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**United States District Court**  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JUAN BONIFACIO ULIN,  
Plaintiff,

No. C-09-03160 EDL

v.

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY ADJUDICATION; DENYING PLAINTIFF'S MOTION TO BIFURCATE WITHOUT PREJUDICE**

LOVELL'S ANTIQUE GALLERY,  
et al.,  
Defendants.

\_\_\_\_\_ /

This is a wage and hour action between Plaintiff Juan Bonefacio Ulin (also known as "Chapin") and his former employer ALEA-72 Inc. dba Lovell's Antique Gallery and its owner/manager Abraham Magidish. Plaintiff brings claims for violation of state and federal overtime law, failure to provide meal and rest periods under California law, failure to pay wages due and "waiting time" penalties under California law, violation of California Business & Professions Code § 17200, and violation of California Labor Code § 226 for failure to provide proper pay statements. Three motions were heard on August 31, 2010: (1) Defendants' Motion for Summary Judgment or Summary Adjudication, which is now GRANTED IN PART AND DENIED IN PART; (2) Plaintiff's Motion for Partial Summary Adjudication of his California Labor Code § 226 Claim,

1 which is GRANTED; and (3) Plaintiff’s Motion to Bifurcate, which is DENIED without prejudice to  
2 raising the issue again during pre-trial proceedings.

3 **I. Factual Background**

4 Defendant ALEA-72 Inc., a corporation formed by Abraham Magidish in 2002, owns and  
5 operates a furniture and antique store doing business under the fictitious name “Lovell’s Antique  
6 Gallery.” Magidish Decl. ¶¶ 2-3, Exs. A-B; Magidish Depo. 16. Lovell’s is open seven days a week  
7 from 9 a.m. to 9 p.m. Magidish Depo. 45. From July 2005 to February or March 2009, Plaintiff was  
8 employed by Defendants, performing warehouse and delivery services. Wang Decl. Ex. 2 (payroll  
9 records from 4/08-3/09); Ulin Depo. 8, 27; Magidish Depo. 51.

10 **A. Plaintiff’s Work Schedule**

11 **1. Defendants’ Version of the Facts**

12 Defendants claim that Plaintiff’s regular work schedule was generally five days a week with  
13 two days off. See R. Hernandez Depo. 54 (he thinks Plaintiff worked 5 days a week); Jimenez  
14 Depo. 25, 30, 44. From April 2005 to April 2008, Plaintiff had Mondays and Saturdays off.  
15 Magidish Decl. ¶¶ 4-5, Ex. D. From April 2008 to February 27, 2009, he had Wednesdays,  
16 Saturdays and Sundays off. Magidish Decl. ¶¶ 4-5, Ex. D; Hernandez Depo. 53-55. According to  
17 Defendants, Plaintiff generally reported to the retail store for work at 9:00 a.m., took a one-hour  
18 break for breakfast until 10:00 a.m., and then worked in the warehouse until 6:00 p.m. with a one-  
19 hour lunch at 1:00 p.m. Magidish Decl. ¶ 4; Hernandez Depo. 24, 36, 99-100; Magidish Depo. at  
20 65, 70, 72, 98-99, 101, 124; Jimenez Depo. at 23, 78, 99; Wang Dec. Exh. 5 (Defendant’s Response  
21 to Interrogatory No. 2). Thus, according to Defendants, he generally worked seven hours per day.  
22 Mr. Magidish testified that Plaintiff’s fixed daily salary compensated him for seven hours of work,  
23 and not for any additional work. Magidish Depo. at 94.

24 The one-hour breakfast break in the morning allowed orders and work to be organized for the  
25 day. Magidish Depo. 52; Hernandez Depo. 24. An assistant, Yesika Jimenez, and a  
26 manager, Roberto Hernandez, coordinated the schedule for other workers and recorded who  
27 reported for work. Magidish Depo. 39-40; Hernandez Depo. 13, 23, 25; Jimenez Depo. 27. Mr.  
28 Magidish called in to determine who reported for work every day and recorded this information on a

1 separate calendar. Magidish Decl. ¶ 5, Ex. D; Magidish Depo. 68; Hernandez Depo. 67-68, 107.

2 Plaintiff sometimes arrived for work after 9 a.m. Magidish Depo. 72; Hernandez Depo. 89.

3 Generally, at around 10 a.m., Plaintiff and other warehouse workers traveled from the  
4 Lovell’s retail store near Union Square to the warehouse on Tennessee Street. Magidish Depo. 38,  
5 65; Jimenez Depo. 22. Plaintiff occasionally departed from the Lovell’s store earlier than 10 a.m. to  
6 go on a delivery. R. Hernandez Depo. 102. The warehouse opened at 10 a.m. and deliveries were  
7 not accepted there prior to this time. Magidish Depo. 102. Deliveries were completed by 4 p.m.,  
8 and the warehouse closed at 6 p.m. Magidish Depo. 59; Jimenez Depo. 100. The warehouse was  
9 sometimes closed on Sundays, in which case Plaintiff might work in the store or in the warehouse,  
10 but he primarily worked in the warehouse. Hernandez Depo. 55-56; Jimenez Depo. 22. Regardless  
11 of where he worked on Sundays, according to Defendants, Plaintiff’s workday ended at 6 p.m.  
12 Magidish Depo. 74-75.

13 During the last two years of employment, Plaintiff worked a reduced schedule. Jimenez  
14 Depo. at 79:6-7. Plaintiff worked other jobs and also took classes while employed by Lovell’s. Ulin  
15 Depo. at 27, 30; Juan Carlos Depo. 71-72; Jimenez Depo. 75; Buchanan Decl. Ex. H (Response to  
16 Interrogatories, No. 5).

17 **2. Plaintiff’s Version of the Facts**

18 **a. Hours Worked**

19 Plaintiff claims that his regular work hours were approximately 12 hours per day, from 9:00  
20 a.m. to 9:00 p.m. Ulin Depo. 17 (was initially told he would work from 9-9), 101-102 (worked 12  
21 hours a day); Wang Decl. Ex. 4 (Plaintiff’s discovery responses) (regular hours from Monday-  
22 Saturday were 9-9 and 10-7 if he worked on Sunday). Plaintiff disputes that he was allowed a one-  
23 hour breakfast break at the start of each workday. Ulin Depo. 107. Plaintiff points out that, during  
24 his deposition, Mr. Magadish explained that notes listing the days worked by Plaintiff containing the  
25 number “9” meant that Plaintiff was at work for nine hours, not the seven hours he claimed  
26 elsewhere. Wang Dec. Ex. 7 (sampling of sheets produced by Mr. Magadish); Magidish Depo. 92.  
27 Plaintiff further points out that Ms. Jimenez, whose testimony Defendants rely on in part as evidence  
28 of Plaintiff’s work schedule, was admittedly sometimes not in the store to see when Plaintiff arrived

1 and could not say whether or not he had been working prior to her arrival at 10:00 a.m. Jimenez  
2 Depo. 22-23. Additionally, manager Roberto Hernandez admitted that his memory of the days  
3 worked by Plaintiff was only 40 percent accurate. R. Hernandez Depo. 54-55. Mr. Hernandez also  
4 testified that, in contrast to Mr. Magidish's claim that work was never performed between 9 a.m. and  
5 10 a.m. during the alleged coffee break, warehouse workers would often be out on delivery in the  
6 morning from 9:00 until 11:00 or 12:00 and he did not know if they took a break to eat during that  
7 time. Id. at 102.

8 Mr. Magidish testified that Plaintiff's fixed daily salary compensated him for seven hours of  
9 work, and not for any additional work. Magidish Depo. 94. Therefore, Plaintiff reasons that, if he  
10 did not regularly receive a one-hour coffee break in the morning (which is disputed), then even  
11 taking Defendants' claim that Plaintiff's regular schedule was from 9 a.m. to 6 p.m. as true, the  
12 length of his work day and entitlement to overtime remains in dispute. However, this would only be  
13 true if Plaintiff also did not receive a one hour lunch break, as discussed below.

#### 14 **b. Days Worked**

15 In addition to disputing the number of hours worked per day, there is also a dispute over the  
16 number of days worked per week. Plaintiff contends that for much of his employment he worked a  
17 regular schedule of six days per week. Ulin Depo. 102 (worked 6 days a week in 2005 through  
18 2007), 59 (had three days off in 2008), 102-103 (worked 5 days a week in 2008 but also performed  
19 one day of work a week at Mr. Magadish's residence), 103 (worked 4 days a week); but see  
20 Magidish Decl. ¶ 4-5, Ex. D. Plaintiff points out inconsistencies in the testimony of Defendants'  
21 employees about the number of days he worked. See Carlos Hernandez Depo. 40 (thinks  
22 "everyone" worked six days a week during period from 2003-2006); Jimenez Depo. at 26 (no one  
23 worked more than five days per week) compared with Jimenez Depo. at 76-77 ("Well, maybe they  
24 worked six days a week a few times, but it was not every week. I don't know.") and Jimenez Depo.  
25 79 (Plaintiff worked 4 days a week or fewer during last two years of employment); R. Hernandez  
26 Depo. 54 (thinks Plaintiff worked five days a week) compared with R. Hernandez Depo. 66 (does  
27 not remember if Plaintiff ever worked more than five days a week).

