

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES RIDGEWAY, JAIME
FAMOSO, JOSHUA HAROLD, RICHARD
BYERS, DAN THATCHER, NINO
PAGTAMA, WILLIE FRANKLIN, TIM
OPITZ, FARRIS DAY, KARL MERHOFF,
and MICHAEL KROHN,

Plaintiffs,

v.

WAL-MART STORES, INC., a Delaware
Corporation dba WAL-MART
TRANSPORTATION LLC and DOES 1-50,
inclusive,

Defendant.

Case No. [08-cv-05221-SI](#)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Plaintiffs’ motion for partial summary judgment came on for hearing on May 1, 2015. For the reasons stated below, the Court hereby GRANTS in part and DENIES in part plaintiff’s motion.

BACKGROUND

Plaintiffs are truck drivers in California previously employed by defendant Wal-Mart for some period of time between 1993 and the present. Fourth Amended Complaint (“FAC”) ¶ 3-6. Plaintiffs allege Wal-Mart violated California law by failing to pay plaintiffs at least the minimum wage for each hour worked.

Plaintiffs initially filed this case in Alameda County Superior Court in October 2008. Docket No. 1. Wal-Mart removed the case to this Court under the Class Action Fairness Act, 28

1 U.S.C. § 1332(d)(2) in November 2008.¹ *Id.* Plaintiffs moved for remand, which the Court
 2 denied. Docket No. 33. In February 2009, the case was stayed pending a final decision by the
 3 California Supreme Court in *Brinker Restaurant Corp. v. Superior Court*, Case No. S166350.
 4 Docket No. 32. The California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior*
 5 *Court*, 53 Cal. 4th 1004 (2012) became final in May 2012, at which point proceedings in this case
 6 resumed. Plaintiffs Carroll Hampton, Robert Rodriguez, Donald C. Bryan, Virgil Caldwell, and
 7 Jeffrey Hammond were terminated on November 27, 2012.² Wal-Mart sought dismissal of
 8 plaintiff's Third Amended Complaint in December 2012, which the Court granted in part and
 9 denied in part. Docket Nos. 65, 72. Plaintiffs filed their Fourth Amended Complaint in May,
 10 2013, and Wal-Mart again moved to dismiss. Docket Nos. 73, 74. In June 2013, the Court denied
 11 Wal-Mart's motion to dismiss as to plaintiffs' claims for meal and rest break violations, unpaid
 12 wages, wage statement violations, minimum wage violations, and UCL claims. Docket No. 82.
 13 The Court granted the motion as to plaintiffs' claims for punitive damages. *Id.*

14 In December 2013, the Court granted the parties' stipulation to dismiss the claims of three
 15 plaintiffs: Richard Brown, Dennis Cole, and Thomas Bryson. Docket No. 94. In May 2014, Wal-
 16 Mart moved for partial summary judgment as to the claims of five plaintiffs: Farris Day, Charles
 17 Ridgeway, Tim Opitz, Dan Thatcher, and Jaime Famoso. Docket No. 109. The Court granted in
 18 part and denied in part Wal-Mart's motion for summary judgment. The Court denied the motion
 19 as to plaintiffs' minimum wage claims for layovers, pre- and post-inspections and paperwork, wait
 20 periods, rest breaks, and moving trailers.

21 In September 2014, the Court granted in part and denied in part plaintiff's motion for class
 22 certification. Docket No. 158. Plaintiffs now move for partial summary judgment.

24 ¹ This case was initially captioned: *Donald C. Bryan, Virgil Caldwell, Carroll Hampton, and*
 25 *Robert Rodriguez v. Wal-Mart Stores, Inc., a Delaware Corporation dba Wal-Mart*
Transportation LLC and DOES 1-50, inclusive. Docket No. 1.

26 ² The case caption then became: *Richard Brown, Charles Ridgeway, Jaime Famoso, Joshua*
 27 *Harold, Richard Byers, Dan Thatcher, Dennis Cole, Nine Pagtana, Willie Stankin, Tim Opitz,*
 28 *Thomas Bryson, Farris Day, Karl Merhoff, and Michael Krohn* v. *Wal-*
Mart Stores, Inc., a Delaware Corporation dba Wal-Mart Transportation LLC and DOES 1-50,
inclusive.

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2 **LEGAL STANDARD**

3 Summary judgment is proper if the pleadings, the discovery and disclosure materials on
4 file, and any affidavits show that there is no genuine issue as to any material fact and that the
5 movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The moving party
6 bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*
7 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to
8 disprove matters on which the non-moving party will have the burden of proof at trial. The
9 moving party need only demonstrate to the Court that there is an absence of evidence to support
10 the non-moving party's case. *Id.* at 325.

11 Once the moving party has met its burden, the burden shifts to the non-moving party to
12 "set out 'specific facts showing a genuine issue for trial.'" *Id.* at 324 (quoting then Fed. R. Civ. P.
13 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is
14 some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith*
15 *Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be
16 insufficient; there must be evidence on which the jury could reasonably find for the [non-moving
17 party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

18 In deciding a summary judgment motion, the Court must view the evidence in the light
19 most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255.
20 "Credibility determinations, the weighing of the evidence, and the drawing of legitimate
21 inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for
22 summary judgment." *Id.* However, conclusory, speculative testimony in affidavits and moving
23 papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill*
24 *Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). The evidence the parties
25 present must be admissible. Fed. R. Civ. P. 56(c).

