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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 Plaintiff
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. RG08-379099 PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION Date: August 20, 2010 Time: 10:00 a.m. Department: 20 Judge: Robert B. Freedman

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1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

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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") who have brought this action on behalf of themselves and all others similarly situated. Plaintiffs' claims are based upon practices generally applied by AB, and therefore, Plaintiffs share a community of interest with the class 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 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. Plaintiffs seek to represent a class of all drivers[1] who performed work for AB out of its Oakland, California facility from the period of March 28, 2004 through March 28, 2008. Should the Court determine that subdividing the class would be beneficial, five sub-classes are readily defined as follows:

(1) The All Hours Worked Subclass[2]

All drivers employed by Defendant during March 28, 2004 through March 28, 2008 who were not paid for all hours worked in any work week.

(2) The Misclassified Employee or No Wages Received Subclass

All individuals who were misclassified as "non-employee trainees" rather than as drivers and as a result were not paid by Defendant for any hours worked in any work week during March 28, 2004 through March 28, 2008.

[1] "Driver" means an employee who operates a vehicle described in subdivision (b) of Section 15210 of the California Vehicle Code, or an individual operating a "motor vehicle." "Motor vehicle" includes, though is not limited to, a vehicle(s) that (1) has a gross vehicle weight rating (GVWR) of 26,001 pounds or more; (2) is a combination vehicle with a gross combination weight rating of 26,001 or more pounds, if the trailer(s) has a GVWR of 10,001 or more pounds; (3) tows any vehicle with a GVWR of 10,001 pounds or more; (4) tows more than one vehicle or a trailer bus; (5) has three or more axles (excludes three axle vehicles weighing 6,000 pounds or less gross); (6) is any size vehicle which requires hazardous material placards or is carrying material listed as a select agent or toxin; and/or (7) transports hazardous wastes (California Health and Safety Code §§25115 and 25117).

[2] See Decl. of Lisl R. Duncan at ¶17: "All drivers in the putative class will either fall into an "All Hours Worked" subclass *or* a "Misclassified Employee or No Wages Received" subclass ... Regardless of whether a driver falls into the "All Hours Worked" subclass or the "Misclassified Employee or No Wages Received" subclass, that same driver may also properly be a member of the "Overtime" subclass, "Living Wage" subclass, and/or "Meal and Rest Period" subclass ... It is possible an individual might fit into the "Misclassified Employee or No Wages Received" subclass during the first period of his/her relationship with AB and then later transition to the "All Hours Worked" subclass because of a change in status. However, during any one given time period, an individual could not be part of *both* of these two subclasses *at the same time.*

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(3) The Overtime Subclass

All drivers employed by Defendant during March 28, 2004 through March 28, 2008 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 Subclass

All drivers employed by Defendant during March 28, 2004 through March 28, 2008 who were paid less than the Oakland Living Wage for any hour worked.

(5) The Meal and Rest Period Subclass

All drivers employed by Defendant during March 28, 2004 through March 28, 2008 who were not provided rest breaks and/or meal periods as required by California law.

Plaintiffs' claims are 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 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 is a drayage company employing drivers who primarily drive trucks to be loaded and unloaded within the Port of Oakland ("Port"). All class members were or are drivers working out of a single facility. (See Declaration of Lavon Godfrey ("Godfrey Decl.") at ¶¶11-13; Declaration of Gary Gilbert ("Gilbert Decl.") at ¶¶12, 13; Declaration of Lisl R. Duncan ("Duncan Decl.")[3] at Exh. B at 12:23-13:2; 35:4-41:6; 44:2-45:5.) Driving time from AB's yard to the Port's entrance takes between 5-15 minutes. All drivers perform essentially the same job duties, making deliveries and/or loading and unloading trucks at the Port. (Godfrey Decl. at ¶¶6, 11-12; Gilbert Decl. at ¶¶12, 13.) Drivers also may be assigned trips throughout California. All drivers report to the same small group of supervisors and were at all times under the control and direction of AB President, William Aboudi. (Exh. B at 14:14-15:17, 16:4-17:16.) AB classifies some drivers as non-employee "trainees" who perform driver duties, but who are not paid any wages. AB does not

