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FILED
ALAMEDA COUNTY
AUG 10 2011
By Exec. Off/Clerk

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. RG08379099 PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION Date: October 28, 2011 Time: 2:00 p.m. Dept: 20 Judge: Robert B. Freedman Reservation Number: R-1204995

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I. INTRODUCTION

Plaintiffs and Class Representatives Lavon Godfrey and Gary Gilbert ("Plaintiffs") brought this action on March 28, 2008 in the California Superior Court in the County of Alameda, alleging that Defendant Oakland Port Services Corp., d/b/a AB Trucking ("Defendant" or "AB") violated the California Labor Code ("Labor Code"), Industrial Wage Order No. 9[1] ("Wage Order 9") regulating the transportation industry, and the California Business and Professions Code. The Second Amended Complaint filed September 20, 2010 is the operative complaint.

AB is a drayage trucking company employing drivers. Employee drivers make deliveries and/or load and unload trucks throughout California, though primarily at the Port of Oakland ("Port"). Plaintiffs are former drivers for AB and class representatives. This Court certified a class and subclasses on December 3, 2010.[2]

Plaintiffs bring this motion for summary adjudication as to the sixth and second causes of action in their Complaint. The sixth cause of action alleges Defendant violated Labor Code §§ 226.7, 512 and Wage Order 9, subdivisions 11 and 12, by failing to provide and/or authorize and permit meal and rest periods for employee drivers. The second cause of action alleges Defendant violated Labor Code §§ 1182.12, 1194 and Wage Order 9, subdivision 4, by failing to pay for all hours worked by employee drivers. [3]

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[1] Codified at 8 California Code of Regulations, section 11090.

[2] The Court defined the class and subclasses as follows:
Class: All drivers who performed work for Defendant out of its Oakland, California facility from the period of March 28, 2004 through the date of notice to the class [March 15, 2011] ("Drivers").
Subclasses:
1. All Drivers who were not paid for all hours worked in any work week;
2. All Drivers who were misclassified as "non-employee trainees" and as a result were not paid for any hours worked;
3. All Drivers who were not paid for hours worked over eight in a day and/or forty in a week at an overtime rate of pay;
4. All Drivers who were paid less than the Oakland Living Wage for any hour worked; and
5. All Drivers who were not provided rest breaks and/or meal periods as required by California law.

[3] Plaintiffs' address the sixth cause of action prior to the second cause of action for clarity as the Defendant deducted one hour of pay from employee drivers each day for a theoretical meal period which was not taken. This practice is the basis for the second cause of action.

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II. ISSUES PRESENTED

Is there a triable issue of material fact as to whether Defendant failed to provide employee drivers[4] with meal periods in violation of Labor Code §§ 226.7 and 512 and Wage Order 9, subd. 11?

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

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

III. FACTS

During the class period of March 28, 2004 through March 15, 2011, employee drivers were regularly employed by AB. (SUF ¶¶ 1, 2.[5]) The employee drivers were supervised by a common small group of managers: the president, dispatcher, and import manager. (SUF ¶ 3, 4.) Employee drivers were each required to use the same system to fill out and maintain time cards and were paid, based on those timecards, through a common payroll processing system. (SUF ¶¶ 5, 6.)

Each day, Employee drivers would get into the queue at the Port of Oakland to enter the terminals. Some days, it would take up to 8 hours to advance through the queue to enter the terminals. (SUF ¶ 7.) While in the queue, the employee drivers had no legal and safe place to pull over to take a break and if they left the queue to take a break, they would lose their spot and start over at the end of the queue. (SUF ¶¶ 8, 9.)

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[4] The term "employee driver" is used to emphasis that this motion does not address whether individuals misclassified as trainees were truly employees and that determination is not relevant to this motion for summary adjudication. That issue, addressed in the Third Cause of Action and the second subclass, "All Drivers who were misclassified as "non-employee trainees" and as a result were not paid for any hours worked" will be addressed at trial and the determination of the trainees' status will control whether those individuals are entitled to any remedy under the Second and Sixth Cause of Action.

[5] All references to "SUF" herein refer to Plaintiffs' Separate Statement of Undisputed Fact filed herewith.

