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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FAITH D. MARTIN, et al,

Plaintiff,

v.

FEDEX GROUND PACKAGE SYSTEM INC.,
et al,

Defendants.

Case No. 06-CV-06883-VRW

PLAINTIFF'S COMPENDIUM OF DOCUMENTS FILED IN THE OLGUIN V. FED EX STATE COURT ACTION ASSIGNED TO THE HONORABLE STEPHEN J. SUNDVOLD VOLUME II OF II

Honorable Vaughn R. Walker
Location: Courtroom 6
Date: December 18, 2008
Time: 2:30 p.m.

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VOLUME	DATE FILED	DOCUMENT TITLE	EXHIBIT
I OF II	8/17/2005	**Notice and Motion for Class Certification**	Ex. 1
I OF II	8/17/2005	**Request for Judicial Notice and Declaration of John Glugoski in Support of Motion for Class Certification**	Ex. 2
I OF II	8/17/2005	**Plaintiff's Compendium of Class Member Declarations; And Further Declaration of John Glugoski with Exhibits** >Declaration of Eric Anglim >Declaration of Justin Bailey >Declaration of Gloria Burks >Declaration of Layna D'Ambrose >Declaration of Christopher Diaz >Declaration of Annabel Dizon >Declaration of Rodrigo Dominguez >Declaration of Luis Grande >Declaration of Eyad Latif >Declaration of Ernesto Manalo >Declaration of Tamekia Shalene Novel >Declaration of Lance Oppenheimer >Declaration of Chris Palmore >Declaration of Justin Walker	Ex. 3
I OF II	8/17/2005	**Declaration of Hillary Williams re Time Card Sampling**	Ex. 4
I OF II	8/17/2005	**Declaration of Matthew Righetti in Support of Motion For Class Certification with Exhibits** >Description and Acknowledgement of Package Handler Duties >Declaration of Jack Foster >Deposition of Lynette Dhillon >interoffice email memorandums of FedEx Ground's corporate personnel >Human Resources Organization Chart >Deposition of Eric Ricardo >Deposition of Michael Vickers >Defendant's Responses to Kelley Freeman's Request for Production of Documents, Set One >California Human Resource Update 2004 >Declaration of John A. Miller >Declarations of Class Representatives Javier Olguin, Miguel Vargas, and Kelley Freeman 2005 >Deposition of Ed Leveque	Ex. 5

PLAINTIFF'S COMPENDIUM OF DOCUMENTS FILED IN THE OLGUIN V. FED EX STATE COURT ACTION ASSIGNED TO THE HONORABLE STEPHEN J. SUNDVOLD

VOLUME	DATE FILED	DOCUMENT TITLE	EXHIBIT
II OF II	**8/24/2008**	**Reply to Opposition to Motion For Class Certification**	**Ex. 6**
II OF II	**8/24/2006**	**Plaintiff's Objections to Defendant's Evidence in Opposition to Plaintiff's Motion for Class Certification**	**Ex. 7**
II OF II	**8/24/2006**	**Supplemental Declaration of John Glugoski in Support of Reply to Opposition to Motion For Class Certification with Exhibits** >Declaration of Dr. Jon Krosnick >Deposition of Justin Walker >Deposition of Gloria Burks >Deposition of Justin Bailey >Court's October 2002 tentative ruling >California Assembly and Senate Resolution 43 >*O'Meara v. United States* (N.D. Ill. 1973) 59 F.R.D. 560 >*Taylor v. U.S.* (1998) 41 Fed. Cl. 440 >Supplemental Declaration of Annabel Dizon >Supplemental Declaration of Justin Walker >Supplemental Declaration of Lance Oppenheimer >Supplemental Declaration of Luis Grande >Supplemental Declaration of Justin Bailey >Supplemental Declaration of Eyad Latif >Supplemental Declaration of Gloria Burks	**Ex. 8**

EXHIBIT 6

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

REPLY TO OPPOSITION TO MOTION FOR CLASS CERTIFICATION

Date: September 14, 2006
Time: 8:30 a.m.
Dept.: CX105

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I.
INTRODUCTION AND SUMMARY OF ARGUMENT

The importance of rest breaks and meal periods under the working conditions package handlers labor under cannot be overstated. A key point that Defendant does not dispute is that the duties of the Fed Ex package handlers are:

