fact that each store functioned independently].)

a) As drivers worked under the same institutional practices, supervision and management control, common questions of fact predominate.

Trial of the class members' claims will require presentation of an extensive and overwhelmingly common factual record. Indisputably, all putative class members work or have worked under the same terms and conditions of employment.

- All class members were or are truck drivers working out of a single facility.
- All drivers perform essentially the same job duties, making deliveries and picking up containers from the Port of Oakland facility and/or loading and unloading trucks at the Port of Oakland.
- All drivers report to the same small group of three supervisors, most directly to the

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

dispatcher and import manager who supervise the drivers on a daily basis. (Exh. B at 16:4-17:16.)

- All drivers were at all times under the control and direction of AB Trucking President, William Aboudi. (Exh. B at14:14-15:17.)
- No written policy on meal or rest periods exists or was ever provided to drivers. (Duncan Decl. ¶ 8 and Exh. B at 116:13-15; 99:14-100:13.)
- Regardless of any individual drivers' route assignments, all drivers are subject to the same treatment, or institutional practices, with regard to meal and rest periods.
- Regardless of any individual drivers' route assignments, all drivers are paid based on the same time keeping and payroll system. (Exh. B at 171:24-173:7; 180:4-21; 189:6-13; Exh. 2-4.)
- Defendant follows a payroll policy and practice applicable to all drivers of automatically deducting one hour from each drivers' shift reported time for a meal period. (Exh. C at 35:10-36:17, 60:8-61:6; Exh. B at Exh. 2, 16.)
- Defendant does not inform drivers that they are entitled and required to take a 30-minute off-duty meal break no later than five hours after beginning their shifts.
- All drivers missed most or all of the meal breaks to which they were entitled. Many drivers ate while driving their trucks.
- Defendant uses the same payroll processing system for all the drivers and produces earnings statements that are identical in form. (Exh. C at 8:12-9:4; 9:16-10:3, 10:22-11:9, 12:6-12; Exh. B at Exh. 2-4.)
- All drivers used the same timecard system for recording hours worked. (Exh. B at Exh. 2-4.)
- Defendant's time keeping system does not provide for a place for drivers to record their meal periods each shift. (Exh. B at Exh. 2-4.)
- Defendant has no record of meal periods taken by drivers.
- All drivers are subject to Defendant's policy of not compensating hours worked over eight-in-a-day and forty-in-a-week, at a time-and-one-half rate. (Exh. B at 119:20-120:4; Exh. C at 19:10-15.)
- Defendants did not provide drivers classified as "trainees" with compensation. (Exh. B at 138:17-24; 142:23-143:23.)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

For all claims in this case, there is an extensive common nucleus of operative facts. A showing of institutional practices is sufficient to show common questions of fact predominate: "As the court explained, Prince, the plaintiff, had alleged 'institutional practices by CLS that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis. At this stage, no more is required.'" (*Ghazaryan, supra,* 169 Cal.App.4th at p. 1537, quoting *Prince, supra,* 118 Cal.App.4th at pp. 1320, 1329; see also *Rose, supra,* 126 Cal.App.3d at p. 933.) Even in the *Brinker, infra,* line of cases, which reason an employer is not required to "ensure" meal periods are taken, the court has indicated that employers with a policy regarding meal and rest periods make an initial showing that meal and rest periods are being provided in accordance with applicable law.[13] Here, no such policy exists or existed and thus an initial showing is not made.

Defendant applies the same time-keeping and payroll system to all drivers. Drivers are all under the control of the company's president, Bill Aboudi. The fact that Defendant does not have drivers' meal periods recorded, does not provide a place on the drivers' time cards to record meal periods, and does not have any written policy regarding meal and rest periods, combined with Defendant's policy of deducting one hour for lunch automatically, shows the commonality in Defendant's treatment of drivers.

b) Questions of law predominate over individual questions.