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1           **B.       Plaintiff's Compensation**

2           It is undisputed that Plaintiff was paid a set amount per day. Ulin Depo. 32. He initially  
3 received \$65 per day. Ulin Depo. 65, 133. In 2006, Plaintiff's pay rate was increased to \$70 per day.  
4 Id. In 2007, Plaintiff's pay was again raised to \$75 per day and it remained the same until the  
5 termination of his employment. Ulin Depo. 35, 133; Magidish Depo. 77. It is also undisputed that  
6 Plaintiff received this daily salary for each day he worked at Lovell's, and that he was regularly paid  
7 bi-monthly. Ulin Depo. 26, 31, 36, 81; Opp. at 12. Plaintiff received his regular pay in an envelope  
8 given to him by Roberto Hernandez or Yesika Jimenez. Ulin Depo. 25. The envelopes generally had  
9 a calculation written on them. See Buchanan Decl. Ex. F. The amount of pay was based upon the  
10 number of days worked. Magidish Depo. 67; Jimenez Depo. 31.<sup>1</sup>

11           However, according to Defendants, the number of days written on the envelopes was not  
12 always accurate. Hernandez Depo. 107. For example, they claim that Plaintiff sometimes received  
13 additional cash for work in excess of the scheduled seven hours per day. Ulin Depo. at 25; Juan  
14 Carlos Depo. 27; Magidish Decl. ¶ 7. Plaintiff was sometimes credited with extra days and received  
15 extra pay when he went on out-of-state trips for customer deliveries. Ulin Depo. 33-34; Jimenez  
16 Depo. 33; 43; Magidish Decl. ¶¶ 6-7. Plaintiff was paid extra if he worked later than his regular  
17 scheduled hours. Magidish Depo. 93-94, 142-145. Plaintiff also received additional pay for  
18 construction work that he performed separately for Mr. Magidish personally. Jimenez Depo. 45.  
19 However, there is no record of these additional cash payments. Magidish Depo. 93-94.

20           **C.       Break Periods**

21           It is undisputed that Plaintiff was free to take breaks during work hours, and sometimes took  
22 breaks for personal reasons. Ulin Depo. 48-49, 52, 109; Juan Carlos Depo. 74 (no one told Plaintiff  
23 he could not take a break). Plaintiff's testimony about when he took morning breaks is somewhat  
24 inconsistent. Ulin Depo. 8, 106 (throughout January 2005 he took regular coffee breaks at 10 a.m.,  
25 \_\_\_\_\_

26 <sup>1</sup> Plaintiff produced 38 of the 96 bi-weekly envelopes he should have received during the four years of  
27 his employment. Jimenez Depo. 34; 53. Defendants argue that he only produced the envelopes most  
28 favorable to his position, and that his claim that these are all of the documents he has relating to his  
employment is not credible because he trained as an accountant in Guatemala and retained all cash  
remittance receipts for transmissions to Guatemala. See Buchanan Decl. Ex. H (Response to Request  
for Production of Documents); Ulin Depo. 114-117, 136. However, neither the completeness of  
Plaintiff's document production nor his credibility are appropriate issues for summary judgment.

1 though he also testified that he was not even employed until July 2005); Ulin Depo. 108-109 (he did  
2 not take breaks throughout 2008).

3 **D. Meal Periods**

4 Plaintiff had a lunch break every day that he worked at Lovell’s. Ulin Depo. 52. A co-  
5 worker would bring back food from a restaurant and the employees ate together. Ulin Depo. 54;  
6 Juan Carlos Depo. 75-76. Plaintiff claims that his lunch break lasted from 15 to 20 minutes to 40  
7 minutes at the most. Ulin Depo. 54-55.; cf. Juan Carlos Depo. (took employees a “good while” to  
8 eat lunch). Lovell’s policy was for employees to take a one-hour lunch break, and a manager  
9 generally called the warehouse to confirm that the workers were starting their lunch. Magidish  
10 Depo. 119. However, Ms. Jimenez testified that the warehouse workers did not call to check in at  
11 the end of their lunch so it was unknown how long they were out for lunch. Jimenez Depo. 90-91.

12 **E. Plaintiff’s Job Duties**

13 Plaintiff’s job duties at the warehouse included packing items for delivery and assisting with  
14 deliveries. Magidish Depo. 51:7-11. Plaintiff also sometimes accompanied a driver to make out-of-  
15 state deliveries for Lovell’s. Ulin Depo. 33; Magidish Depo. 164, 166; Jimenez Depo. 82-83. He  
16 went on many delivery trips during his employment, including more than 10 trips during his last  
17 year of employment, eight of which were outside of the Bay Area. Jimenez Depo. at 32; Jimenez  
18 Decl. ¶ 3, Ex. B. He traveled to Texas, Houston, Dallas, Florida, Georgia, Utah, Nevada and Arizona  
19 while making deliveries for customers. Jimenez Depo. 33. In 2008, he also traveled to Missouri,  
20 Kentucky, George, Colorado, Louisiana. Jimenez Decl. ¶ 3, Ex. B.

21 **F. Plaintiff’s Working Conditions**

22 Plaintiff was sad to stop working at Lovell’s because he enjoyed working there.  
23 The work was fun and there was a spirit of teamwork. Ulin Depo. 39-40; 60. Plaintiff considered  
24 Mr. Magidish a good boss who was generous with financial assistance and provided Plaintiff with  
25 clothes and shoes. Ulin Depo at 38; 40-42. Plaintiff’s hours were eliminated on February 27, 2009.  
26 Ulin Depo. 59-60. Defendants found Plaintiff a new job. Ulin Depo. 60; Magidish Decl. ¶ 7.

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1           **G. Plaintiff’s Work Authorization Status**

2           Defendants contend that Plaintiff submitted false work authorization documents to his  
3 employer when he completed Form I-9, his Employment Eligibility Verification form.  
4 Jimenez Decl. at ¶ 2, Ex. A; Marachi Decl. ¶¶ 2-6, Ex. A. Defendants have submitted the  
5 declaration of an immigration attorney who has concluded, based on his own investigation, that  
6 Plaintiff was not working legally in the United States when he worked at Lovell’s. Marachi Decl. at  
7 ¶ 6. Plaintiff has not challenged this declaration or otherwise attempted to counter or respond to it.

8           **H. Mr. Madigish’s Involvement In Plaintiff’s Employment**

9           Mr. Magidish was responsible for posting, calculating, measuring, estimating, recording, or  
10 otherwise determining the hours worked by Plaintiff, and wages paid him. Wang Decl. Ex. 5  
11 (Defendants’ Response to Plaintiff’s Interrogatory No. 7). Mr. Magidish also authorized and issued  
12 payments to Plaintiff. Wang Decl., Exh. 5 (Defendants’ Response to Plaintiff’s Interrogatory No. 8).  
13 Mr. Magidish supervised Plaintiff’s work, and was responsible for recruiting, hiring, firing,  
14 disciplining, assigning jobs and setting wages for Plaintiff. Wang Decl., Exh. 5 (Defendants’  
15 Response to Plaintiff’s Interrogatory Nos. 9, 10).

16           **I. Defendants’ Knowledge**

17           Mr. Magidish knew that if Plaintiff worked in excess of five days per week, overtime would  
18 be incurred. See Magidish Depo. 95-97 (“I know that if he worked five days in those periods; so it’s  
19 ten days. Ten days he gets \$75, but after that he has to get time and a half; that’s the law. But I don’t  
20 remember if he worked 13 days straight. That’s what my understanding.”); Magidish Depo. 133  
21 (stating that if Plaintiff worked 11 days and therefore exceeded 40 hours, he would have to pay him  
22 overtime). Additionally, Mr. Magidish admitted to usually “tipping” employees for “overtime and  
23 appreciation” in cash and providing free lunch if they worked later than 6:00 p.m, the amount  
24 depending on his mood. Magidish Depo. 143-145.

25           **II. LEGAL STANDARD**

26           Summary judgment shall be granted if “the pleadings, discovery and disclosure materials on  
27 file, and any affidavits show that there is no genuine issue as to any material fact and that the  
28 movant is entitled to judgment as a matter of law.” Fed. R. Civ. Pro. 56(c). Material facts

1 are those which may affect the outcome of the case. See Anderson v. Liberty Lobby,  
2 Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient  
3 evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The court must view  
4 the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable  
5 inferences to be drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475  
6 U.S. 574, 587 (1986). The court must not weigh the evidence or determine the truth of the matter,  
7 but only determine whether there is a genuine issue for trial. Balint v. Carson City, 180 F.3d 1047,  
8 1054 (9th Cir. 1999). The evidence presented by the parties must be admissible. Fed. R. Civ. Proc.  
9 56(e).

10 A party seeking summary judgment bears the initial burden of informing the court of the  
11 basis for its motion, and of identifying those portions of the pleadings and discovery responses that  
12 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317,  
13 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively  
14 demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue  
15 where the nonmoving party will bear the burden of proof at trial, the moving party can prevail  
16 merely by pointing out to the district court that there is an absence of evidence to support the  
17 nonmoving party’s case. Id.