> **Work assignments can include repetitive lifting, carrying, pushing and pulling of packages up to 150 lbs. in weight in a standing or moving position more than 60% of work time.**
>
> **Work assignments require reaching, handling, fingering, feeling, eye-hand coordination, turning and/or twisting and/or bending at the waist more than 60% of work time.**
>
> **Job requires working in areas of facilities with temperature and humidity variations ranging from 20 to 100 percent humidity and below zero to 110 degrees Fahrenheit temperatures based on local weather variations more than 60% of work time.**
>
> **Job requires working rapidly for long periods of time more than 60% of work time.**
>
> **Work assignments require reading labels, charts, verifying numbers, memorization and carrying out instructions, estimating speed of moving objects and the size, form, weight and quality of objects more than 60% of work time.**

See Plaintiffs' Motion for Class Certification.

Knowing full well that a class action is the only effective means of recourse for the putative class members, FedEx's Opposition takes the position that there is no way this matter can be managed or tried as a class action. FedEx's conclusion is in direct conflict with the leading case on wage and hour class actions, *Sav-On Drug Stores v. Superior Ct.* 34 Cal.4th 319 (August 26, 2004). In *Sav-on*, the California Supreme Court encouraged trial courts to utilize numerous mechanisms in order to manage and try cases like this -- wage and hour class actions. "For decades '[t]his court has urged trial courts to be procedurally innovative' (*citation omitted*) in managing class actions, and 'the trial court has an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class' (*citations omitted*). "Plaintiffs can easily litigate the merits of the alleged common questions in a class action here by using pattern and practice evidence, including surveys, statistics, or other

sampling techniques, as well as testimony and documents" from FedEx regarding FedEx's "policies and practices." *Sav-on v. Superior Court, supra,* 34 Cal.4th at pp. 322-23. Contrary to FedEx's contention, the issues involved here can be dealt with through the use of survey methodology. See rebuttal Declaration of Dr. Jon Krosnick attached as Exhibit 1 to Supp. Decl. of J. Glugoski confirming that FedEx trial plan (hinged on thousands of individual trials) is unnecessary. Dr. Krosnick sets forth a trial plan based upon well accepted survey research methodology designed to effectively try the issues in this case on a representative basis.

Specifically, FedEx ignores the numerous class-wide issues set forth in Plaintiff's Motion that are common and predominate. Resolving these issues in a class context are in the interest of judicial economy. The issues are:

- Concerning meal periods – whether FedEx provided meal periods as required by California law;
- Concerning meal periods – whether FedEx should be required to maintain records of meal periods as required by California law; and
- Concerning rest breaks – whether FedEx authorized and permitted rest breaks as required by California law.

It is noteworthy that FedEx not only ignores these predominant class issues, but also points to three additional areas that appear well suited for class-wide adjudication. See Section C. below.

Whether package handlers were authorized and/or permitted to take rest breaks is ideally suited for survey analysis. Similarly, whether package handlers were provided meal periods is also appropriate for a survey. There is no need to engage in thousands upon thousands of individual inquiries. See Decl. of Dr. Krosnick rebutting FedEx's proposed trial plan calling for individualized determinations.

II.
ANALYSIS

A. SURVEY RESEARCH METHODOLOGY RATHER THAN INDIVIDUALIZED TRIALS CAN AND SHOULD BE USED IN THIS MATTER.

FedEx's opposition to Plaintiffs' Motion for Class Certification is premised on the idea that individual inquiries rather than class-wide determination must be made. However, these types of situations, where there is a common and uniform practice, are ideally situated for the

use of a trial methodology based on surveying the putative class members themselves. Specifically, Dr. Krosnick has explained the survey he envisions: the primary goals would be to measure 1) whether package handlers were permitted and/or authorized to take ten minute off-duty rest breaks for every four hours worked; 2) whether package handlers were asked by FedEx whether they wanted to waive their meal periods when they worked more than five hours per shift; and 3) whether package handlers orally agreed to waive their right to meal periods when they worked more than five hours per shift. Further, Dr. Krosnick sets forth the methods to carry out the survey (i.e., face-to face interviews, telephone interviews and/or questionnaires). See Decl. of Dr. Jon Krsonick, Ex. 1 to Supp. Decl. of J. Glugoski.