A. MEAL AND REST PERIODS

Despite an obligation under State law to provide meal periods to employee drivers, AB failed to inform employee drivers of the entitlement and requirement that they take a 30-minute off-duty meal break no later than five hours after beginning their shifts. (SUF ¶ 10.) No written policy on meal periods existed at AB during the relevant period and no written policy on meal periods was ever provided to employee drivers. (SUF ¶ 11.) AB's common time keeping system did not provide a place for employee drivers to record their meal periods each shift. (SUF ¶ 13.) AB has no record of meal periods taken by employee drivers during the period of March 28, 2004 through March 15, 2011. (SUF ¶ 14.) Employee drivers were not provided 30-minute, off-duty meal periods within every five hours worked. (SUF ¶ 12.)

Despite these facts, AB followed a payroll policy applicable to all employee drivers of automatically deducting one hour from each employee driver's shift reported-time for a meal period. (SUF ¶ 15.)

Also during the relevant period, employee drivers did not receive a 10-minute, off-duty paid rest period for every four hours worked. (SUF ¶ 16.) No written policy on rest periods existed at AB during the relevant period and no written policy on rest periods was ever provided to employee drivers. (SUF ¶ 17.) AB did not keep any records showing rest periods taken by employee drivers. (SUF ¶ 18.)

During the relevant period, employee drivers did not receive compensation of an additional hour of pay for a missed meal period, nor did they receive compensation of an additional hour of pay for a missed rest period. (SUF ¶ 19.)

B. FAILURE TO PAY FOR ALL HOURS WORKED

During the relevant period, all employee drivers suffered an hour deduction from hours worked each day based on AB's assumption that a one hour meal period was taken. (SUF ¶ 15.) Employee drivers actually worked the hour and, as a result, they were not compensated for one hour worked per day. (SUF ¶ 20.)

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IV. ARGUMENT

A. STANDARDS FOR DETERMINING A MOTION FOR SUMMARY ADJUDICATION

California Code of Civil Procedure ("CCP") section 437c(f)(1) provides, "A party may move for summary adjudication as to one or more causes of action within an action …." For purposes of summary adjudication, separate wrongful acts give rise to separate causes of action. Whether these facts are pleaded in the same or single counts is not determinative. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853-1855.)

Where the plaintiff seeks summary judgment or adjudication, the burden is to produce admissible evidence on each element of a "cause of action" entitling the plaintiff to judgment. (CCP § 437c(p)(1).) Plaintiffs who bear the burden of proof at trial by a preponderance of the evidence must produce evidence that would require a reasonable trier of fact to find any underlying material fact *more likely than not.* (See e.g., *Buss v. Superior Court* (1997) 16 Cal.4th 35, 53-54 [so holding under Evid. Code, §§ 115 & 500, as to the quantum and placement of the burden of proof, respectively]; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.)

When a plaintiff carries this burden, the burden of proof then shifts to the defendant "to show that a triable issue of one or more material facts exists as to that cause of action." (CCP § 437c(p)(1).)

> … the Supreme Court [has] recognized that the moving party always bears the initial burden of establishing the absence of a genuine issue of material fact … The nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." This can be accomplished by producing "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." If the evidence is "merely colorable" or is "not significantly probative," summary judgment shall be granted [citations omitted].

(*Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1286 [disapproved by *Aguilar*, *supra*, 25 Cal.4th at 854 fn. 23 on other grounds.].)

The facts that support Plaintiffs' sixth and second causes of action are undisputed. No triable issue of material fact exists as to the elements required to prove these causes of action. For the reasons discussed below, Plaintiffs and the class are entitled to summary adjudication because

there is no triable issue of material fact with respect to whether Defendant violated Labor Code §§ 226.7, 512, 1182.2, 1194 and Wage Order 9, subdivisions 4, 11 and 12.

B. SIXTH CAUSE OF ACTION

Plaintiffs' sixth cause of action alleges that Defendant failed to provide Plaintiffs and other employees all meal and rest periods as required by Labor Code §§ 226.7, 512 and Wage Order 9, subdivisions 11 and 12.

1. There Is No Genuine Issue of Material Fact Regarding the Claim Defendant Failed to Provide Employee Drivers with Meal Periods

Plaintiffs are entitled to a judgment that Defendant has violated Labor Code §§ 226.7 and 512 and Wage Order 9 as a matter of law.

a) Labor Code §§ 226.7, 512 and Wage Order 9, subdivision 11.