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

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provide "trainees" with compensation. (Exh. B at 138:17-24; 142:23-143:23; Gilbert Decl. at ¶¶17, 19.) 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. (Exh. B at 119:20-120:4; Exh. C at 19:10-15.) AB's facility is located within the Port area on City property. (See Exh. B at 12:23-13:2; 35:4-41:6; 44:2-45:5.) AB was approved for a "space assignment" by the Port meaning its facility is in an area under the jurisdiction of the Port. (See Duncan Decl. at ¶18 at Exs. L and M.) However, AB does not pay drivers at least the minimum wage rate set forth in the Oakland Living Wage ("OLW") Ordinance. (See Exh. C at 68:2-5.) In addition, AB has systematically failed to provide drivers 30-minute, off-duty meal periods and paid rest breaks. (Godfrey Decl. at ¶¶ 13-15; Gilbert Decl. at ¶¶14, 15.) AB 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 and 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; Godfrey Decl. at ¶16; Gilbert Decl. at ¶¶14, 15.) All drivers missed most or all of their meal breaks and many ate while driving. (Godfrey Decl. at ¶¶ 13-15; Gilbert Decl. at ¶¶14, 15.) AB's time keeping system does not provide for a place for drivers to record their meal periods each shift and AB has no record of meal periods taken by drivers. (Exh. B at Exh. 2-4, 16; Godfrey Decl. at ¶16; Exh. C at 35:10-36:17, 60:8-61:6.) All drivers are paid based on the same time keeping and payroll system and used the same timecard system for recording hours worked. (Exh. B at 171:24-173:7; 180:4-21; 189:6-13; Exh. 2-4; Godfrey Decl. at ¶11; Gilbert Decl. at ¶16.) 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. (Exh. C at 35:10-36:17, 60:8-61:6; Exh. B at Exh. 2, 16.) AB produces earnings statements identical in form for all drivers. (Exh. C at 8:12-9:4; 9:16-10:3, 10:22-11:9, 12:6-12; Exh. B at Exh. 2-4.)

III. 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

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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:

> 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 ... 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.'

(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 ["*Vasquez*"].) 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 ["*Bell*"].) 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; see *Sav-On, supra,* at p. 340.) 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 ["*Ghazaryan*"].)

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, not only because it denied workers meal and rest periods, but because it automatically subtracted one-hour of pay for a meal period each

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shift, regardless of whether a one hour lunch was taken or not. AB also claims it does not have to pay drivers wage rates established by California and municipal law. AB knowingly tries to circumvent payment of learners by misclassifying them as non-employee trainees, evidenced by AB's creation of a standard "release of liability" form. 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, 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.) Denial of class treatment could also likely mean AB 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.[4] Any doubt as to whether a class action is appropriate should be resolved in favor of certification.[5] (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].)

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[4] 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].)

[5] 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.* (1987) 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.

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B. THIS CASE SATISFIES ALL CLASS CERTIFICATION REQUIREMENTS

Code of Civil Procedure section 382 authorizes class action suits when the question is one 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 principles, class wide treatment of this wage and hour suit is appropriate under section 382 and California case law.

1. The putative class and subclasses are 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, a class of all drivers and five subclasses are readily defined. Identification of the class members will be readily accomplished through AB'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].) There must be "many" class members, a requirement "construed liberally." (*Rose, supra*, 126 Cal.App.3d at p. 934 [finding 42 individuals sufficient]; see also *Collins v. Roca* (1972) 7 Cal.3d 232 [upholding class action with 35 class members].) The potential class here consists of over 50 drivers, more than justifying class treatment.[6]

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* (2001) 24 Cal.4th 906, 913.) Common issues need only predominate such that they would be "the

[6] Defendant's payroll records reflect an average of 12 "employee" drivers at any given time period. (See for example, Exh. B at Exh. 2-4.) The statutory period is four years.