1. Trial Methodology:

Plaintiffs strongly believe, based on preparing numerous class action cases for trial, that this case is ideally situated for class-wide treatment. Certifying this case as a class action and setting forth a clear trial methodology will allow for focused and efficient discovery in preparation for trial. Plaintiffs propose the use of a survey.

a. Liability issues:

In the liability phase, the main disputes will likely be over 1) whether package handlers were permitted and/or authorized to take ten minute off-duty rest breaks for every four hours worked; 2) whether package handlers were asked by FedEx whether they wanted to waive their meal periods when they worked more than five hours per shift; 3) whether package handlers orally agreed to waive their right to meal periods when they worked more than five hours per shift; and 4) whether package handlers were provided meal periods.[1]

i. Surveying the class

Plaintiffs believe it would be appropriate to study the experiences of the putative class members utilizing well-recognized survey/statistics techniques. The survey in this case would not be daunting at all. Among other things, the package handlers would be asked questions

---

1 All questions are appropriate for survey analysis; however, the records themselves will show whether meal periods were taken. The absence of a meal period entry would indicate no meal period was taken as California has a requirement that meal periods be recorded and FedEx had a policy that meal periods should be recorded

based on the four areas stated above (i.e., were you authorized and permitted to take 10 minute rest breaks, did you orally waive your right to meal periods, etc.). See Decl. of Dr. Jon Krosnick. "Although surveys are not the only means of demonstrating particular facts, presenting the results of a well-done survey through the testimony of an expert is an efficient way to inform the trier of fact about a large and representative group of potential witnesses. In some cases, courts have described surveys as the most direct form of evidence that can be offered." Reference Manual on Scientific Evidence, Federal Judicial Center 2000 West Group St. Paul. MN (2000) p. 236. The Reference Manual's notes reflect that it is intended to assist judges in identifying, narrowing, and addressing issues bearing on the adequacy of surveys either offered as evidence or proposed as a method for developing information.

The Manual for Complex Litigation, Second, recommended that parties be required, "before conducting any poll, to provide other parties with an outline of the proposed form and methodology, including the particular questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process." Likewise, the Manual for Complex Litigation, Third, recommends early disclosure and discussion of survey plans to streamline the issues and avoid later disagreements about the efficacy of survey results.

After certification, the Court should order the parties to meet and confer on issues such as sample size and survey techniques. And, where there is substantial disagreement amongst the experts, the Court can consider appointing a statistician to advise the Court about how many class members should be randomly selected to testify at trial in order to accurately adjudicate both liability and damages while respecting the due process rights of both sides. After setting the sample size, then a random sample is selected from the total population. Those class members selected in the random sample can be subjected to focused discovery in preparation for trial. Plaintiffs' believe this case may be tried in two weeks if surveys and random statistical sampling are adopted.

b. **Damages:**

Plaintiffs preface their damages discussion with the observation that damages are routinely bifurcated from liability issues in complex cases such as this. That being said, most of the evidence necessary to establish aggregate class wide damages, both for unpaid wages and prejudgment interest, as well as for waiting time penalties, is readily available through FedEx's own payroll database, which contains, *inter alia*, dates of employment and annual salaries for each class member. As a matter of formal corporate policy Defendant denied putative class members meal and rest breaks each week. See Decl. of Rubado.

B. FEDEX FAILS TO SUBMIT A SINGLE DECLARATION AND/OR STATEMENT FROM A PUTATIVE CLASS MEMBER CONFIRMING HE/SHE RECEIVED REST BREAKS AND MEAL PERIODS.

Noticeably absent from FedEx's opposition are any declarations and/or statements from putative class members indicating that they were 1) authorized and/or permitted rest breaks; 2) were provided meal periods as required under California law; and/or 3) waived their rights to meal periods orally. Further, there are no records submitted of audits conducted by FedEx wherein FedEx confirmed compliance with California meal and rest period requirements. There are, however, FedEx documents which confirm that FedEx conducted self-audits at random locations and confirmed that it was in violation of meal and rest break requirements. Second, there is a mandate in 2004 (in response to this lawsuit) calling for a complete conveyor belt shut down at all locations to accommodate rest breaks. FedEx attempts to argue that the violations discovered in their self-audits are isolated instances rather than a uniform policy of violation; however, such is not the case.[2]

With respect to meal periods, although this can also be studied by surveying the class, the documents themselves are perhaps the best evidence showing whether a meal period was provided. There is no need to bring in all putative class members to testify. The exemplar time sheets that were randomly selected and which were provided to the Court demonstrate that employees worked over 6 hours yet received no meal period. In the entire production of

---

[2] If FedEx's representations about when the conveyor belts were shutdown are correct, one would expect that FedEx's contentions would be supported by the survey results.

documents, there is **not one** time card that indicates a meal period was provided. Further, FedEx's opposition provides no evidence that meal periods were actually provided – not a single time card, record, or declaration.