Labor Code § 226.7 provides:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order the industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Labor Code § 512 provides that: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes ..." The language of Wage Order 9, subdivision 11 relating to meal periods tracks the language in the Labor Code. (See also *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 953 ["*Cicairos*"].)

b) The requisite elements to prove violations of Labor Code §§ 226.7, 512 and Wage Order 9, subdivision 11.

The words of a statute should be given their ordinary and usual meaning and should be construed in their statutory context. (See e.g., *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 ["We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent"].)

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Plaintiffs must show that, more likely than not, employee drivers' meal periods were *not*: (1) uninterrupted, (2) for 30 continuous minutes, or (3) provided within the first five hours of a shift. (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304 ["*Jaimez*"].) Plaintiffs must show that Defendant did not affirmatively "ensure" employee drivers were "actually relieved of all duty" during, or in order to have, a meal period. This affirmative duty includes the obligation to record employees' meal periods. (*Cicairos, supra*, 133 Cal.App.4th at pp. 962-963.)

Plaintiffs must also show that Defendant did not pay employee drivers one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period was not provided. (See Labor Code § 226.7(b), Wage Order 9, subd. 11(D).)

c) The requisite elements of this claim are established.

As to the sixth cause of action, the evidence shows that employee drivers worked during meal periods, as defined by Wage Order 9, and that when employee drivers were not provided meal periods, they were not paid an additional hour's worth of pay. (SUF ¶¶ 12, 19.) The undisputed facts show Defendant never provided employee drivers with written policies on meal periods. In addition, AB's representative responsible for instructing employee drivers on meal period only vaguely and evasively describes mentioning to drivers when, and for how long, meal periods should be taken. (SUF ¶¶ 7-14.) Specifically, William Aboudi, AB's person most knowledgeable regarding AB's meal and rest period policies, testified in response to questioning by Plaintiffs' counsel:

> Q. Do you have a set policy -- that is, communicated to the drivers -- regarding what you expect to happen with meal periods?
> A. Yes. We expect them to take their meal break, one hour, every shift.
> Q. And how is that communicated to the drivers?
> A. I tell 'em.
> Q. When do you tell them?
> A. When I hire them and as we go along, if need be, if they need clarification.
> Q. When is the last time you provided a driver with clarification regarding the company's meal-period policy?
> A. No idea.

...

> Q. Do you provide any information to the drivers at this orientation regarding meal periods and rest periods?
> A. We talk about everything.

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> Q. Do you provide any written follow-up on any of those communications?
> A. We've done memos, but really it's all just sitting and communicating with these people, because everything that you give them goes in the trash can.
> Q. What kind of memos have you done?
> A. From time to time there's memos that go out to the drivers about certain problems that we're having. Could be terminal operations, new rules that went into effect, a problem that we see with them not filling out paperwork properly. It varies.
> Q. How frequently would you say such memos are produced?
> A. When there's a problem. When there's a need to address.
> Q. When is the last time that you produced such a memo?
> A. I don't recall.

(SUF ¶¶ 11, 10.) In contrast, drivers testified clearly that they never received full, 30-minute meal periods. (SUF ¶ 12.) It is more likely than not AB employed drivers for a work period of more than five hours per day without providing the employee drivers with a meal period of not less than 30 minutes. (SUF ¶¶ 7-14.) Moreover, Defendant can produce nothing based on admissible evidence that any driver employee received any meal period that was (1) uninterrupted, (2) for 30 continuous minutes, or (3) provided within the first five hours of a shift. (*Jaimez*, *supra*, 181 Cal.App.4th at p. 1304.)

AB additionally has an affirmative obligation under the Labor Code and Wage Order to ensure that workers are actually relieved of all duty. In *Cicairos*, the Court of Appeal explained this obligation in reversing the trial court's ruling granting the employer's motion for summary judgment, which included a meal and rest period claim. Although the Court of Appeal performed its analysis in the opposite context, it nonetheless clearly described the employer's burden of proof (see also CCP § 437c(p)(1)), as follows:

> Under the facts presented in support of summary judgment, the defendant's obligation to provide the plaintiffs with an adequate meal period is not satisfied by assuming that the meal periods were taken, because employers have "an affirmative obligation to ensure that workers are actually relieved of all duty." (Dept. of Industrial Relations, DLSE, Opinion Letter No. 2002.01.28 (Jan. 28, 2002) p. 1.) They also have a duty, under wage order No. 9, to record their employees' meal periods. The defendant does not claim to have complied with this provision.