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principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." (*Vasquez, 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 standardized policies by employers. (See, e.g., *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304 ["*Jaimez*"][7] [finding employer's policy and practice of deducting 30 minutes per shift for each driver, regardless of whether the driver took a meal break, raises common legal and factual issues].[8]) For all claims in this case, there is an extensive common nucleus of operative facts.[9]

a) Common questions of fact and law – all hours worked.

The predominant legal issue of whether drivers were paid for all hours worked in accordance with applicable law is a question which will be addressed for all drivers in this subclass. Likewise, the factual issue of whether drivers were paid for all hours worked, under AB's uniform practice regarding compensation for drivers,[10] is a common inquiry for all members

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[7] The California Supreme Court denied the petition and depublication request(s) of this case on May 12, 2010. The court of appeals' holding is in favor of class certification: "In light of the numerous common issues of fact and law that predominate in this lawsuit, we conclude that proceeding by way of class action is the superior method of adjudication." (*Jaimez, supra*, at p. 1308.) *Jaimez* is strong support for class certification here.

[8] See also, *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].)

[9] A showing of institutional practices is sufficient to show common questions of fact predominate: "... alleged 'institutional practices by CLS ... affected all of the members of the potential class in the same manner ... 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.)

[10] 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.) All drivers used the same timecard system.

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of the subclass. Based on AB's payroll records produced in discovery, Plaintiffs estimate there are at least 40 members of this subclass. (See, *supra,* footnote 6.) Ms. Godfrey's claims are representative of this subclass.

The California Labor Code ("Labor Code") requires employers to pay each employee not less than the applicable minimum wage for all hours worked in the payroll period. When an employee works instead of taking a meal period, this is time worked for which the employee must be compensated. (See Industrial Welfare Commission ("IWC") Wage Order No. 9, section 3, codified at 8 California Code of Regulations 11090; Labor Code § 510.) The employer fails to pay at least minimum compensation for each hours worked when employees miss meal periods yet have wages deducted. (See *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324 [holding the minimum wage standard applies to each hour worked by an employee for which they were not paid].) As a direct and proximate result of AB's failure to compensate all drivers properly because it automatically deducts one hour of pay for meal periods that are not taken, AB has failed to pay drivers for "all hours worked."

Here, all drivers employed in the statutory period were not provided meal periods as required by law. (See Exh. D at 157:7-158:11; Godfrey Decl. at ¶¶13-17; Gilbert Decl. at ¶¶14, 15.) Moreover, AB follows a payroll policy and practice applicable to all drivers of automatically deducting one hour from each driver's shift reported-time for a meal period. (Exh. C at 35:10-36:17, 60:8-61:6; Exh. B at Exh. 2, 16; Godfrey Decl. at ¶17.) On occasion, when a driver has tried to use the break room at the Oakland facility, AB's president has told the driver to get back in the truck and that she should eat her lunch in the truck in line at the Port. (Godfrey Decl. at ¶15.) Much of the work performed by drivers consists of lining up to enter and exit terminals at the Port. Sometimes it can take as many as 8 hours of waiting before a load is received at the terminal. (Exh. B at 75:20-77:5.) 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

(Exh. B at Exh. 2-4; Godfrey Decl. at ¶11; Gilbert Decl. at ¶16.) 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.)

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drivers to eat in their trucks while waiting in queues to enter Port terminals. (See 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.) These drivers share a community of interest arising from their shared experience under AB's uniform treatment of drivers, particularly through its automatic meal period deduction.

Plaintiffs distinguish the "All Hours Worked" and the "Meal and Rest Period" subclasses because there are separate legal inquiries involved for each subclass. It is true that the "All Hours Worked" subclass arises due to violations which would also necessarily affect the "Meal and Rest Period" subclass. However, those drivers who fall under the "Misclassified Employee or No Wages Received" (hereafter "Misclassified") subclass would also be included in the "Meal and Rest Period" subclass (despite the fact that the "All Hours Worked" and the "Misclassified" subclasses would not likely have overlapping membership). (See Duncan Decl. at ¶17). In addition, there are different remedies implicated by an "All Hours Worked" claim, which seeks payment for hours worked, and a "Meal and Rest Period" claim, seeking premium pay.

b) Common questions of fact and law – misclassified/received no wages.