Further, FedEx argues that prior to the written meal waiver agreement, all package handlers *orally* waived their meal period each day. Where is the evidence from the putative class members confirming that the putative class members orally agreed to waive their meal periods? There is none. But to indulge FedEx, this issue can be surveyed easily: "Prior to the implementation of the written meal waiver agreement, did you orally waive your rights to meal periods when you worked a shift less than six hours?"

For more than six months FedEx was in possession of Plaintiffs' moving papers and in that time, FedEx could not find one individual who 1) admitted to having received a rest break, 2) admitted to receiving a meal period, and/or 3) admitted that s/he orally waived their meal period.

On the other hand Plaintiffs have submitted declarations from putative class members *all across the state* confirming that they were denied meal periods and rest breaks and that they never orally waived their meal periods. This speaks volumes.

1. The Putative Class Members confirm that not only did they want a rest break but a meal period as well because being a package handler is physically "hard work."

FedEx argues that prior to the implementation of the meal waiver agreement, each and every one of the putative class members waived their meal periods orally. Not only does FedEx provide no competent evidence to support this conclusion, but this is in fact contrary to the testimony of the putative class. In deposition, when asked by Defense Counsel about meal periods, putative class members Justin T. Walker and Gloria Burks confirmed that they would have wanted meal periods.

Gloria Burks testified:

> Q. If someone had told you, instead of finishing at six you're going to finish at 6:30, but we're going to give you half hour to have a meal somewhere in there, would that -- is that something you would have wanted?

A. Yeah, because, you know, it's like working three to four, maybe five hours straight with no break or nothing, and you're huffing and puffing because you know you've got to get it done, I mean, to me that's -- and the work that we did. You know what I'm saying? It's hard work.[3]

2. FedEx Misstates The Testimony of The Putative Class Members Regarding 10-Minute Rest Breaks.

FedEx makes much to do about the fact that putative class members occasionally used the bathroom or took a drink of water during their shifts. Yet, nowhere does FedEx attempt to show that the putative class members took a *10-minute rest break* to go to the bathroom or take a drink of water. In deposition, FedEx conveniently skirted around the issue about the length of these so called "mini-breaks." The question presented by this case is not whether package handlers ever went to the bathroom or took a drink of water, but whether they received 10-minute rest breaks. No evidence has been submitted to indicate these instances amounted to ten-minute rest breaks.

In addition to FedEx's failure to submit evidence of 10-minute rest breaks, FedEx also misrepresents the testimony of class members. FedEx claims that Mr. Bailey received breaks; however, he testified that it was not until 6 months prior to signing his declaration on December 3, 2004 (July 3, 2004) that his "supervisor started to shut off the conveyor belt for ten minutes each morning, and he began to receive one ten-minute rest break for every 4 hours that I worked." He still "does not receive any meal breaks." He testified that he would work as much as seven hours a day without a meal period.[4]

Annabel Dizon likewise admits receiving rest breaks but as stated in her declaration she did not start getting 10-minute breaks until FedEx started turning off the conveyor belt in August 2004.[5]

To clarify any confusion, Plaintiffs submit the supplemental declarations from the putative class members confirming that bathroom usage and/or taking a drink of water were

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[3] See Exhibit 3, Deposition of Gloria Burks p. 41: marked and attached to the Supp. Decl. of J. Glugoski.

[4] See Declaration of Justin Bailey in support of Motion for Class Certification and Ex. 4, Deposition of Justin Bailey p. 50: marked and attached to the Supp. Decl. of J. Glugoski.

[5] See Declaration of Annabel Dizon filed along with Plaintiffs' motion for class certification.

not ten-minute rest breaks and took at best several minutes, never lasting more than five minutes. See supplemental declarations of class members.[6]

C. FEDEX's MANAGING DIRECTOR CONFIRMS THAT EVEN WHEN PACKAGE HANDLERS WORK OVER 6.5 HOURS IN A DAY, THEY ARE INELIGIBLE FOR MEAL AND REST BREAKS

California meal and rest break requirements are very clear.