(*Cicairos*, *supra*, 133 Cal.App.4th at pp. 962-963.) The Court of Appeals found that "under these facts, the defendant has failed to establish it provided the plaintiffs with their required meal periods." It is undisputed that AB did not affirmatively ensure that employee drivers were relieved

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of all duty for 30-minutes after five hours of work each day.

First, AB was well aware that when employee drivers drove to the Port of Oakland, it could take as many as 8 hours to get through the terminal at the Port of Oakland. (SUF ¶ 7.) During this time, employee drivers had to maintain control over their truck. AB was aware that employee drivers who left their place in the queue while in line at the Port of Oakland would lose their original place in the queue, and that there was no area for an employee driver to legally and safely pull the truck over while in line. (SUF ¶¶ 8, 9.) Second, and in further exacerbation of these well-known conditions, AB failed to inform employee drivers of the right and requirement that they take a 30-minute off-duty meal break no later than five hours after beginning their shifts, and that it failed to provide any written policy on meal periods to employee drivers (no such written policy existed). (SUF ¶¶ 10, 11.) These facts show it was more likely than not that employee drivers' meal periods, if any, were not (1) uninterrupted, (2) for 30 continuous minutes, or (3) provided within the first five hours of a shift. Likewise, these facts show Defendant did not affirmatively ensure workers were relieved of duty.

Third, AB's timekeeping system during the relevant period admittedly did not provide a place for employee drivers to record their meal periods each shift. (SUF ¶ 13.) AB has no record of meal periods taken by employee drivers during the period of March 28, 2004 through March 15, 2011. (SUF ¶ 14.) The Wage Order, supported by the *Cicairos* court's findings, establishes that AB has a *duty* to record employee drivers' meal periods; AB admittedly did not. (SUF ¶ 18; Wage Order 9, subd. 7(a)(3).) This fact alone shows it is more than likely AB failed to meet its "affirmative obligation" to ensure its employees took meal periods.

Finally, AB admits that employee drivers did not receive compensation of an additional hour's worth of pay for a missed meal period. (SUF ¶ 19.) This is undisputed.

The facts which support and prove that violations of Labor Code §§ 226.7 and 512 and Wage Order 9, subdivision 11 occurred are undisputed.

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2. There Is No Genuine Issue of Material Fact Regarding the Claim Defendant Failed to Provide Employee Drivers with Rest Periods

Like the meal period claim above, Plaintiffs are also entitled to a judgment as a matter of law that Defendant has violated Labor Code §§ 226.7 and Wage Order 9, subdivision 12, in failing to authorize and permit rest breaks.

a) Labor Code § 226.7[6] and Wage Order 9, subdivision 12.

Wage Order 9, subdivision 12 provides:

> Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof ... Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

b) The requisite elements to prove violations of Labor Code § 226.7 and Wage Order 9, subdivision 12.

Plaintiffs must show it is more than likely that Defendant did not "authorize" or "permit" employee drivers to take rest breaks. (See Labor Code § 226.7; Wage Order 9, subd. 12.)

Plaintiffs must show that Defendant did not pay employee drivers one additional hour of pay at the employee's regular rate of compensation for each workday that the rest period was not provided. (See Labor Code § 226.7(b).)

c) The requisite elements of this claim are established.

The undisputed facts show Defendant employed drivers for a work period of more than four hours per day without providing the employee drivers with a rest period at the rate of ten minutes per four hours. (SUF ¶ 2, 7-9, 16, 18.) As with meal periods, AB's management avoided direct questions about "authorizing" and "permitting" rest breaks for its employee drivers. William Aboudi testified:

> Q. So as you sit here today, you can't give me an estimate of when you provided last verbal instruction to a driver regarding rest breaks, can you?
> A. I'm trying to think of when I talked to a driver, but it wasn't regarding the rest break, so I don't recall.

[6] Cited above in full.

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Q. And in practice, other than at the time of hire, unless an issue comes to your attention, you have no further conversation with a driver regarding rest breaks; is that correct?
A. If somebody brings it up in a group, if we're talking, if a person has a concern, if somebody requested clarification, then we can clarify it.
Q. Has it come up since 2005 that a driver has asked for a clarification on the rest breaks?
A. Sure.
Q. When?
A. I don't remember, but I'm sure. A lot of stuff comes up.
Q. Do you have to any specific recollection of it coming up?
A. No.

(SUF ¶ 16.)