AB's records reflect there were between 1-6 trainees working at any given time. (See Exh. B, Exs. 2-4, 10; Godfrey Decl. at ¶7.) Here, the universal legal inquiry for all members of this group is whether AB *mis*classified employees as non-employees, and, as a result, whether these individuals are entitled to compensation for work they performed. The factual inquiry of whether AB did not provide these trainees with compensation, is an inquiry that must necessarily be determined for each member of this subclass.[11] There is substantial evidence of approximately 20 individuals in this subclass. (Exh. B at 138:17-24; 142:23-143:23; Gilbert Decl. at ¶¶17, 19.) Mr. Gilbert's claims are representative of this subclass.

Labor Code sections 510, 1194 and IWC Wage Order 9 require employers to pay each employee not less than the applicable minimum wage for all hours worked in the payroll period. AB suffers and permits drivers it classifies as "trainees" to work; however these "trainees" are

[11] By comparison, the court in *Jaimez* articulated the following common questions of law and fact: The predominant legal issue (whether the employer misclassified its drivers as exempt) and the predominant factual issue (employer's uniform practice regarding driver classification) are amenable to class treatment. (*Jaimez, supra,* at p. 1301.)

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510.337.1001

misclassified, not paid at all for work they perform, and not subject to a learner[12] rate. (See Exh. C at 22:1-23:20; Exh. E at 10:6-7; Gilbert Decl. at ¶17, 18.) Moreover, while trainees perform functions performed by drivers classified as employees, they do not receive any cognizable training.[13] AB admits it does not pay trainees for the "training" process. (See Exh. B at 138:1-24, Ex. 4; Exh. C at 22:1-23:20.) AB admits Mr. Gilbert was a "trainee." (See Exh. E, Exh. 1.) AB acts as though its trainees are not entitled to any wages. An individual, however, is an employee of an employer any time he or she is engaged in work for the benefit of the employer.[14] 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.[15] AB attempts to sidestep the employment relationship by requiring those it misclassifies as non-employee "trainees" to sign an agreement before beginning their training with AB. This document is entitled "Oakland Port Services Corporation Truck Driver Training Program Trainee Participation and Release of Liability Agreement.[16]" Whether or not this agreement is valid in light of statutory authority and IWC Wage Order 9(2) is a common question to all individuals classified as trainees. Regardless of the document, the determination of whether those drivers are "employees" is based on their circumstances and not on AB's choice of words. This common

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[12] IWC Wage Orders define "learners" as "employees." (See IWC Wage Order 9(4)(a).)

[13] On-the-job training, however, such as trainings of locations inside the Port, does not negate the employment relationship for "learners" as provided for by IWC Wage Order 9(4).

[14] 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.* (2000) 22 Cal.4th 575, 582.) See e.g., *Martinez v. Combs* (2010) 49 Cal. 4th 35, 69: "The language thus "cast a duty upon the owner or proprietor to prevent the unlawful condition, and the liability rest[ed] upon principles wholly distinct from those relating to master and servant. *The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist.*"

[15] 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") granted 6/25/10.) As the OLW Ordinance is in effect, it is the default for any wage analysis. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 778.) Trainees must receive no less than the OLW as a result.

[16] This document states: "Trainee understands that the OPS Training Program does not establish an employment relationship ... Trainee is not entitled to wages for the time spent in the OPS Training Program." (Gilbert Decl. at ¶9; Exh. E, Ex. 1.)

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issue would be principal in any individual action brought by an individual in this group.