18 If the moving party meets its initial burden, the opposing party “may not rely merely on  
19 allegations or denials in its own pleading;” rather, it must set forth “specific facts showing a genuine  
20 issue for trial.” See Fed. R. Civ. P. 56(e)(2); Anderson, 477 U.S. at 250. “Conclusory, speculative  
21 testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat  
22 summary judgment.” Soremekun v. Thrifty Payless, Inc. 509 F.3d 978, 984 (9th Cir. 2007); see also  
23 Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (“[M]ere allegation and  
24 speculation do not create a factual dispute for purposes of summary judgment”). If the nonmoving  
25 party fails to show that there is a genuine issue for trial, “the moving party is entitled to judgment as  
26 a matter of law.” Celotex, 477 U.S. at 323.

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1 **III. ANALYSIS**

2 **A. Defendants’ Motion for Summary Judgment or Summary Adjudication**

3 **1. Plaintiff’s Immigration Status**

4 Defendants argue that Plaintiff’s submission of false documents at the time of his  
5 employment precludes any recovery of overtime pay. Defendants point to the declaration of  
6 immigration attorney Jason Marachi, who reviewed the documents that Plaintiff submitted to  
7 Defendants at the time of his employment, performed an independent investigation, and concluded  
8 that Plaintiff submitted false work authorization documents to his employer and was not working  
9 legally in the United States while he worked for Defendants. See generally Marachi Decl. Plaintiff  
10 has not raised any factual dispute on this issue, but disagrees that his recovery of damages is  
11 affected.

12 Defendants rely primarily on Reyes v. Van Elk, Ltd., 148 Cal. App. 4th 604, 611 (2007),  
13 where the court stated that:

14 Thus, as presented to this court, this case does not involve a situation where  
15 undocumented workers submitted false work authorization documents to a  
16 prospective employer. (See e.g., Ulloa v. Al’s All Tree Service, Inc.  
17 (Dist.Ct.2003) 2 Misc.3d 262, 768 N.Y.S.2d 556, 558 [“The Court also notes in  
18 passing that, if there had been proof in this case that the Plaintiff had obtained his  
19 employment by tendering false documents (activity that is explicitly unlawful  
under IRCA), Hoffman would require that the wage claim [for unpaid wages] be  
disallowed in its entirety.”].) However, the issue of whether Hoffman requires  
that a wage claim be denied if an employee submitted false authorization  
documents is not before this court.

20 However, Reyes expressly did not reach the issue raised by Defendants, and therefore is of little help  
21 to them. Hoffman Plastic Components, Inc. v. National Labor Relations Board, 535 U.S. 137  
22 (2002), cited by Reyes, foreclosed an award of backpay under the National Labor Relations Act to a  
23 worker who had submitted false documents to his employer because the Court found that an award  
24 of backpay “for years of work not performed, for wages that could not lawfully have been earned,  
25 and for a job obtained in the first instance by criminal fraud” would run counter to immigration  
26 policy. Id. at 149, 151. Hoffman did not involve a case such as this, where Plaintiff claims to have  
27 already performed the work in question and seeks payment for that work, and so it is also not  
28 directly on point.

1 Plaintiff argues that regardless of whether he presented false documents and was working  
2 illegally, he is entitled to recover his earned wages. Plaintiff notes that the cases interpreting  
3 Hoffman have not applied it to bar recovery of wages already earned. See, e.g., Singh v. Jutla &  
4 C.D. & R's Oil, Inc., 214 F.Supp.2d 1056, 1061 (N.D. Cal. 2002) (Breyer, J.) (quoting Flores v.  
5 Albertsons, Inc., 2002 WL 1163623 (C.D.Cal.2002) (“Hoffman does not establish that an award of  
6 unpaid wages to undocumented workers for work actually performed runs counter to IRCA.”); Opp.  
7 at 19 (citing cases).

8 The case cited in Reyes, Ulloa v. Al's All Tree Service, Inc., 768 N.Y.S.2d 556, 558 (Dist.Ct.  
9 2003), does not mandate a contrary result. Ulloa is New York small claims court decision where the  
10 Court limited an undocumented worker’s recovery of unpaid wages to the minimum wage, and then  
11 noted “in passing that, if there had been proof in this case that the Plaintiff had obtained his  
12 employment by tendering false documents (activity that is explicitly unlawful under IRCA),  
13 Hoffman would require that the wage claim [for unpaid wages] be disallowed in its entirety.” No  
14 case has followed this portion of Ulloa, or otherwise affirmatively held that an undocumented  
15 worker is precluded from recovering wages for work already performed simply because he  
16 submitted false documents at the time of employment. Indeed, a higher New York court has  
17 expressly rejected Ulloa’s dicta, and instead held that: “If federal courts ban discovery on  
18 immigration status in unpaid wages cases, the use of fraudulent documents on immigration status to  
19 gain employment in unpaid wages cases is likewise irrelevant. The only crucial issue is whether the  
20 undocumented worker performed services for which the worker deserves compensation. If so, public  
21 policy requires payment so that employers do not intentionally hire undocumented workers for the  
22 express purpose of citing the workers’ undocumented status or their use of fraudulent documents as  
23 a way to avoid payment of wages.” Pineda v. Kel-Tech Const., Inc., 832 N.Y.S.2d 386, 396  
24 (N.Y.Sup. 2007).

25 At oral argument, Defendants contended that, even if Plaintiff’s employment status does not  
26 require that *all* of his claims be disallowed, Hoffman precludes an award of liquidated damages  
27 under the FLSA. Defendants’ argument appears to be that FLSA liquidated damages are akin to the  
28 backpay for work not performed due to wrongful termination at issue in Hoffman, in that they go

1 beyond simply compensating for past work, and therefore federal immigration policy makes this  
2 remedy unavailable to Plaintiff because it would reward violation of immigration laws while  
3 punishing the employer. There is no case expressly addressing the issue of whether FLSA liquidated  
4 damages are available to a plaintiff who presented false documents to his employer. While a close  
5 question, and one that pits important governmental policies relating to labor and immigration against  
6 each other, the Court’s interpretation of the statute and the caselaw runs counter to Defendants’  
7 position.

8 First, the plain language of the FLSA mandates liquidated damages in an amount equal to the  
9 unpaid wages unless the employer “shows to the satisfaction of the court that the act or omission  
10 giving rise to such action was in good faith and that he had reasonable grounds for believing that his  
11 act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended,” in which  
12 case “the court may, in its sound discretion, award no liquidated damages or award any amount  
13 thereof . . .” 29 U.S.C. § 260. “Under 29 U.S.C. § 260, the employer has the burden of establishing  
14 subjective and objective good faith in its violation of the FLSA.” Local 246 Utility Workers Union  
15 of America v. Southern California Edison Co., 83 F.3d 292, 297-298 (9th Cir. 1996). Thus, the plain  
16 language of the FLSA’s liquidated damages provision focuses exclusively on the employer’s  
17 conduct, not the employee’s conduct. There is nothing in the language of the statute that allows the  
18 Court to take *Plaintiff’s* misconduct into account in determining whether to award liquidated  
19 damages. To the contrary, the imposition of liquidated damages is mandatory unless the *employer*  
20 establishes its own good faith.

21 Second, under the FLSA, “ liquidated damages represent compensation, and not a penalty.  
22 Double damages are the norm, single damages the exception.” Local 246 Util. Workers Union v. S.  
23 Cal. Edison Co., 83 F.3d 292, 297 (9th Cir.1996); see also Overnight Motor Transp. Co. v. Missel,  
24 316 U.S. 572, 584 (1942) (liquidated damages compensate for damages too obscure and difficult of  
25 proof), superceded by statute on other grounds; Herman v. RSR Sec. Services Ltd., 172 F.3d 132,  
26 142 (2d Cir. 1999) (“Liquidated damages are not a penalty exacted by the law, but rather  
27 compensation to the employee occasioned by the delay in receiving wages due caused by the  
28 employer's violation of the FLSA”). Congress provided for liquidated damages because it

1 recognized that those protected by federal wage and hour laws would have the most difficulty  
2 maintaining a minimum standard of living without receiving minimum and overtime wages and thus  
3 “that double payment must be made in the event of delay in order to insure restoration of the worker  
4 to that minimum standard of well-being.” See Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707  
5 (1945).