Consistent with this testimony, Defendant has no record of rest periods taken by employee drivers during the relevant period. (SUF ¶ 18.) While Defendant is not specifically required to keep records of the drivers' rest breaks, when Defendant has no record of rest breaks *and* no evidence of any training or other instruction given drivers regarding rest breaks (SUF ¶¶ 16, 17), it becomes more than likely that Defendant did not "authorize" or "permit" drivers to take rest breaks.

For a rest period to be authorized or permitted, the employee driver must have some way to be relieved of work duties. A driver employee must be able to leave his truck and not be responsible for the vehicle or its cargo. An employee driver waiting, in her truck, in the queue to enter the Port of Oakland cannot safely park her truck or pull over to the side. (SUF ¶ 9.) As such, employee drivers did not receive a 10-minute, off-duty paid rest period for every four hours worked. (SUF ¶ 16.) AB admits that during the relevant period, employee drivers did not receive compensation of an additional hour of pay for a missed rest period. (SUF ¶ 19.)

The evidence which supports and proves that violations of Labor Code § 226.7 and Wage Order 9, subdivision 12 occurred is undisputed.

C. SECOND CAUSE OF ACTION

Plaintiffs' Second Cause of Action alleges Plaintiffs worked hours for Defendant for which they were not compensated and that Defendant regularly shorted hours on paychecks and deducted time from employee paychecks for meal periods even if such meal periods were not taken.

Plaintiffs allege Defendant violated Labor Code §§ 1182.12, and 1194 and Wage Order 9, subdivision 4.[7]

1. **<u>There is No Triable Issue of Material Fact with Respect to Whether Defendant Failed to Pay for All Hours Worked by Drivers</u>**

Plaintiffs are entitled to a judgment that Defendant has violated Labor Code §§ 510 and 1182.12 and Wage Order 9, subdivision 4, as a matter of law.

a) Labor Code §§ 1182.12, 1194 and Wage Order 9, subd. 4.

Labor Code § 1182.12 provides:

> Notwithstanding any other provision of this part, on and after January 1, 2007, the minimum wage for all industries shall be not less than seven dollars and fifty cents ($7.50) per hour, and on and after January 1, 2008, the minimum wage for all industries shall be not less than eight dollars ($8.00) per hour.

Wage Order 9, section 4 provides for each employee to be paid no less than minimum wage for each hour worked and for those wage payments to be made on no less than a bi-weekly basis. Wage Order 9, section 2, subsection 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."

Labor Code § 1194 provides a private right of action to "any employee receiving less than the legal minimum wage…"

b) The requisite elements to prove violations of Labor Code §§ 1182.12, 1194 and Wage Order 9.

Employees must be paid for hours they work. Plaintiffs must show it is more likely than not that Defendant failed to pay employee drivers for all time they were working. "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 basis of liability is the owner's failure to*

[7] This motion does not address the appropriate hourly rate that should have been paid for the deducted time. Whether straight time or overtime compensation under Labor Code § 510 should have been provided is addressed in the third subclass "All Drivers who were not paid for hours worked over eight in a day and/or forty in a week at an overtime rate of pay" and is an issue of damages under the Second Cause of Action, not liability.

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perform the duty of seeing to it that the prohibited condition does not exist."].) When employee drivers are not paid *at all* for hours they worked (SUF ¶¶ 15, 19, 20), there is no triable issue of material fact as to whether a violation of Labor Code §§ 1182.12, 1194 and Wage Order 9, subdivision 4 occurred as a matter of law.

c) The requisite elements of this claim are established.

During the relevant period, employee drivers were not provided 30-minute, off-duty meal periods within every five hours worked. (SUF ¶ 12.) Instead, employee drivers continued working. However, AB admits it followed a payroll policy applicable to all employee drivers of automatically deducting one hour from each employee driver's shift reported-time for a meal period. (SUF ¶ 15.) In addition to the admission by AB's person most knowledgeable on payroll that the computer system was set up to automatically deduct one hour of pay for a meal period each day (and that a manual entry and override was required if a correction to this auto-deduction needed to be made), one only need review the timecards produced by Defendant to see that when employee drivers worked 9 hours, for instance, their timecards reflected they would be paid for 8. (*Id.*) All employee drivers suffered an hour deduction from hours worked each day based on AB's assumption that a one hour meal period was taken. Employee drivers actually worked the hour and, as a result, they have not been compensated for one hour worked per day. (SUF ¶ 20.) The undisputed facts show it is more than likely Defendant failed to pay employee drivers for all hours they worked.