Here, "trainees" are suffered or permitted to work, but AB 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. (Gilbert Decl. ¶¶12, 13; Godfrey Decl. ¶¶10, 11.) AB has no program or organized action for trainees, and it has no AB training manuals or materials. (See Exh. B at 144:13-21; 146:20-22; Duncan Decl. at ¶8.) The "trainers" are other drivers, who are given no special instruction on how to train. (See Exh. D at 18:20-19:5, 340:16-341:24, 345:10-23; Godfrey Decl. at ¶¶13, 14, 16.) 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. (See Godfrey Decl. at ¶¶6, 11, 12 and Gilbert Decl. at ¶¶12, 13.) These common circumstances pertain to all individuals misclassified by AB as trainees.

c) Common questions of a fact and law – overtime wages.

Both AB's PMKs testified that drivers receive only straight time for all hours worked. (See Exh. B at 119:20-120:4; Exh. C at 19:10-15.) As a result, drivers share a community of interest regarding this overtime claim. The predominant common factual issues for all drivers in this subclass include whether AB had a uniform practice of misclassifying drivers as exempt from overtime and whether AB had a uniform policy of requiring drivers to work more than 8 hours in a day or 40 hours in a week, but failing to pay them at an overtime rate for that work.[17] (See *Jaimez, supra*, at p. 1302.) Whether drivers were entitled to overtime wages based on either (1) the DOT exemption from the FLSA not being applicable or (2) the spotter exception, is a legal inquiry that will be common to all drivers in the subclass. Plaintiffs estimate this subclass will be comprised of approximately 50 drivers. (See Exh. B, Exs. 2-4, 10; Godfrey Decl. at ¶¶18, 19.) Plaintiffs Godfrey and Gilbert are both representative as to the overtime claim.

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

[17] One common way in which more than 8 hours a day were worked is the hour worked but unpaid as a result of the automatic deduction of a one-hour meal period per shift made by management.

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worked beyond eight (8) in a workday and forty (40) in a week. AB'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 wage rate for any hours worked. (See Exh. B, Exh. 2-4.) In fact, AB has a policy of not paying overtime to its drivers, which was confirmed by its PMKs in deposition testimony. (See Godfrey Decl. at ¶¶6, 11-12, 18, 19; Exh. C at 19:10-15, 68:2-5; Exh. B at 119:20-120:4.) All drivers are commonly subject to AB'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.) Because of AB's uniform policy, drivers in this subclass share a community of interest in determining whether they received wages at the proper rate.

Further, if employees miss a meal period during a shift such that it causes the shift 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 8½ hour day (if ½ hour lunch is taken), the employee must be compensated at the overtime rate for the 30 minutes worked but not paid. (Labor Code § 510.)

Whether or not overtime laws apply, and if so, which set of laws, is a common question. Generally, employees in California are entitled to overtime after 8 hours in a day or 40 in a week. Certain employees, including some drivers, are outside the scope of California's 8-hour day rule. This results in application of the Fair Labor Standards Act ("FLSA"), and for drivers, the application of the Motor Carrier exemption.[18] (See 29 U.S.C. § 213(b)(1).) Under the exemption, drivers who may be regulated by the secretary of transportation are not entitled to overtime compensation, even after 40 hours of work in a week. The exemption, however, is not a barrier to overtime compensation for drivers in this case. First, there is an exception to this exemption for a category of drivers referred to as "spotters,"[19] and, second, overtime must be paid in California if

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

[19] 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

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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. Here, the DOT has not taken jurisdiction over the drivers, the employer does not consider the drivers to be under DOT jurisdiction, 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. Whether drivers are entitled to overtime is a question common to this group of drivers because they functioned under the same conditions giving rise to the inquiry.

d) Common questions of a fact and law – Oakland Living Wage.