6 Following Hoffman, “[c]ourts have distinguished between awards of post-termination back  
7 pay for work not actually performed and awards of unpaid wages pursuant to the Fair Labor  
8 Standards Act (‘FLSA’).” Zeng Liu v. Donna Karan Intern., Inc., 207 F.Supp.2d 191, 192  
9 (S.D.N.Y. 2002); see also Widjaja v. Kang Yue USA Corp., 2010 WL 2132068, \*1 (E.D.N.Y.  
10 2010). In Flores v. Amigon, 233 F.Supp.2d 462 (E.D.N.Y. 2002), the court held that Hoffman did  
11 not apply to FLSA cases in which workers sought pay for work actually performed, and that,  
12 “enforcing the FLSA’s provisions requiring employers to pay proper wages to undocumented aliens  
13 when the work has been performed actually furthers the goal of the IRCA” because if the FLSA did  
14 not apply to undocumented aliens, employers would have a greater incentive to hire illegal aliens  
15 with the knowledge that they could not be sued for violating minimum wage requirements. While  
16 the interest in deterring employers from knowingly hiring undocumented workers in order to avoid  
17 lawsuits for wage violations does not apply when an employee uses false documents to successfully  
18 deceive an unknowing employer who attempted to comply with immigration law, the interest in  
19 deterrence does apply when the employer had reason to suspect or knew that the employee was not  
20 authorized to work in the United States but hired him anyway, colluding in the use of false  
21 documents. The record here is silent as to whether Defendants were successfully deceived as to  
22 Plaintiff’s authorization to work or instead knew or suspected that his documents were falsified.

23 Unlike the backpay for hours not worked at issue in Hoffman, here the liquidated damages  
24 are a form of compensation for time worked that cannot otherwise be calculated. See also Singh v.  
25 Jutla & C.D. & R’s Oil, Inc., 214 F. Supp. 2d 1056 (N.D Cal. 2002) (Breyer, J.) (stating that  
26 Hoffman did not address remedies of compensatory and punitive damages, and holding that  
27 undocumented employee could proceed with FLSA retaliation claim); Galdames v. N&D Investment  
28 Corp., 2008 WL 4372889 (S.D.Fla. Sept. 24, 2008) (finding that Hoffman did not overrule previous  
rule that an “undocumented worked may bring claims for unpaid wages and liquidated damages” for

1 work already performed); Renteria v. Italia Foods, Inc., 2003 WL 21995190, \*5-6 (N.D.Ill. 2003)  
2 (striking FLSA backpay and frontpay claims in light of Hoffman/IRCA, but allowing claim for  
3 compensatory damages).

4 While none of the cases cited above involve an employee who affirmatively presented false  
5 documents, as opposed to simply being undocumented, Hoffman did not preclude compensatory  
6 damages for time already worked on the basis that the employee presented false documents. While  
7 the Hoffman Court was certainly concerned about the fact that the plaintiff had criminally violated  
8 IRCA by presenting false documents and was therefore never authorized to work in the United  
9 States, it also focused on the facts that: (1) the plaintiff had not actually performed the work for  
10 which he was seeking backpay, (2) he was only entitled to the backpay award by remaining in the  
11 country illegally, and (3) he could not mitigate damages as required without triggering further a  
12 IRCA violation. Here, by contrast, no further employment by Plaintiff is at issue as he only seeks  
13 compensation for work performed before his termination by Defendants and the issue of mitigating  
14 damages is not present, unlike in Hoffman. Further, as the Hoffman Court held, the NLRB’s other  
15 “‘traditional remedies’ [were] sufficient to effectuate national labor policy regardless of whether the  
16 ‘spur and catalyst’ of backpay accompanies them.” In contrast, FLSA liquidated damages are not a  
17 “spur and catalyst,” but instead numerous courts have found that they are intended as compensation  
18 for unpaid wages already earned but too difficult to calculate. Therefore, Defendants’ Motion is  
19 DENIED on this issue.

20 **2. Has Plaintiff Met His Burden Regarding Defendants’ Violation**  
21 **of the California Labor Code or the FLSA?**

22 An employee bringing an overtime claim under the Fair Labor Standards Act (“FLSA”) has  
23 the burden of proving that he performed work for which he was not properly compensated.  
24 Anderson v. Mt. Clemens Pottery, 328 U.S. 680, 687-88 (1946). In view of the remedial purpose of  
25 the FLSA and the employer’s statutory obligation to keep proper records of wages, hours and other  
26 conditions and practices of employment, this burden is not to be “an impossible hurdle for the  
27 employee.” Id. “[W]here the employer’s records are inaccurate or inadequate and the employee  
28 cannot offer convincing substitutes, . . . the solution . . . is not to penalize the employee by denying  
him any recovery on the ground that he is unable to prove the precise extent of uncompensated

1 work. Such a result would place a premium on an employer’s failure to keep proper records . . . ; it  
2 would allow the employer to keep the benefits of an employee’s labors without paying due  
3 compensation as contemplated by the [FLSA].” Brock v. Seto, 790 F.2d 1446, 1448 (9th Cir. 1986)  
4 (quoting Anderson, 328 U.S. at 688).

5 “[A]n employee has carried out his burden if he proves that he has in fact performed work for  
6 which he was improperly compensated and if he produces sufficient evidence to show the amount  
7 and extent of that work *as a matter of a just and reasonable inference*.” Id. (emphasis in original).  
8 The burden then shifts to the employer to show the precise number of hours worked or to present  
9 evidence sufficient to negate “the reasonableness of the inference to be drawn from the employee’s  
10 evidence.” Id. If the employer fails to make such a showing, the court “may then award damages to  
11 the employee, *even though the result be only approximate*.” Id. (emphasis in original). “[A]n award  
12 of back wages will not be barred for imprecision where it arises from the employer’s failure to keep  
13 records as required by the FLSA.” Id.; see also Hernandez v. Mendoza, 199 Cal. App. 3d 721  
14 (1988) (quoting and applying standard set forth in Brock in connection with California Labor Code  
15 claim).

16 Defendants argue that Plaintiff has not met his initial burden of showing that he has in fact  
17 performed work for which he was improperly compensated and has not produced sufficient evidence  
18 to show the amount and extent of that work as a matter of a just and reasonable inference.  
19 Specifically, they argue that he only produced 38 out of 96 pay envelopes, and he did not produce  
20 records relating to paychecks he received from March 2008 until his termination approximately a  
21 year later. In addition to this alleged evidentiary deficiency, Defendants attack Plaintiff’s  
22 credibility. They argue that Plaintiff’s testimony that he worked more than five days a week is not  
23 credible in light of other testimony that his regular schedule was five days a week, and that in any  
24 event he admitted that he was paid his daily rate of pay for all days worked. Ulin Depo. 31.  
25 Defendants also argue that Plaintiff’s testimony that he worked twelve hours a day is not credible  
26 because he worked in the warehouse which closed at 6 p.m. every day and admitted that he worked  
27 from 10 a.m. to 7 p.m. (nine hours) on Sundays. See Buchanan Decl. Ex. H (Response to  
28 Interrogatory No. 1). Defendants also point out that Plaintiff worked at another job and took classes  
during his employment, and state that his interrogatory response is somehow inconsistent with his

1 deposition testimony on this topic, but do not explain the inconsistency or why it is relevant. In light  
2 of the foregoing, they contend that Plaintiff's evidence is conflicting and it is "incredible" that he  
3 worked the hours he claims, especially since he took meal and rest breaks. On summary judgment,  
4 the Court may not weigh the evidence or make credibility determinations, so these arguments are  
5 unpersuasive.

6 Plaintiff counters by pointing to the various factual disputes (detailed in the Factual  
7 Background section above) relating to the hours and days he worked and his compensation for that  
8 time. Defendants respond that Plaintiff's Opposition fails to satisfy his burden because he did not  
9 submit a declaration setting forth the basis of his claims for overtime and has not otherwise disclosed  
10 any details of his claim during discovery. For example, in response to an interrogatory requesting  
11 that Plaintiff state the hours worked on each day he worked for Defendants, Plaintiff objected and  
12 stated that his "normal work hours of that [sic] days Monday through Saturday were from 9:00 a.m.  
13 to 9:00 p.m. and on Sundays from 10:00 a.m. to 7:00 p.m." Buchanan Decl Ex. H at 2. Elsewhere  
14 he testified that he worked 12 hours a day every day, but was unable to specify the number of days  
15 he worked overtime in any given year. Ulin Depo. at 99-101. They contend that, "[s]ince this is a  
16 wage and hour case, there is an expectation that Plaintiff would present some sort of calendars, or  
17 other detailed information, for each month he worked at Lovell's, identifying the days of the week  
18 he worked and the hours he worked." Reply at 4-5.

19 While Plaintiff's evidence is scarcely overwhelming and he may face credibility issues at  
20 trial, he has raised a triable issue of fact as to whether he performed work for which he was  
21 improperly compensated. Further, because Defendants admittedly did not keep records of their  
22 wage payments to Plaintiff as required, Plaintiff's production of at least some of the pay envelopes  
23 and testimony about his work schedule is sufficient evidence of the amount and extent of that work  
24 to permit a just and reasonable inference of the amount he is owed, at least as to Plaintiff's initial  
25 burden on summary judgment.

26 **3. Have Defendants Met Their Burden of Negating A Triable Issue As To**  
27 **The Reasonableness of the Inference to Be Drawn From Plaintiff's**  
28 **Evidence?**

Defendants argue that, even if Plaintiff has met his initial burden, their evidence negates the  
reasonableness of any inference to be drawn from Plaintiff's evidence. Specifically, they point to

1 evidence that his regular work schedule was five days a week from 9 a.m. to 6 p.m. with an hour off  
2 for breakfast and lunch, and later four days a week with reduced hours. See Magidish Decl. ¶ 4-5,  
3 Ex. D. Further, they contend that Plaintiff regularly went on out of state trips and was paid for every  
4 day he was on an out of state trip. Id. at ¶ 6. He was sometimes paid extra in cash if he worked  
5 beyond his regular hours. Id. at ¶ 7. They contend that this evidence is sufficient as a matter of law  
6 to negate any reasonable inference to be drawn from Plaintiff’s evidence.