Common legal issues predominate as Plaintiffs' claims concern a uniform pattern of statutory violations by AB Trucking. All putative class members are subject to the same institutional practices by a single defendant giving rise to the legal claims in the Complaint. The questions of whether Defendant paid drivers for the hours each driver performed job functions, whether individuals in the "training" program are employees or can be unpaid, whether drivers were entitled to overtime wages based on either (1) DOT not being applicable or (2) the spotter exception, and whether the paystubs provided to drivers with each payment constitute adequate

[13] See *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1089; *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 586.)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

wage statements, must be determined in all cases.

The legal inquiry as to whether Defendant is a "Port-Assisted Business" such that it is required to pay its employees the Living Wage as prescribed by the Oakland City Charter will be identical in each case. Similarly, a determination as to whether the Defendant is covered by the Oakland Municipal Code such that it owes wages to its employees at the rate prescribed by the Living Wage Ordinance is a common legal question shared by all drivers that must be addressed to make a determination in each claim.

Defendant's practice of no written policy regarding meal and rest periods similarly affects all drivers, thus proving these claims will be dictated by common legal inquiries. Whether Defendant provides any additional pay to cover missed rest breaks and whether its compensation practices permit rest breaks "as a practical matter" (see *Cicairos, supra*, 133 Cal.App.4th at p. 963) are questions common to all drivers. Whether liability exists for failure to keep records of meal periods is a common question. Likewise, whether Defendant met its affirmative duties to provide 30-minute off-duty meal breaks and whether it made automatic deductions for meal periods from each shift, are legal inquiries that will be similar for all putative class members.

c) This case involves common remedial issues; individualized damage calculations do not defeat class certification.

As Defendant's actions are challenged on identical legal grounds for each member of the putative class, the same types of remedial issues are implicated. For instance, common remedial questions include: (1) whether AB Trucking is liable for failure to pay all hours worked in violation of IWC Wage Order 9; (2) whether AB Trucking is liable for failure to pay any hours worked (to employees misclassified as "trainees") in violation of Labor Code section 510 and IWC Wage Order 9; (3) whether AB Trucking is liable for failure to pay overtime wages in violation of Labor Code sections 510, 1194 and IWC Wage Order 9; (4) whether AB Trucking is liable for failure to pay the Living Wage for Port Assisted Businesses under the Oakland City Charter; (5) whether AB Trucking is liable for failure to pay the Oakland Living Wage pursuant to the Oakland Living Wage Ordinance; (6) whether AB Trucking is liable for an hour of pay for each missed meal period in violation of Labor Code section 512 and IWC Wage Order 9; and (7) whether AB

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

Trucking is liable for an hour of pay for each missed rest break in violation of the IWC Wage Order 9.

The common questions of fact and law described above apply to all drivers. The only question involving individual treatment is the calculation of how much is owed to each class member. Where common issues predominate, the potential need for individual damage computations does not defeat class treatment. (*Sav-on, supra*, 34 Cal.4th at p. 328.) A case may proceed as a class action "so long as each class member will not be required to litigate numerous and substantial issues to establish his individual right to recover." (*Id.* at p. 811; see also *Karp, supra,* 4 Cal.3d at p. 815 [holding the need of each class member to establish individual damages "does not preclude the maintenance of the suit as a class action"]; *Bell, supra*, 115 Cal.App.4th at p. 744 [upholding class treatment of a wage and hour case even where individual determination of damages was necessary].) Any individual issues that may arise in this case pale in comparison to the weight presented by the common questions of law and fact.

3. Plaintiffs' claims are typical of the proposed class members' claims.

A class representative's claim is typical if it arises from the same event, practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. (See generally *Dart, supra*) Typicality requires that class representatives be similarly situated to the class members they seek to represent. (*B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1347.) It is not necessary that the representatives' interests be identical to the other class members' interests. (*Id.* at pp. 1347, 1350-1353; see also *Classen, supra*, 145 Cal.App.3d at 46 ["it has never been the law in California that the class representative must have *identical* interests with the class members"] (emphasis in original).) In fact, the Supreme Court has held that most differences amongst class members do not defeat class certification. (*Dart, supra,* 29 Cal.3d at p. 473.)