Whether AB pays drivers at a rate less than the OLW is a common factual question which must be addressed for all drivers in this subclass. Whether AB is required to pay its employees the OLW as prescribed by the Oakland City Charter will be a central and identical legal issue for each putative class member. In this case, a common nexus of fact about AB's wage rate exists for this subclass. Plaintiffs estimate this subclass will be comprised of approximately 50 drivers. (See Exh. B, Exs. 2-4, 10.) Plaintiffs Godfrey and Gilbert are both representative as to the living wage claim. AB pays its drivers at a rate less than the OLW rate.[20] (See Exh. C at 68:2-5.) While working for AB, Plaintiff Gilbert earned $0.00 per hour. (See Exh. C at 22:1-23:20; Exh. E at 10:6-7; Gilbert Decl. at ¶17, 18.) Plaintiff Godfrey earned $11.00 per hour. (Exh. B, Ex. 3.) Oakland City Charter section 728 requires that all Port-Assisted Businesses provide compensation not less than the OLW. 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's facility is located within the Port area on City property. (See Exh. B at 12:23-13:2; 35:4-41:6; 44:2-45:5.) AB admits it has a lease with Oakland Maritime Support Services or "OMSS." (See Exh. B at 36:10-22.) AB's facility was located at 2505 Bataan Avenue in the Port

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Standards Act, *supra*, at p. 338; *see* 29 C.F.R. § 782.3(b).) Ms. Godfrey's experience establishes that Defendant employed drivers who were "spotters." (See Godfrey Decl. at ¶12.)

[20] See Plaintiff's RJN, *supra*, granted 6/25/10.

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area before moving to 11 Burma Road in the Port Area, which is described as being "one block away" from Bataan Avenue. (Exh. B at 37:9-15.) AB moved to Burma Road because all tenants in Bataan were moved. (Exh. B at 40:6-41:6.) AB was approved for a "space assignment" by the Port for "OAB Bldg R070 Rooms 2, 17, 22, 23 at Bataan Avenue." (See Duncan Decl. at ¶18 at Exs. L and M.) This "space assignment" document was signed by William Aboudi and Port representatives. (*Id.*) According to the Board of Port Commissioners, Port, Tariff No. 2-A, a "space assignment" is: "the assignment of space, areas, facilities, land or buildings that are under the jurisdiction of the Port.[21] Plaintiffs anticipate deposing a representative of the Port to explain the documentation describing AB's relationship with the Port, including Exhibit L, in order to address the factual inquiries raised by this claim. Drivers in this subclass share a common interest in that AB's payroll records for the statutory period show that drivers were paid less than the OLW rate and that the vast majority of drivers did not receive health benefits. (See Exh. B, Ex. 2-4.) Whether drivers were entitled to the OLW, is a legal inquiry that will be common to all drivers.

e) Common questions of a fact and law predominate in determining whether drivers were properly provided meal and rest periods.

Whether AB provides drivers with all meal and rest periods in accordance with applicable law, whether AB provides any additional pay to cover missed rest breaks and whether its compensation practices permit rest breaks "as a practical matter" are common inquiries to be addressed in all claims. (See *Cicairos, supra*, 133 Cal.App.4th at p. 963.) Common facts exist creating a subclass of drivers whose claims are subject to these uniform factual and legal inquiries. Plaintiffs estimate this subclass will be comprised of approximately 50 drivers. (See Exh. B, Exs. 2-4, 10.) Plaintiffs Godfrey and Gilbert are both representative as to the meal and rest period claim. All drivers were commonly subject to AB's lack of a written meal and rest period policy. (See Godfrey Decl. at ¶¶13-16; Gilbert Decl. at ¶¶14, 15.) All drivers were commonly subject to the instruction of William Aboudi regarding company policy on meal and rest periods at the time of hiring. (Exh. B at 117:15-118:25.) AB's time keeping system does not provide for a place for

[21] See Duncan Decl. at Exh. M.

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drivers to record their meal periods each shift. (Exh. B at Exh. 2-4, 16; Exh. C at 35:10-36:17, 60:8-61:6; Godfrey Decl. at ¶16.) AB 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.) Creating a common nucleus of operative fact, this automatic deduction is applied to all drivers. (See Exh. C at 35:10-36:17; 60:8-61:6; Exh. D at 176:6-177:11.) Whether the automatic deduction occurred is a common factual *and* legal inquiry. (See e.g., *Jaimez, supra*, at p. 1303-1304.) On similar facts, the court in *Jaimez* certified a meal and rest period class properly determining 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. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.)" (*Jaimez, supra*, at p. 1303.) The Court, here, should likewise certify the meal and rest period claims.[22]

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 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.)[23]

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[22] In light of the uncertainty in the law due to the Supreme Court's pending decision in *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, if the Court determines a finding on the meal and rest period classes would be premature, holding that issue in abeyance would be within the Court's inherent power. However, by denying the petition and depublication request(s) regarding *Jaimez* on May 12, 2010, the Supreme Court indicated that class certification should go forward on meal and rest period claims prior to a final determination in the *Brinker* case.