7 Defendants also argue that some of Plaintiff’s disputed facts are immaterial. For example,  
8 according to Defendants, regardless of whether Plaintiff received a full hour for breakfast or not, he  
9 either worked seven or eight hours, neither of which creates an overtime obligation. However,  
10 Defendants ignore the fact that there are also questions about whether Plaintiff received a full hour  
11 for lunch (he testified it was generally 15-20 minutes). Even taking as true Defendants’ position that  
12 he worked from 9 a.m. to 6 p.m., if he did not have at least 30 minutes at both breakfast and lunch,  
13 or a full hour at one of those times, he still worked more than eight hours a day. Thus, the factual  
14 questions about the length of his break periods are material. With respect to meal periods,  
15 Defendants also argue that “the overwhelming evidence is that Plaintiff and his coworkers enjoyed a  
16 leisurely lunch break every day” and that Plaintiff’s claim to the contrary is “incredible.” Reply at  
17 7-8. However, regardless of whether Plaintiff’s version of the facts is “incredible” to Defendants,  
18 there is a disputed fact about how long his lunch was and this fact is material.

19 Defendants also attack Plaintiff’s reliance on the deposition testimony of his co-worker Juan  
20 Carlos Hernandez, and argue that Mr. Carlos’ testimony does not support Plaintiff’s claim that he  
21 regularly worked six days a week. Reply at 7. However, Mr. Carlos did testify that he worked six  
22 days a week in 2003, thinks he worked six days a week in 2004, could not recall how many days a  
23 week he worked in 2005, could not recall but later confirmed that “everybody” worked six days a  
24 week in 2006, worked five days a week in 2007, worked three days a week in 2008, worked six days  
25 a week in 2009, and is currently working six days a week. J. C. Hernandez Depo. 39-40. This  
26 testimony, coupled with Plaintiff’s own testimony, creates a triable issue of fact as to the number of  
27 days per week Plaintiff worked.

28 Defendants next argue that there is no dispute that Plaintiff received extra compensation for  
additional work. However, none of the citations to Plaintiff’s deposition that they list support this



1 contention, and instead indicate that he worked extra and was told he was going to be paid extra but  
2 was not. See Ulin Depo. at 34-35. In contrast, Mr. Magadish contends that Plaintiff was paid extra  
3 for extra work. Magidish Decl. ¶ 7. This is a triable issue of fact. Oddly, Defendants also argue  
4 that Plaintiff has failed to submit any evidence of additional cash payments he received, even though  
5 he contends that he was *not* paid extra for additional work and Defendants admit that they do not  
6 have any record of these additional payments either.

7 In sum, Plaintiff contends that he worked overtime and was not compensated for it;  
8 Defendants say he did not work overtime and, if he did, he was compensated. These are  
9 quintessential triable issues of fact. Further, even Defendants' evidence is unclear as to whether,  
10 even if he was paid extra for time worked, how much he was paid and whether it was sufficient to  
11 compensate him for the hours worked. See Magidish Depo. at 143-154 (the amount of cash he paid  
12 for overtime work varied and depended on his mood and there is no written record of the cash  
13 payments). For all of these reasons, summary adjudication of Plaintiff's overtime claim is DENIED.

#### 14 **4. California Labor Code Violations**

15 In addition to the issues discussed above, Defendants' motion also seeks summary  
16 adjudication of Plaintiff's California Labor Code claims, which include section 510 (overtime pay),  
17 section 226 (accurate and complete wage statements), and section 226.7 (meal and rest periods).

##### 18 **a. Overtime Pay (Labor Code § 501)**

19 Defendants argue that, even if Plaintiff is entitled to overtime pay pursuant to Labor Code  
20 section 510, section 1194.2(a) precludes the recovery of any liquidated damages. See Cal. Labor  
21 Code § 1194.2(a) ("Nothing in this subdivision shall be construed to authorize the recovery of  
22 liquidated damages for failure to pay overtime compensation."). Plaintiff did not counter this point  
23 in his Opposition, and is precluded from seeking liquidated damages for California Labor Code  
24 violations. Defendants also argue that Plaintiff's claim for violation of California labor laws being  
25 pursued through California Business & Professions Code section 17200 is subject to a four year  
26 statute of limitations, limiting Plaintiffs damages to the time period from July 13, 2005 to the date of  
27 Plaintiff's termination. See Cortez v. Purcolator Air Filter, 23 Cal. 4th 163, 178-79 (2000). Plaintiff  
28 does not oppose this point, and instead readily endorses it. The Court GRANTS summary  
adjudication of both of these issues.



1 they were “coming back into California” and told him to go fix a broken light the following day on  
2 his day off). Nevertheless, it is undisputed that Plaintiff went on some out of state delivery trips as  
3 part of his employment.

4 Plaintiff counters that: (1) Defendants cannot claim the exemption because they did not raise  
5 it as an affirmative defense and Plaintiff will be prejudiced if they are allowed to rely on it now; (2)  
6 Defendants have failed to present undisputed facts supporting its application; and (3) the exemption  
7 would only apply to the weeks Defendants could prove Plaintiff performed exempt work. The Court  
8 agrees with Plaintiff on all three points.

9 Numerous courts have held “that the application of an exemption under the Fair Labor  
10 Standards Act is a matter of affirmative defense on which the employer has the burden of proof.”  
11 See Corning Glass Works v. Brennan, 417 U.S. 188, 196-197 (1974). An affirmative defense can be  
12 raised for the first time on summary judgment provided that there is no prejudice to the plaintiff.  
13 See Healy Tibbitts Construction Co. v. Insurance Co. of North America, 679 F.2d 803 (9th Cir.  
14 1982). Here, Plaintiff will be prejudiced if Defendants are allowed to raise the defense at this time  
15 because detailed factual questions arise as to the applicability of the motor carrier exemption, which  
16 have not been the subject of discovery. For example, because Plaintiff was unaware of this defense,  
17 he did not obtain discovery specific to Plaintiff’s interstate trips or the details of his in-state trips,  
18 and did not attempt to discern which weeks Plaintiff may have been performing work falling within  
19 the exemption and which weeks he was not. Defendants do not dispute that they did not specifically  
20 plead the exemption as an affirmative defense. Instead, they contend that their Answer broadly  
21 denied that the FLSA applies to them and denied any violation of section 501 of the California  
22 Labor Code, and their first Affirmative Defense was for failure to state a claim. Defendants do not  
23 address Plaintiff’s claim of prejudice at all. Defendants will not be allowed to raise the defense at  
24 this late date, after discovery has closed, because Plaintiff will be prejudiced as a result.

25 Further, Defendants have not shown that there are no factual questions about the applicability  
26 of the exemption, so summary adjudication is unwarranted. Defendants cite no evidence in support  
27 of their description of Plaintiff’s job duties and do not attempt to explain how those duties match the  
28 various requirements of the exemption. See 29 C.F.R. § 782.7. It is therefore unclear whether  
Plaintiff performed exempt work at all, and if so to what extent. Without additional evidence or

1 argument by Defendants, summary judgment is inappropriate. Finally, Plaintiff points out that, even  
2 if Defendants could raise this argument on summary judgment, and even if they had shown that  
3 Plaintiff fell within the exemption, there would still be remaining questions about what weeks  
4 Plaintiff performed exempt work. The exemption only applies in those workweeks where he  
5 performs exempt activities, 29 C.F.R. § 782.2(b)(4), and Defendants bear the burden of proving  
6 when the exemption was applicable. Because Defendants have provided no evidence or argument  
7 on this point, summary adjudication is unwarranted for this reason as well.

8 **c. Meal and Rest Periods (Labor Code § 226.7)**

9 Defendants argue that all of the evidence in this case reflects that Plaintiff took a lunch break  
10 every day and was free to take rest breaks throughout the day. However, there is a dispute about  
11 how long Plaintiff’s meal breaks were, and whether they complied with the 30 minute requirement  
12 set forth in section 11 of the applicable Wage Order. Therefore, summary adjudication of this issue  
13 is DENIED.

14 **d. Wage Statements (Labor Code § 226)**

15 Defendants contend that “Labor Code section 226 . . . only requires that gross wages be  
16 stated,” and that the handwritten notes on the envelopes produced by Plaintiff are sufficient to meet  
17 this requirement as a matter of law. For the reasons discussed below in connection with Plaintiff’s  
18 Motion for Summary Adjudication, summary adjudication of this issue is DENIED as to Defendants  
19 and GRANTED in favor of Plaintiff. There is no question that the pay envelopes do not meet the  
20 requirements of section 226.