> § 11. No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...
>
> § 12. 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. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.... [7]

The testimony of Northern California Managing Director Dan Rubado confirms FedEx's uniform policy of disregarding California law. Mr. Rubado's declaration submitted in support of FedEx's opposition states that shifts last up to 6.5 hours. Mr. Rubado testifies "even if all package handlers worked the entire sort, many would be ineligible for a break of any kind and many more would not be entitled to a meal break." (See Decl. of Rubado ¶ 6, p. 2.) Under well-established California law, if an employee works 6.5 hours he/she ***IS*** entitled to both a meal period and a rest break -- no exception. [8] FedEx's admitted policy that the employee is neither eligible for a rest break nor a meal period unquestionably violates California law.

D. FEDEX's OPPOSITION HIGHLIGHTS THAT THERE ARE ADDITIONAL CLASS ISSUES THAT ARE NOT ONLY COMMON BUT PREDOMINATE.

FedEx argues for a very broad and liberal definition of the term "rest break," which highlights further issues that are both common and predominate:

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[6] See Ex's. 9-15, Supp. Decl. of putative class members marked and attached to the Supp. Decl. of J. Glugoski.
[7] Industrial Welfare Commission Wage Orders.
[8] The meal waiver agreement deals with shifts that are completed within 6 hours. If a shift goes over 6 hours, the meal period cannot be waived.

- Whether time spent on duty waiting for a truck that is late is considered a rest break;
- Whether time spent on duty waiting in the area while a truck just emptied is moved out and the next truck to unload is moved in is considered a rest break; and
- Whether during a conveyor belt malfunction, time spent on duty at the belt waiting for the belt to be repaired is a rest break.

While these may be interesting circumstances applicable to FedEx's operations, they are by no means unique to certain employees, or "individualized." These circumstances present common questions, primarily legal in nature, that can and should be resolved once for the entire class. Allowing these questions to be resolved individually in thousands of cases would risk inconsistent adjudications and would not promote judicial economy.

E. THE COURT RULED THE "ONE HOUR OF PAY" IS A WAGE; FEDEX's OPPOSITION IS AN IMPROPER MOTION FOR RECONSIDERATION.

FedEx improperly seeks to use its opposition as the "springboard" for a motion for reconsideration on an issue already decided by the Court. In October 2002, the Court found the one-hour of pay to be wage:

> The language of the Statute is not ambiguous, and therefore the Court does not need to resort to the Legislative history to find its meaning. The Statute requires that if the employee does not receive the required meal or rest breaks, the employee receives pay for the time worked. There is nothing ambiguous about the word "pay"; it is equivalent to wages. There is no mention of penalty in the Statute. The amount owed is money due to the employee at the time of termination. As this money due the employee was not allegedly not paid at the time of termination, waiting-time penalties are appropriate.
>
> What the California Statute does is provide for pay when a benefit was not given as required. Plaintiffs are entitled to both the rest and meal periods and pay for the rest periods. When they don't receive the rest periods, they are out a benefit, a form of compensation; and the Statute properly compensates when employers ignore the law.[9]

F. EVEN ASSUMING FEDEX'S WAS NOT IMPROPERLY SEEKING RECONSIDERATION OF THIS COURT'S PRIOR RULING, THE OUTCOME WOULD BE THE SAME.

FedEx's argument is based on the faulty premise that the one-hour of pay provided by Labor Code section 226.7 and the wage order is a penalty. FedEx supports its position by citing to dicta and the DLSE *Hartwig* decision – neither of which have any precedent value. In addition, as the Court is well aware, the Supreme Court has granted review of the "wage versus

[9] See Ex. 5, October 2002 ruling, marked and attached to the Supp. Decl. of J. Glugoski.

penalty" issue in the *Murphy v. Kenneth Cole* case wherein in the "one-hour of pay" was held to be a penalty. As it stands there are state and federal cases that have reasoned both ways on this issue. We won't have a definite conclusion until the Supreme Court decides the *Kenneth Cole* case.