An employee must be paid at least the minimum wage for each individual hour worked. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323. The employee drivers were not paid at all for the hour of time deducted for the theoretical meal period. There is no triable issue of material fact as to whether Defendant violated Labor Code §§ 1182.12, 1194 and Wage Order 9.

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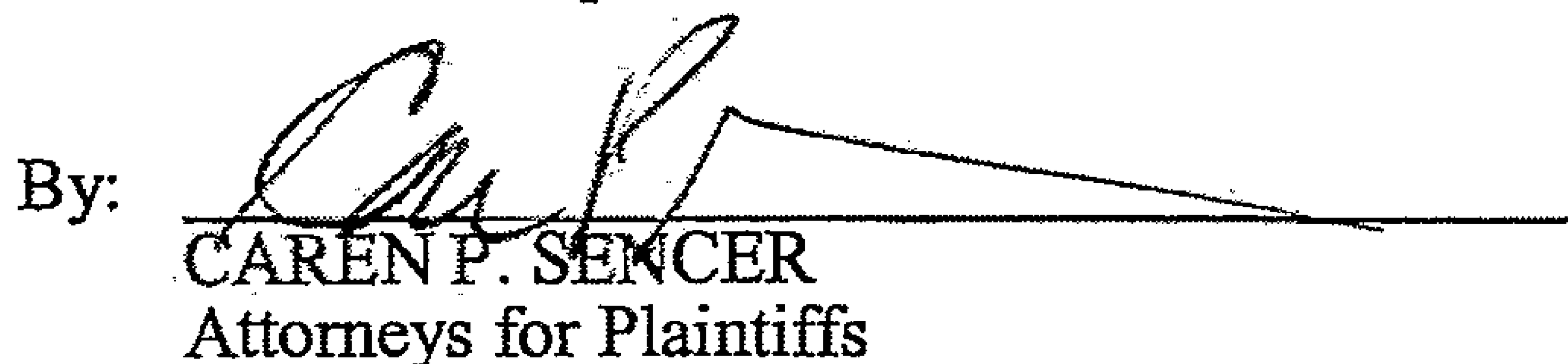
V. CONCLUSION

As the foregoing reveals, there is no issue of material fact as to whether Defendant violated Labor Code §§ 226.7, 512, 1182.2, 1194 and IWC Wage Order 9. The evidence conclusively shows that employee drivers worked during meal and rest periods, and were not paid an additional hour's worth of pay. All employee drivers suffered an hour deduction from hours worked each day, based on AB's assumption that a one hour meal period was taken, and subsequent automatic deduction, and were not compensated for all hours worked. Accordingly, Plaintiffs are entitled to summary adjudication as to Plaintiffs' sixth and second causes of action as a matter of law.

Dated: August 10 , 2011

WEINBERG, ROGER & ROSENFELD
A Professional Corporation



By: CAREN P. SENCER
Attorneys for Plaintiffs

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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 August 10, 2011, 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
jay@aboudi-law.com

copies of the document(s) described as:

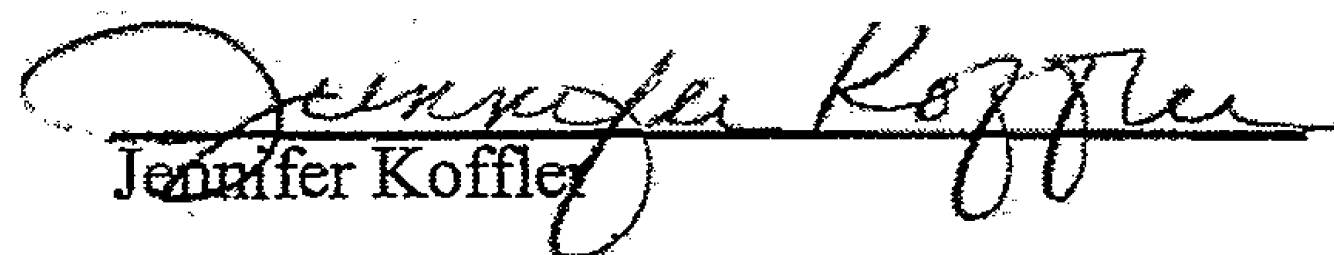
PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

[ ] **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 August 10, 2011.



Jennifer Koffler

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