21 **5. FLSA Claim**

22 **a. Overtime Pay**

23 Defendants argue that the statute of limitations for overtime claims under the FLSA is two  
24 years, or three years for willful violations, and seek an Order on the applicable statute of limitations.  
25 See 29 U.S.C. § 255(a). Pursuant to McLaughlin v. Richland Shoe Co., 486 U.S. 128, 130-131  
26 (1988), an employer has not committed a willful violation unless “it knew or showed reckless  
27 disregard for the matter of whether its conduct was prohibited by the FLSA.” “If an employer acts  
28 reasonably in determining its legal obligation, its action cannot be deemed willful . . . . If an

1 employer acts unreasonably, but not recklessly, in determining its legal obligation, then” it would  
2 not be deemed willful.

3 Defendants present no argument or evidence on the issue of willfulness. Plaintiff points out  
4 that Mr. Magadish admitted that he knew that if Plaintiff worked in excess of five days per week,  
5 overtime would be incurred. See Magidish Depo. 95-97 (“I know that if he worked five days in  
6 those periods; so it’s ten days. Ten days he gets \$75, but after that he has to get time and a half;  
7 that’s the law. But I don’t remember if he worked 13 days straight. That’s what my understanding.”);  
8 Magidish Depo. 133 (stating that if Plaintiff worked 11 days and therefore exceeded 40 hours, he  
9 would have to pay him overtime). Additionally, Mr. Magidish admitted to usually “tipping”  
10 employees in cash and providing free lunch if they worked later than 6:00 p.m, the amount  
11 depending on his mood. Magidish Depo. 143-145. Given this testimony, Defendants have not met  
12 their burden of establishing that the statute of limitations for willful violations does not apply, and  
13 Plaintiff has presented some evidence that the violations were willful. Summary adjudication of this  
14 issue is therefore DENIED.

15 Plaintiff also appears to argue that the four year statute of limitations for California Business  
16 & Professions Code § 17200 (the “UCL”) is applicable to his FLSA claim. See Opp. at. 24.  
17 However, Plaintiff cites no law supporting this argument, and it is rejected. At oral argument,  
18 Defendant argued that Plaintiff should not be allowed to recover FLSA liquidated damages beyond  
19 the FLSA’s two or three year limitations period (i.e., liquidated damages should not be considered  
20 restitution that can be recovered under the UCL’s four year statute of limitations). When questioned  
21 about this, Plaintiff was unable to cite any cases holding that FLSA liquidated damages are  
22 “restitution” under the UCL. Instead, several courts have found that FLSA liquidated damages are  
23 not restitution that can be recovered under the UCL. See Tomlinson v. Indymac Bank, F.S.B., 359  
24 F.Supp.2d 891, 897 (C.D.Cal. 2005) (FLSA liquidated damages are not a penalty but also not  
25 restitutionary because they do not return to employees money obtained through an unfair business  
26 practice and employees do not have a “vested right” in the liquidated damages); Parks v. Eastwood  
27 Ins. Services, 2004 WL 5506690, \*1 (C.D.Cal. 2004) (class could seek restitution under the UCL for  
28 defendant’s failure to properly pay overtime under FLSA, provided their claims were within the  
UCL’s 4-year statute of limitations, but were “limited to recovering restitution for their lost wages,

1 and they may not recover liquidated damages.”). If liability is found, Plaintiff is limited to recovery  
2 of FLSA liquidated damages for two or three years depending on willfulness, not four years under  
3 the UCL.

4 Defendants also seek an Order on the issue of the overtime rate of pay for each overtime hour  
5 worked. The FLSA requires overtime pay of at least one and a half times the regular rate of pay  
6 based on the number of hours worked in a week. 29 U.S.C. § 207(a)(1). An employee’s regular rate  
7 of pay is calculated by dividing average earnings for a work day by the number of hours actually  
8 worked. 29 C.F.R. § 548.3; 29 C.F.R. § 778.109. It is undisputed that Plaintiff’s rate of pay ranged  
9 from \$65 to \$75 per day during his employment. Defendants contend that any overtime should be  
10 calculated based on an eight hour day, but do not explain why an eight hour day would be used when  
11 Mr. Magidish testified that Plaintiff’s regular work schedule was seven hours a day and Plaintiff  
12 testified that he worked up to twelve hours a day. Plaintiff’s Opposition does not address this issue.  
13 The Court cannot rule on the proper amount of overtime pay as a matter of law based on the  
14 evidence currently before it.

15 **b. Motor Carrier Exemption**

16 Defendants also contend that Plaintiff is exempt from overtime requirements under the FLSA  
17 because of the motor carrier exemption. For the reasons discussed above in connection with  
18 Plaintiff’s state law claims, summary adjudication of the motor carrier exemption issue is  
19 unwarranted and Plaintiff will be prejudiced if Defendants are allowed to raise this affirmative  
20 defense at this time.

21 **c. Rest and Meal Periods**

22 Defendants argue that all of the evidence in this case reflects that Plaintiff took a lunch break  
23 every day and was free to take rest breaks throughout the day. However, there is a dispute about  
24 how long Plaintiff’s meal breaks were, and whether they complied with the 30 minute requirement  
25 set forth in 29 C.F.R. § 785.19. Therefore summary adjudication of this issue is DENIED.

26 **d. Liquidated Damages**

27 The FLSA provides for liquidated damages in an amount equal to the unpaid wages. 29  
28 U.S.C. § 216(b). However, “if the employer shows to the satisfaction of the court that the act or  
omission giving rise to such action was in good faith and that he had reasonable grounds for

1 believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as  
2 amended, the court may, in its sound discretion, award no liquidated damages or award any amount  
3 thereof . . .” 29 U.S.C. § 260. “Under 29 U.S.C. § 260, the employer has the burden of establishing  
4 subjective and objective good faith in its violation of the FLSA.” Local 246 Utility Workers Union  
5 of America v. Southern California Edison Co., 83 F.3d 292, 297 -298 (9th Cir. 1996). Thus,  
6 Defendants’ burden is to establish that they had “an honest intention to ascertain and follow the  
7 dictates of the Act” and had “reasonable grounds for believing that [their] conduct complie[d] with  
8 the Act.” Id. “If the employer fails to carry that burden, liquidated damages are mandatory.” Id. If  
9 the employer succeeds in carrying the burden, the court may still award liquidated damages in its  
10 discretion. Id. at 298.

11 Defendants argue that they acted in good faith because additional payments were made to  
12 compensate for additional time worked, they found Plaintiff a new job when they laid him off, and  
13 he was provided with meals and clothing. They further contend that Plaintiff did not act in good  
14 faith because he submitted false employment documents at the time of his employment and should  
15 not be entitled to a windfall in the form of liquidated damages. However, as discussed above, the  
16 statute does not examine a plaintiff’s culpability for purposes of liquidated damages.

17 Defendants have not put forward any evidence that they honestly believed that their  
18 payments to Plaintiff complied with the FLSA or that they had reasonable grounds for this belief.  
19 Further, Defendants’ contention that they made additional cash payments to compensate Plaintiff for  
20 any extra time worked is a disputed fact, as is the amount of any such payments. Because there are  
21 disputed questions of fact as to Defendants’ subjective and objective good faith, summary  
22 adjudication on the issue of FLSA liquidated damages is DENIED.

23 **5. Mr. Magidish’s Individual Liability**

24 Defendants argue that Plaintiff’s claims against Mr. Magidish in his individual capacity fail  
25 as a matter of law because Plaintiff was employed by Lovell’s, which was owned by ALAEA-72,  
26 Inc., and not by Mr. Magadish personally. See Magadish Decl. ¶¶ 2-3, Exs. A-C. They contend that  
27 Plaintiff has not presented any evidence that would allow him to pierce the corporate veil or  
28 otherwise disregard the corporate form, and that his arguments in favor of individual liability relate

1 solely to the FLSA. Therefore, at a minimum they seek summary adjudication of the California  
2 state law claims against Mr. Magadish.

3 **a. FLSA Claims**

4 The FLSA defines an “employer” as “any person acting directly or indirectly in the interest  
5 of an employer in relation to an employee . . . .” 29 U.S.C. § 203(d). The Ninth Circuit has held that  
6 the definition of “employer” under the FLSA is not limited by the common law concept of  
7 “employer,” but ““is to be given an expansive interpretation in order to effectuate the FLSA’s broad  
8 remedial purposes.”” Boucher v. Shaw, 572 F.3d 1087, 1090 -1091 (9th Cir. 2009) (quoting Lambert  
9 v. Ackerley, 180 F.3d 997, 1011-12 (9th Cir.1999) (en banc) . The determination of whether an  
10 employer-employee relationship exists does not depend on “isolated factors but rather upon the  
11 circumstances of the whole activity.” Id. The key is the “economic reality” of the relationship. Id.  
12 The economic reality test requires the court to examine whether the alleged employer: (1) had the  
13 power to hire and fire the employee; (2) supervised and controlled employee work schedules or  
14 conditions of employment; (3) determined the rate and method of payment; and (4) maintained  
15 employment records. See Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470  
16 (9th Cir.1983) (abrogated on other grounds by Garcia v. San Antonio Metropolitan Transit  
17 Authority, 469 U.S. 528, 539 (1985)).