[23] 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.)

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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 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).)

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. (Duncan Decl. ¶8 and Exh. B at 116:13-15; 99:14-100:13; Godfrey Decl. at ¶¶16.) AB 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. (Godfrey Decl. at ¶16; Gilbert Decl. at ¶¶14, 15.) 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.) All drivers missed most or all of the meal breaks to which they were entitled. Many drivers ate while driving their trucks. (Godfrey Decl. at ¶¶ 13-15; Gilbert Decl. at ¶¶14, 15.) 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. (Godfrey Decl. at ¶¶ 13-15; Gilbert Decl. at ¶¶14, 15.)

IWC Wage Order 9 requires

> [e]very employer [to] keep accurate information with respect to each employee ... Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease ... need not be recorded. ... An employee's records shall be available for inspection by the employee upon reasonable request.

(Cal. Code Regs., tit. 8, § 11090, subd. 7(A)(3), (C).) Despite the fact the employees hold the occupation of truck drivers, the obligation to ensure meal and rest periods remains with the employer. (See *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962 ["*Cicairos*"].) With regard to the question of meal and rest periods, the same inquiries into whether these Labor Code sections and the IWC Wage Order apply, and the factual inquiries about arising out of AB's treatment of drivers, are common to all members of this subclass.

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f) Payment of Wages After Discharge or Quit.

AB's failure to pay all wages owed at the time of discharge or quitting as required under Labor Code sections 201, 202 and 203, is derivative of the violations Plaintiffs allege. Whether AB paid drivers all wages owed each pay period, including wages at the applicable wage rate (overtime and/or OLW), for each hour worked and premiums for missed meal and rest periods are inquiries common to all drivers in the putative class. Whether AB did not pay trainees any wages, and as such failed to pay all wages owed each pay period and the wages owed at the separation of Plaintiffs' working relationship with AB, are similarly common inquiries. AB has not subsequently compensated Plaintiffs for this money owed. (See Gilbert Decl. at ¶17, 18.)

Penalties under Labor Code section 203 are applicable whenever, at the time of separation, wages are willfully unpaid. Here, AB made a conscious decision to automatically deduct one hour of pay per day for meal periods not taken, willfully paid the straight time rate for all hours beyond 8 in a day or 40 in a week, willfully paid less than the OLW, and willfully denied breaks by providing no policy and discouraging any break from being taken. Clearly, an employee entitled to compensation but receiving none, was willfully denied wages. As a result the penalty of 30 days wages is derivative of each underlying claim that flows from each subclass. As a result, this claim is applicable for all members of the proposed class and each subclass.

g) Inaccurate Wage Statements.

AB's failure to provide accurate itemized wage statements to drivers in violation of Labor Code section 226 is similarly a direct and proximate result of AB's failure to compensate Plaintiffs properly. Drivers received inaccurate wage statements because the statements they received each pay period did not reflect the accurate amount of wages owed to them. As the employer improperly deducted one hour each day from each drivers' paid time, each wage statement under reports the total hours worked. The group classified as "trainees" received no wage statements at all. In addition, wage statements received by Plaintiffs during the statutory period failed to comply with the requirements of Section 226 because they do not show the beginning and ending date of the pay period on the statement. (See Exh. B, Ex. 13.) Furthermore, incorrect wages rates

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(overtime and/or OLW) appear on the wage statements. Whether drivers received inaccurate (or no) wage statements is a common inquiry applicable for all members of the proposed class.