The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. (*Medrazo, supra,* at p. 99 (citing *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1091).) It is only when a defense unique

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

to the class representative will be a major focus of the litigation (*id.*), or when the class representative's " 'interests are antagonistic to or in conflict with the objectives of those [s]he purports to represent' " (*Dart, supra,* 29 Cal.3d at p. 470) that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained. (*Id.* at pp. 470-471.)

As stated above, Plaintiffs and putative class members are truck drivers who performed job functions for Defendant out of the Port of Oakland facility. Like the putative class members, Plaintiffs worked out of the Port of Oakland, were under the control of Bill Aboudi, were supervised by the same dispatcher, received assignments following the same protocol and performed the same duties. All drivers used the same time card and time-keeping system. Drivers received paystubs issued through the same payroll processing system and all claims for pay were processed through the same system. Plaintiffs' claims, as class members' claims, arise from Defendant's consistent failure to pay all and/or any wages at the applicable rate for all hours worked at the appropriate wage rate, failure to pay overtime and provide drivers with meal and paid rest breaks. As a result, Plaintiffs' claims mirror those of the class members.

This case will turn on whether Defendant provided breaks and compensation to drivers in accordance with the laws of the state. As Plaintiffs prove their claims, they will necessarily prove the claims of all the class members. For instance, if Plaintiffs demonstrate that AB Trucking systematically denied them 30-minute, off-duty meal periods, then Plaintiffs will demonstrate through the common payroll deduction system that these meal periods were also denied to absent class members. In showing that AB Trucking misclassified drivers as "trainees" even though they were suffered and permitted to work, Plaintiffs will establish that AB Trucking has failed to compensate "trainees" at any wage rate. The inquiry into the application of the Oakland Living Wage is a legal question common to all drivers. Plaintiffs' claims are overwhelmingly typical of the putative class members' claims, further justifying class treatment of this case.

There may be variations in drivers' execution of their duties, such as different routes

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

driven. However, these differences are immaterial to the claims here as they have no effect on the uniform application of AB Trucking's payroll policies and meal and rest break practices. There may also be variations in that some drivers may have taken some breaks of varying lengths at varying times and locations. Again, these considerations are only relevant in the calculation of damages; they are not pertinent to determining the common issues presented in the liability phase of this case.[14]

4. Plaintiffs and their counsel will fairly and adequately represent the putative class.

Adequacy of representation is met where plaintiffs' interests are not antagonistic to those of the class, plaintiffs will vigorously prosecute class claims, and plaintiffs are represented by qualified counsel. (See *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450; *Cal Pak Delivery, Inc. v. United Parcel Serv.* (1997) 52 Cal.App.4th 1, 12.)

Plaintiffs are more than adequate representatives of the class as they share the interests of the class and have pursued those interests vigorously. (Duncan Decl. ¶ 15; Exh. D; Exh. E) In addition, class members are adequately represented by Plaintiffs' attorneys who have substantial experience litigating wage and hour class action lawsuits. (Duncan Decl., ¶ 10-13 and Exh. J.) Plaintiffs' attorneys are well-qualified and experienced, having successfully handled similar suits. (Duncan Decl., ¶ 10-12.) Moreover, Plaintiffs' counsel has vigorously pursued this case and will more than adequately represent the Plaintiffs and the class members. (Duncan Decl., ¶ 12.)

V. CONCLUSION

Having met each of the requirements for certification under Code of Civil Procedure section 382, Plaintiffs respectfully request that the Court certify this case as a class action and certify Plaintiffs and their counsel as representatives of the three classes as defined above.

Dated: December 14, 2009

WEINBERG, ROGER & ROSENFELD

By: _____
CAREN P. SENCER
Attorneys for Plaintiffs

[14] See *Classen, supra*, 145 Cal.App.3d at p. 46 ["[A] class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages."]; see also *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238 ["Differences in individual class members' proof of damages is not fatal to class certification."].

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001