18 In Lambert, the Ninth Circuit upheld a finding of liability against a chief operating officer  
19 and a chief executive officer where the officers had a significant ownership interest as well as  
20 operational control of significant aspects of the company’s day-to-day functions, the power to hire  
21 and fire employees, the power to determine salaries, and responsibility for maintaining employment  
22 records. Lambert, 180 F.3d at 1012. The court found that the evidence supported a jury  
23 determination that the individuals exercised economic and operational control over the employment  
24 relationship with the employees, and were accordingly employers within the meaning of the Act.  
25 Id.; see also Chao v. Hotel Oasis, Inc., 493 F.3d 26, 34 (1st Cir. 2007) (holding corporation’s  
26 president personally liable where he had ultimate control over business’ day-to-day operations and  
27 was the corporate officer principally in charge of directing employment practices); United States  
28 Dep’t of Labor v. Cole Enters., Inc., 62 F.3d 775, 778-79 (6th Cir. 1995) (president and 50% owner  
of corporation was “employer” within FLSA where he ran business, issued checks, maintained



1 records, determined employment practices and was involved in scheduling hours, payroll and hiring  
2 employees).

3 Mr. Magidish formed corporate defendant ALEA-72 Inc. in 2002, and ALEA-72 in turn  
4 owns and operates “Lovell’s Antique Gallery.” Magidish Decl. ¶ 2-3, Exs. A-B; Magidish Depo. 16.  
5 Mr. Magadish was responsible for posting, calculating, measuring, estimating, recording, or  
6 otherwise determining the hour worked by Plaintiff, and wages paid him. Wang Decl. Ex. 5  
7 (Defendants Response to Plaintiff’s Interrogatory No. 7). Mr. Magidish also authorized and issued  
8 payments to Plaintiff. Id. at Interrogatory No. 8. Mr. Magidish supervised Plaintiff’s work, and was  
9 responsible for recruiting, hiring, firing, disciplining, assigning jobs and setting wages for Plaintiff.  
10 Id. at Interrogatory Nos. 9, 10. Given the facts indicating that Mr. Magidish could be deemed an  
11 “employer” under the FLSA, summary adjudication of Plaintiff’s FLSA claims against Mr.  
12 Magidish in favor of Defendants is DENIED.

13 **b. California Labor Code Claims**

14 Plaintiff’s Opposition does not address the propriety of his California claims against Mr.  
15 Magidish, and during oral argument he conceded that they should be dismissed. Defendants’ motion  
16 for summary adjudication of claims 1, 3, 4, 5 and 6 is GRANTED as to Mr. Magadish.

17 **6. Procedural Deficiencies Of Plaintiff’s Opposition**

18 Defendants’ Reply points out the numerous procedural defects of Plaintiff’s Opposition and  
19 request that it be stricken as a sanction. The Opposition was filed seven hours late in violation of  
20 Local Rule 7-3(a). It is 33 pages long in violation of Local Rule 7-4(b), and Plaintiff did not ask for  
21 leave to file excess pages as provided for by Local Rule 7-11 or mention the fact that the brief is  
22 over the allowed length. The Opposition does not contain a table of contents or table of authorities  
23 as required by Local Rule 7-4(a)(2). The Opposition is dated July 26 but was not filed until August  
24 11, and therefore Plaintiff had ample time to request additional pages and to prepare the required  
25 tables but failed to do so. Additionally, Plaintiff’s social security number was not redacted from an  
26 exhibit related to the Opposition, in violation of Federal Rule of Civil Procedure 5.2. Two exhibits  
27 associated with the Opposition were entirely blank, and were not provided to the Court until after  
28 Defendants’ Reply was due. Plaintiff filed two errata relating to the Opposition and accompanying  
declaration (one correcting typos and one attaching omitted deposition pages), one of which was

1 filed after Defendants' Reply. Plaintiff did not provide chambers copies of his Opposition papers for  
2 over a week.

3 Plaintiff's counsel is admonished for failure to follow the Court's rules, and is Ordered to  
4 strictly comply with all applicable procedural rules going forward. However, the Opposition was  
5 not stricken as a sanction because Defendants have not shown any prejudice resulting from  
6 Plaintiff's procedural violations.

7 **B. Plaintiff's Motion for Partial Summary Adjudication**

8 Plaintiff has moved for partial summary adjudication of his claim for violation of California  
9 Labor Code § 226 (inadequate wage statements) against Defendant Alea-72, Inc. Section 226(a)  
10 provides in pertinent part:

11 (a) Every employer shall, semimonthly or at the time of each payment of wages,  
12 furnish each of his or her employees, either as a detachable part of the check,  
13 draft, or voucher paying the employee's wages, or separately when wages are paid  
14 by personal check or cash, an accurate itemized statement in writing showing (1)  
15 gross wages earned, (2) total hours worked by the employee, except for any  
16 employee whose compensation is solely based on a salary and who is exempt  
17 from payment of overtime under subdivision (a) of Section 515 or any applicable  
18 order of the Industrial Welfare Commission, (3) the number of piece-rate units  
19 earned and any applicable piece rate if the employee is paid on a piece-rate basis,  
20 (4) all deductions, provided that all deductions made on written orders of the  
21 employee may be aggregated and shown as one item, (5) net wages earned, (6)  
22 the inclusive dates of the period for which the employee is paid, (7) the name of  
23 the employee and his or her social security number, except that by January 1,  
24 2008, only the last four digits of his or her social security number or an employee  
25 identification number other than a social security number may be shown on the  
26 itemized statement, (8) the name and address of the legal entity that is the  
27 employer, and (9) all applicable hourly rates in effect during the pay period and  
28 the corresponding number of hours worked at each hourly rate by the employee.  
The deductions made from payments of wages shall be recorded in ink or other  
indelible form, properly dated, showing the month, day, and year, and a copy of  
the statement or a record of the deductions shall be kept on file by the employer  
for at least three years at the place of employment or at a central location within  
the State of California.

...

(e) An employee suffering injury as a result of a knowing and intentional failure  
by an employer to comply with subdivision (a) is entitled to recover the greater of  
all actual damages or fifty dollars (\$50) for the initial pay period in which a  
violation occurs and one hundred dollars (\$100) per employee for each violation  
in a subsequent pay period, not exceeding an aggregate penalty of four thousand  
dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's  
fees.

It is undisputed that Alea-72 failed to comply with this provision because it did not provide  
him with wage statements itemizing the number of hours worked and the correct wages earned.

1 From 2005 to 2008, Plaintiff was paid in cash and Defendants kept no records of the payments  
2 made. Magidish Depo. 126-128. Beginning in 2008, Plaintiff was paid partially by check with an  
3 attached wage statement, but the statements did not reflect all of the amounts paid because Plaintiff  
4 was also paid partially in cash. Magidish Depo. 125-126.

5 Defendants present no evidence to the contrary in their Opposition, but simply argue that the  
6 pay envelopes Plaintiff received every pay period “provide substantially sufficient information” to  
7 meet the requirements of section 226. See Buchanan Decl. Ex. F (copies of pay envelopes, some of  
8 which contain Plaintiff’s nickname and various other numbers that appear to be the number of days  
9 he worked and the amount being paid). However, the number of days written on the envelopes were  
10 admittedly not always accurate, see Hernandez Depo. 107, and much of the other required  
11 information was never included. Therefore, Defendants’ argument that the sparse envelopes comply  
12 with the detailed requirements of section 226(a) is not well taken.

13 Plaintiff further argues that Defendants’ violation of section 226 was “knowing and  
14 intentional,” therefore entitling him to damages. See Cal. Labor Code § 226(e). In Perez v. Safety-  
15 Kleen Systems, Inc., 2007 WL 1848037, \*9 (N.D. Cal. 2007), the court examined the “knowing and  
16 intentional” language, and held that ignorance of the law did not excuse an employer who knowingly  
17 provided wage statements containing the incorrect total hours worked. In this case, from 2005 to  
18 2008, Defendants paid in cash and knowingly and intentionally did not keep or provide records of  
19 payment. See Magidish Depo. 128. Following the reasoning of Perez, this conduct constitutes a  
20 knowing and willful violation. Similarly, from 2008 onward, Plaintiff apparently received a check  
21 and wage statement for a portion of his wages, but Defendants knowingly and intentionally did not  
22 include all of the wages in the check and accompanying statement and paid another portion in cash.  
23 Defendants present no argument or evidence to the contrary in their Opposition. This, too, is  
24 sufficient under Perez to be a knowing and willful violation.

25 Finally, Plaintiff argues that he has suffered injury as a result of Defendants’ violation.  
26 Specifically, he contends that, because of the lack of wage statements, he is now left to his own  
27 devices to determine if the wages he received were sufficient to compensate him for the hours  
28 worked, and has no fixed method to calculate the overtime pay he is due which has prejudiced him  
in this lawsuit. See Elliot v. Spherion Pacific Work, LLC, 572 F.Supp.2d 1169, 1181 (C.D.Cal.