3. <u>This case involves common remedial issues; individualized damage calculations do not defeat class certification.</u>

As AB's actions are challenged on identical legal grounds for each member[24] of the putative class, the same types of remedial issues are implicated. For instance, common remedial questions include: (1) whether AB is liable for failure to pay all hours worked in violation of IWC Wage Order 9; (2) whether AB is liable for failure to pay any hours worked (to employees misclassified as non-employee "trainees") in violation of Labor Code section 510 and IWC Wage Order 9; (3) whether AB is liable for failure to pay overtime wages in violation of Labor Code sections 510, 1194 and IWC Wage Order 9; (4) whether AB is liable for failure to pay the OLW for Port Assisted Businesses under the Oakland City Charter; (5) whether AB is liable for failure to pay the OLW pursuant to the OLW Ordinance; (6) whether AB 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 is liable for an hour of pay for each missed rest break in violation of the Wage Order.

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 *Vasquez, 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

[24] As described above, drivers will likely fall into the "All Hours Worked" subclass *or* the "Misclassified Employee or No Wages Received" subclass; however the other three proposed subclasses will consist of members from both the Misclassified Employee and All Hours Worked subclasses. (See also, Duncan Decl. at ¶17.)

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the weight presented by the common questions of law and fact.

4. 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 to the class representative will be a major focus of the litigation, or when the class representative's "'interests are ... 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. Even then, the court should determine if dividing the class into subclasses to eliminate the conflict is feasible. (*Id.* at pp. 470-471.)

Like the putative class members, Plaintiffs worked out of the Port, were under the control of Bill Aboudi, received assignments following the same protocol and performed the same duties. (Godfrey Decl. at ¶¶6, 11-12; Gilbert Decl. at ¶¶12, 13.) All drivers used the same time-keeping system. (Exh. B at 171:24-173:7; 180:4-21; 189:6-13; Exh. 2-4.) Drivers received paystubs issued through the same payroll processing system and all claims for pay were processed through the same system. (Exh. C at 8:12-9:4; 9:16-10:3, 10:22-11:9, 12:6-12; Exh. B at Exh. 2-4.) Plaintiffs' claims arise from AB's consistent failure to pay all and/or any wages for all hours worked at the appropriate wage rate and to provide drivers with meal and paid rest breaks. As a result, Plaintiffs'

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Suite 200
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claims mirror those of the class members.

This case will turn on whether AB provided compensation and meal and rest periods 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 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 misclassified drivers as non-employee "trainees" even though they were suffered and permitted to work, Plaintiffs will establish that AB has failed to compensate these employees at any wage rate. There may be variations in drivers' execution of their duties, such as different routes driven. However, these differences are immaterial to the claims here as they have no effect on the uniform application of AB's payroll, meal and rest break practices. Some drivers may have taken some breaks of varying lengths at varying times and locations. Again, however, 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.[25]

5. 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; see generally Godfrey Decl. and Gilbert Decl.) 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.

[25] 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."].

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Suite 200
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(Duncan Decl., ¶10-12.) Plaintiffs' counsel has vigorously pursued this case and will more than adequately represent the Plaintiffs and the class members. (Duncan Decl., ¶12.)

IV. 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 class, or subclasses, as defined above.

Dated: July 19, 2010

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: _____
LISL R. DUNCAN
Attorneys for Plaintiff

118212/580616

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

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On July 19, 2010, I served upon the following parties in this action:

Jay Ian Aboudi
The Law Office of Jay Ian Aboudi
1855 Olympic Blvd.,Ste. 210
Walnut Creek, CA 94596

copies of the document(s) described as:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

[ ] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[X] **BY OVERNIGHT DELIVERY SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and placed the same for collection by Overnight Delivery Service by following the ordinary business practices of Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery Service correspondence, said practice being that in the ordinary course of business, Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service offices for next day delivery the same day as Overnight Delivery Service correspondence is placed for collection.

[ ] **BY E-MAIL** I caused to be transmitted each document listed herein via the e-mail address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on July 19, 2010.

Jennifer Koffler

118212/555975

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