Despite this Court's previous ruling and the Supreme Court's decision to review the *Kenneth Cole* case, FedEx seeks to introduce a decision from a hearing officer on a claim made by an employee for denied meal and rest breaks. In this decision, the DLSE has reversed its earlier position on whether Labor Code section 226.7 payments constitute wages or penalties. FedEx argues that because the DLSE has reversed its earlier position on whether Labor Code section 226.7 payments constitute wages or penalties, this Court should now follow the DLSE's reversal. Plaintiffs do not believe this issue is appropriate for resolution within the parameters of a motion for class certification. However, Plaintiffs point out that the *Tomlinson* court was aware of the DLSE's new position and gave it no weight, finding instead that section 226.7 payments constitute wages. *See Tomlinson vs. Indymac Bank, FSB* (2005) 359 F.Supp.2d at 891, 897 fn. 3. Second, *Hartwig v. Orchard Commercial, Inc.* (2005) DLSE Case NO. 12-56901RB ("*Hartwig*") is of no help to FedEx since it is merely an administrative decision by a deputy labor commissioner. *Hartwig* is also immaterial because it flatly contradicts the DLSE's previous interpretation of Labor Code section 226.7. The California Supreme Court has noted that vacillating positions taken by the state's administrative agencies are not entitled to any deference. *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 13 ("*Yamaha*"). It is also well settled that only the judiciary, not administrative agencies, may interpret a statute. *See McClung v. Employment development Dept.* (2004) 34 Cal.4th 467, 470; *Yamaha, supra,* 19 Cal. 4th at p. 11 n. 4 ("[t]he court, not the agency, has 'final responsibility for the interpretation of the law.'"). The Supreme Court has clearly mandated that it is the function of the judiciary – not administrative agencies – to independently interpret California's statutes. *See Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1264 (explaining that, in California, "agency interpretations are not binding or … authoritative" and "[c]ourts must, in short, independently judge the text of a

statute."); *Yamaha, supra,* 19 Cal.4th at p. 11 n.4 ("[t]he court, not the agency, has 'final responsibility for the interpretation of the law.'"). Thus, a deputy labor commissioner's decision in *Hartwig* has no application here. This is especially true given that the *Hartwig* decision is merely *administrative* precedent, not judicial precedent, issued to advise DLSE's hearing officers how to rule in proceedings before the Labor Commissioner.

The DLSE lacks the authority to promulgate laws governing meal periods *as the specific authority to regulate meal periods has been delegated to the IWC.* Indeed, Labor Code section 1193.5 specifies the actions that the DLSE may take; promulgating laws governing employee working conditions and/or meal periods is not mentioned. Since the DLSE lacks the authority to promulgate laws governing meal periods, a decision designed to alter and narrow the protections afforded by the Labor Code and the Wager Orders could never constitute new or different law.

1. The Assembly of the State Of California Issued A Resolution Confirming That The DLSE Does Not Have The Authority To Change The Law.

A recent Resolution of the Assembly of the State of California that may assist Court in resolving the issues raised by Defendant's motion concerning plaintiffs' restitution claim for violation of Bus. & Prof. Code section 17200 *et seq.* ("UCL"). The Assembly Concurrent Resolution No. 43 – Relative To Labor is attached as Exhibit 6 to the Declaration of J. Glugoski.

FedEx asks this Court to find that the remedy under section 226.7 is a penalty not a wage however the so called "precedent decision is void and cannot constitute "new or different law" because the DLSE lacks authority to promulgate laws or regulations concerning meal and rest breaks. Instead, that authority lies exclusively with the California Legislature or the Industrial Welfare Commission ("IWC"). Labor Code section 1173 confers upon the IWC the authority "to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries to which employees are employed in this state, and to investigate the health, safety, and welfare of those employees." See section 1 of Article XIV of the California Constitution. The California Supreme Court has affirmed that the IWC "is the

state agency empowered to formulate regulations (known as Wage Orders) governing employment in the State of California." *See Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561.

> In Resolution No. 43, the Assembly and Senate of California have declared that:
> WHEREAS the DLSE does not have the authority to promulgate a regulation that weakens the substantive protections and remedies afforded to California employees under Sections 226.7 and 512 of the Labor Code and the 17 Wage Orders; and
>
> WHEREAS the proposed regulation is inconsistent with existing law and regulations which require, among other protections, that the employer provide a meal break to all employees within the first five hours of work unless a statutory waiver is entered into between the employer and the employee; and
>
> * * *
>
> *Resolved by the Assembly of the State of California, the Senate thereof concurring,* That the Legislature of the State of California hereby declares that the DLSE does not have the authority to promulgate the proposed regulation concerning meal and rest periods; and be it further
>
> *Resolved,* That this authority rests exclusively with the Legislature or, in the alternative, the IWC, pursuant to legislative delegation of power; and be it further
>
> *Resolved,* That the proposed regulation on meal and rest breaks is inconsistent with existing law and will create confusion concerning these rights; and be it further
>
> *Resolved,* That the Chief Clerk of the Assembly transmit copies of this resolution to the Governor of the State of California, to the Secretary of Labor and Workforce Development Agency, and to the State Labor Commissioner.