1 2008) (injuries courts have found sufficient to sustain a § 226(e) damages claim include “the  
2 possibility of not being paid overtime, employee confusion over whether they received all wages  
3 owed them, difficulty and expense involved in reconstructing pay records, and forcing employees to  
4 make mathematical computations to analyze whether the wages paid in fact compensated them for  
5 all hours worked”). As a result of this damage, Plaintiff seeks the maximum statutory damages –  
6 \$4,000 – for failure to provide the required documentation for three years of employment (2 bi-  
7 monthly payments x 3 years = 72 payment periods; \$50 for first violation + \$7100 for the other 71  
8 violations = \$7150, which exceeds \$4000 maximum so maximum applies). Plaintiff also seeks costs  
9 and fees incurred in prosecuting this portion of his claim.

10 In Opposition, Defendants argue that Plaintiff has admitted that he was paid a fixed amount  
11 for every day he worked. Ulin Depo. 36, 81. However, this is irrelevant to whether Plaintiff was  
12 damaged as a result of Defendants’ failure to keep records. Defendants also argue that Plaintiff’s  
13 motion lacks evidentiary support because he did not submit a declaration regarding his damages and  
14 did not provide copies of the envelopes or wage statements that accompanied his checks in 2008 and  
15 2009. However, copies of the envelopes were attached as Exhibit F to the Buchanan Declaration in  
16 Support of Defendants’ Motion, as well as in opposition to Plaintiff’s motion, and therefore they are  
17 before the Court. With respect to evidence of damages, in Wang v. Chinese Daily News, Inc., 435  
18 F. Supp. 2d 1042, 1050-51 (C.D. Cal. 2006), the court held that “this lawsuit, and the difficulty and  
19 expense Plaintiffs have encountered in attempting to reconstruct time and pay records” was evidence  
20 of the plaintiff’s injury as a result of the improper wage statements. The same reasoning applies  
21 here.

22 Instead of opposing the substance of Plaintiff’s motion or presenting evidence that they were  
23 in compliance with section 226, Defendants primarily oppose the motion on the basis that: (1)  
24 Plaintiff submitted false work authorization documents at the time of his employment and therefore  
25 is not entitled to any statutory damages; and (2) Plaintiff made interstate deliveries and therefore his  
26 employer was exempt from the requirements of section 226. For the reasons discussed in connection  
27 with Defendants’ Motion, neither of these arguments defeats summary adjudication.

28 First, Defendants have cited no case holding that a plaintiff who submitted false documents  
to an employer is precluded from recovering damages under section 226(e). Hoffman Plastic

1 Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137 (2002) held that such an  
2 employee could not recover backpay for work he did not perform under the FLSA, but did not speak  
3 to the issue of state law damages such as those in section 226. Additionally, neither party addresses  
4 California’s statutes enacted following Hoffman, one of which states that:

5 (a) All protections, rights, and remedies available under state law, except any  
6 reinstatement remedy prohibited by federal law, are available to all individuals  
7 regardless of immigration status who have applied for employment, or who are or  
8 who have been employed, in this state.

9 (b) For purposes of enforcing state labor and employment laws, a person's  
10 immigration status is irrelevant to the issue of liability, and in proceedings or  
11 discovery undertaken to enforce those state laws no inquiry shall be permitted  
12 into a person's immigration status except where the person seeking to make this  
13 inquiry has shown by clear and convincing evidence that the inquiry is necessary  
14 in order to comply with federal immigration law.

15 Cal. Labor Code § 1171.5; see also Cal. Civil Code § 3339; Cal. Gov’t Code 7285; Hernandez v.  
16 Paicius, 109 Cal. App. 4th 452, 460 (2003) (“These statutes . . . leave no room for doubt about this  
17 state’s public policy with regard to the irrelevance of immigration status in enforcement of state  
18 labor . . . laws”). The case relied on by Defendants, Reyes v. Van Elk, Ltd., 148 Cal. App. 4th 604,  
19 611 (2007), specifically held that these statutes were not preempted by the Immigration Reform and  
20 Control Act (“IRCA”). In light of the fact that Defendants have not cited any case disallowing  
21 recovery by an undocumented worker for violation of section 226(e), and the strong California  
22 public policy in favor of evenly applying labor laws to documented and undocumented workers, as  
23 reflected in California Labor Code section 1171.5, Defendants’ argument fails.

24 Second, Defendants contend that they are exempt from section 226 because a portion of  
25 Plaintiff’s duties including preparing and packing for delivery in interstate commerce and then  
26 accompanying the driver on interstate delivery trips. However, and as discussed above, Defendants  
27 raised this defense for the first time on summary judgment thereby prejudicing Plaintiff, they have  
28 made no effort to present evidence of Plaintiff’s duties as they compare to the requirements for  
applicability of the motor carrier exemption, and they have made no effort to identify which weeks  
of Plaintiff’s employment the exemption would apply. Therefore, Defendants have not met their  
burden in raising this defense.

For all of the foregoing reasons, Plaintiff’s Motion is GRANTED and judgment of this claim  
shall be entered in the amount of \$4000.

1           **C.       Plaintiff’s Motion to Bifurcate Trial**

2           Plaintiff has filed a motion to bifurcate trial of liability issues from the calculation of  
3 damages pursuant to Federal Rule of Civil Procedure 42(b). Specifically, Plaintiff asks the Court to  
4 hear evidence on the factual issues of whether Plaintiff worked overtime and what, if any,  
5 compensation beyond his daily salary was paid for those hours first, and then to apply state and  
6 federal law to calculate compensation for any unpaid overtime.

7           The question of whether to bifurcate a trial is a matter committed to this Court’s discretion.  
8 See, e.g., Danjaq LLC v. Sony Corp., 263 F.3d 942, 961 (9th Cir.2001). Federal Rule of Civil  
9 Procedure 42(b) provides:

10                   The court, in furtherance of convenience or to avoid prejudice, or when separate  
11 trials will be conducive to expedition and economy, may order a separate trial of  
12 any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue  
13 or of any number of claims, cross-claims, counterclaims, third-party claims, or  
14 issues, always preserving inviolate the right of trial by jury as declared by the  
15 Seventh Amendment to the Constitution or as given by a statute of the United  
16 States.

17           When deciding whether to bifurcate, a court should consider: (1) whether separate trials would be in  
18 furtherance of convenience; (2) whether separate trials would avoid prejudice; (3) whether separate  
19 trials would serve judicial economy; (4) whether separate trials would reduce the risk of jury  
20 confusion; and (5) whether the issues are clearly separable. See William W. Schwarzer, Civil  
21 Procedure Before Trial, § 16:160.4 (The Rutter Group 2005).

22           In his moving papers, Plaintiff’s primary argument is that evidence or argument on the  
23 differences between the calculation of overtime and related penalties under state and federal law,<sup>3</sup>  
24 calculations which are purely legal questions, could confuse the trier of fact and potentially  
25 prejudice the decision making process on the factual issues to be decided. Plaintiff further argues  
26 that bifurcation will promote efficiency because each side can present evidence on the factual (i.e.  
27 liability) dispute of whether and how much Plaintiff worked overtime and how much extra he was

28 <sup>3</sup>Plaintiff explains the differences in calculation methods as follows: Under the FLSA, the regular rate of pay is calculated by “dividing his total remuneration for employment (except statutory exclusions) in any work week by the total number of hours actually worked by him in that workweek for which compensation was paid.” 29 C.F.R. § 778.109. In contrast, California law determines the regular rate of pay for an employee such as Plaintiff who was paid a fixed daily rate by dividing the daily rate by eight hours. See Lujan v. Southern Cal. Gas Co., 96 Cal. App. 4th 1200 (2002). These differing formulas would likely result in a different rate of overtime pay under state and federal law.


1 paid for this work, and then, if liability is found, the amount of damages can be resolved by briefing  
2 the Court on the remaining legal issues.

3 Defendants do not oppose Plaintiff's motion on substantive grounds, but instead argue that  
4 the motion is premature because pursuant to the Case Management Order bifurcation is an issue to  
5 be addressed in the joint pretrial statement and decided at the pretrial conference in November.  
6 While the Case Management Order does require that the parties address bifurcation in their pre-trial  
7 papers, it does not preclude a party from raising the issue in advance. Therefore this argument is not  
8 persuasive. Defendants further point out that Plaintiff has waived a jury trial. See Buchanan Decl. ¶  
9 2. Plaintiff admits that he has waived a jury trial and all issues, whether bifurcated or not, will be  
10 heard by the Court. Accordingly, there will be no jury to confuse. Plaintiff also contends that an  
11 Order on bifurcation is appropriate now because it will affect the scope of the pre-trial submissions  
12 and therefore promote efficiency. However, Plaintiff does not explain this argument at all.

13 Given that Plaintiff has not explained how bifurcation will promote efficiency, and there do  
14 not appear to be issues of jury confusion because this will be a Court trial, the motion is DENIED  
15 WITHOUT PREJUDICE to Plaintiff raising the issue in connection with the pre-trial conference.

16  
17 **IT IS SO ORDERED.**

18  
19 Dated: September 22, 2010

20   
21 ELIZABETH D. LAPORTE  
22 United States Magistrate Judge  
23  
24  
25  
26  
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