See Exh. 6 to Supp. Decl. of J. Glugoski

Assembly Resolution No. 43 leaves no doubt that the DLSE lacks the authority to promulgate regulations concerning meal and rest breaks.

G. PLAINTIFFS AGREE TO MODIFY THE CLASS DEFINITIONS.

1. The Rest Break Class Shall Be Modified From "NOT RECEIVING" to "NOT AUTHORIZED AND/OR PERMITTED."

Plaintiffs concede FedEx's point concerning the class definition as to rest breaks. Plaintiffs hereby amend the definition to read as follows:

> All package handlers who worked one or more shifts in excess of 3.5 hours and were not authorized and/or permitted a paid ten-minute break during which the individual was relieved of all duties, from October 2000 to the time of certification.

2. Use of a Survey is Ideal to Determine When The Conveyor Belt Was Shut Down To Accommodate Rest Breaks; Later sub-classing Can Be Made If Necessary.

FedEx indicates correctly that in response to this lawsuit conveyor belts may have been shut down to accommodate rest breaks at some facilities prior to July/August 2004. This issue can be handled easily through the use of a survey. The putative class members would be asked to respond to questions through the means proposed by Dr. Krosnick, regarding whether (and when) FedEx implemented a procedure of "shutting down of the conveyor belt" to permit rest breaks. The responses from the putative class members will indicate whether sub-classing is necessary according to either hub (facility) or time frame in order to narrow – and more precisely define – the allowable scope of rest break claims.

H. PLAINTIFFS ARE ADEQUATE CLASS REPRESENTATIVES.

FedEx's claim that Plaintiffs cannot serve as adequate representatives is misplaced because FedEx fails to address the proper legal standard for either typicality or adequacy. Tellingly, FedEx concedes (as it must) that Plaintiffs make the same claims as the class and that Plaintiff's claims are based on the same nucleus of operative facts. *Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 470. For typicality, Plaintiffs must merely show that (1) their claims arise from the same event, practice, or course of conduct that gives rise to the claims of the other class members, and (2) is based on the same legal theory. *Rosario v. Lividitis* (7th Cir. 1992) 963 F.2d 1013, 1018. Here, Plaintiffs' claims arise from FedEx's uniform policy of denying meal and rest breaks to its hourly employees. Likewise, Plaintiffs' claims are based on the same legal theory as that of the absent class members. Hence, typicality is met.

I. A CLASS ACTION IS A SUPERIOR METHOD OF ADJUDICATION.

1. The California Supreme Court Has Confirmed That Class Treatment Is Proper.

California maintains an express public policy directed at the enforcement of California's wage laws for the benefit of workers which directs courts to construe such laws broadly "so as to promote employee protection," and which works in tandem with the state's

"public policy which encourages the use of the class action device" to this end. *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 340. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims, which would otherwise be too small to warrant individual litigation. *Ibid.* Trial courts are "urged... to be procedurally innovative" and to adopt the numerous flexible procedures which are available to them under the class action device, such as sub-classing and reserving individual issues to subsequent proceedings after adjudication of the class-wide questions. *Id.*

Plaintiffs can easily litigate the merits of the alleged common questions in a class action here by using pattern and practice evidence, including surveys, statistics, or other sampling techniques, as well as testimony and documents from FedEx regarding its policies and practices. The availability of representative evidence means that common questions predominate even when there are some individual issues that must also be resolved. *Id.* at pp. 332-333 and n.6.

2. **Class Members Claims Will Not Be Pursued If A Class Is Not Certified.**

The right to file a class action originates in equity, with the objective of redressing small wrongs that otherwise might go unremedied. *Bauman v. Islay Investments* (1975) 45 Cal.App.3d 797, 802. The alternatives of multiple litigation (joinder, intervention, consolidation, the test case) often do not sufficiently vindicate legal rights because these devices "presuppose a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits." *Vasquez v. Superior Court*, (1981) 4 Cal.3d 800, 808. "[T]he very purpose of class actions is to open a practical avenue of redress to litigants who would otherwise find no effective recourse for the vindication of their legal rights." *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934-935. The employer should not be allowed to "litigate each individual case which is filed seeking to obtain a favorable determination and, at the same time, hop[e] that few of the potential claimants will even file suit." *O'Meara v. United States* (N.D. Ill. 1973) 59 F.R.D.

560, 567. Even if each class member's claim did amount to several thousand dollars many class members still would not file suit. Legal fees and expenses could quickly amount to tens of thousands of dollars. *Taylor v. U.S.* (1998) 41 Fed. Cl. 440, 447 ("it is unlikely that each plaintiff would bring an individual claim" for $25,000).[10]

III.
CONCLUSION

In reality, FedEx does not want to litigate the issues raised by its employees' claims in tens of thousands of actions rather than one. Its real concern lies in its candid recognition that a class action increases the likelihood that class members will obtain a meaningful recovery for their injury – and it quite reasonably believes that a denial of certification will result not in many separate actions and payouts but in few or none, as low paid part-time hourly workers will have great difficulty in litigating their relatively small individual monetary claims. In urging the Court to deny class certification in this wage and hour class action, FedEx seeks to deny its employees the very legal protections that are most deserving of protection under California's public policies (applicable to both wage and hour law and class actions). FedEx arguments, if accepted would effectively prohibit class certification in any meal/rest break case. Moreover, denying certification here would deny package handlers the only effective procedural mechanism that is practical to protect their working condition rights. This Court should certify this case and, after notice, order the parties to start working together on a trial plan focused on surveying the class members.

Dated: August 23, 2006

Respectfully submitted,
RIGHETTI LAW FIRM, P.C.

John Glugoski
Attorneys for Plaintiffs

[10] True and correct copies of *O'Meara v. United States* and *Taylor v. United States* are marked and attached to the Supp. Decl. of f J. Glugoski as Ex. 7 and 8, respectively.

EXHIBIT 7

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S EVIDENCE IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Date: September 14, 2006
Time: 8:30 a.m.
Dept.: CX105

Defendants' Evidence:	Plaintiffs' Response:
Declaration of Dan Rubado submitted in support of Defendant's Opposition to Plaintiff's Motion for Class Certification.	Objection. Lacks foundation; Hearsay. As a Managing Director, Mr. Rubado was not working at the hubs during the relevant time period in question.
Declaration of Ed Leveque submitted in support of Defendant's Opposition to Plaintiff's Motion for Class Certification.	Objection. Lacks foundation; Hearsay. As a Managing Director, Mr. Leveque was not working at the hubs during the relevant time period in question.
Exhibit 1 – Order, Decision, or Award of the Labor Commissioner in Hartwig v. Orchard Commercial, Inc., Case No. 12-56901RB, lodged by Defendant in Support of Opposition to Plaintiff's Motion for Class Certification.	Objection. Hartwig lacks precedent value. The Supreme Court has granted review of the wage versus penalty issue in the *Murphy v. Kenneth Cole* case wherein in the "one-hour of pay" was held to be a penalty. As it stands the only citable case to rule on this matter is *Tomlinson v. Indymac Bank, F.S.B.* 359 F.Supp.2d 891 (C.D. Cal., 2005). In *Tomlinson*, the United States District Court for the Central District of California specifically held that the hour of pay was a wage not a penalty. Second, *Hartwig* lacks credibility because it flatly contradicts the DLSEs previous interpretation of the same issue. The Supreme Court has clearly mandated that it is the function of the judiciary – not administrative agencies – to independently interpret California's statutes. *See Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1264 (explaining that, in California, "agency interpretations are not binding or … authoritative" and "[c]ourts must, in short, independently judge the text of a statute."); *Yamaha,* 19 Cal.4th at 11 n.4.
Ex. 2 – July 17, 2005 Division of Labor Standards Enforcement Memorandum designating Hartwig as a "Precedent Decision", lodged by Defendant in Support of Opposition to Plaintiff's Motion for Class Certification.	See objection to Ex. 1.

Dated: August 23, 2006

RIGHETTI LAW FIRM, P.C.

John Glugoski
Attorney for the Plaintiffs