26

27 **DISCUSSION**

28 Plaintiffs now for move summary judgment as to: (1) their minimum wage claims; and (2)

1 Wal-Mart's eighth affirmative defense. Plaintiffs contend that Wal-Mart's payment policies, as
 2 articulated in Wal-Mart's Driver Pay Manuals, violate California wage law by failing to pay
 3 drivers at least minimum wage for all of the time they work, including time spent on pre-trip and
 4 post-trip inspections, rest breaks, wait time, fueling the tractor, washing the tractor and trailer,
 5 weighing the tractor and trailer and completing mandatory paperwork. Plaintiffs further argue that
 6 drivers are entitled to payment of minimum wages for the time spent taking mandatory layovers.
 7 Plaintiffs have clarified that the present motion is limited to questions of liability and does not
 8 seek any determination of damages.¹ Reply at 5. For the purposes of this motion for partial
 9 summary judgment, plaintiffs seek a determination of whether the driver pay policies described in
 10 the Driver Pay Manuals violate California minimum wage law.

11 12 **I. Wal-Mart's Driver Pay Policies**

13 At issue in this case are the 2001, 2006, and 2008 Wal-Mart Driver Pay Manuals. Each of
 14 these documents is labeled "Driver Pay Manual" or "Driver Reference and Pay Manual," details
 15 the activities for which drivers are paid, and specifies activities for which drivers are not paid.
 16 Wilson Dep., Exs. 12, 13, 14; Aurit Dep., Ex. 2. As explained in the Manuals, Wal-Mart pays its
 17 drivers based on mileage, activity pay, and non-activity pay. Wilson Dep. at 42-44. Activity pay
 18 is for duties like arrive, hook, layover, live load pay and chain pay. *See e.g.*, Wilson Dep., Ex. 13
 19 at 2; Ex. 14 Driver Pay Manual 2006 at 1; Aurit Dep., Ex. 2 at 5. Non-activity pay includes
 20 scheduled time (events the Wal-Mart dispatch or home office schedules) and unscheduled time
 21 (unplanned events). *Id.*

22 The 2001 Driver Pay Manual details activities for which pay is earned, which include:
 23 drops (delivering a loaded trailer), backhaul (picking up a loaded trailer), relay, claims (returning
 24 merchandise), and chain pay. Wilson Dep., Ex. 12. The Manual specifies that drivers are paid for
 25 wait time after two hours. *Id.* at 13. It also states that drivers receive layover pay per occurrence

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 28 ¹ Plaintiffs state in their reply: "This motion concerns two overarching undisputed facts: (1) Wal-Mart's Driver Pay Manual, on its face, does not provide for payment of at least minimum wage for every required job duty; and (2) Wal-Mart in fact applies the payment plan stated in its Driver Pay Manuals to all Drivers in the Plaintiff class." Reply at 5.

1 when away from their residence or domicile office, up to eight hours per layover. *Id.* at 12.

2 The 2006 Driver Pay Manual states that drivers are paid for mileage rate, activity pay, and
3 non-activity pay (scheduled time and unscheduled time). Wilson Dep., Ex. 14. Activity pay is
4 for: arrive, hook, stop, layover, live load, and chain pay. *Id.* at 1. This Manual states that drivers
5 are paid for wait time after 45 minutes. *Id.* at 4.

6 The 2008 Driver Pay Manual includes the following categories for which drivers are paid:
7 mileage rates, activity pay, unscheduled time, and scheduled time. Activity pay is earned for
8 arrive, hook, stop, layover, live load, live unload, and chain pay. Aurit Dep., Ex. 2 at 5. The 2008
9 Pay Manual specifies that drivers are paid for wait time after waiting 45 minutes. *Id.* at 9. The
10 pay Manual also specifies that a layover is earned when drivers take a mandatory DOT break and
11 is not paid in conjunction with any other pay.² *Id.* at 13, 41. The pay Manual states that the
12 “intent is to pay Drivers for layovers taken in the tractor cab.” *Id.* Activities for which no pay is
13 earned are also detailed. No pay is earned when: at a weigh scale, waiting for a work assignment
14 at driver’s home domicile, a driver is required to drop a trailer for fueling or maintenance. *Id.* at
15 14.

16 Ann Wilson, Wal-Mart’s Senior Director of Regional Transportation for dispatching
17 operations in the western half of the United States, testified about the Driver Pay Manuals in her
18 deposition. Wilson Dep., Ex. B; Wilson Decl., Docket No. 190-2 ¶ 1. Wal-Mart identified
19 Wilson as the person most qualified at Wal-Mart to answer questions about California-based
20 driver compensation systems. Wilson Dep., Docket No. 181-7, Ex. B at 26. In her deposition,
21 Wilson described the Driver Pay Manuals as guidance manuals for their offices to know how to
22 pay the drivers. Wilson Dep. at 33. Specifically, Wilson stated in her deposition that the Manual
23 “would be a guidance for them to follow. There’s some discretion that the general transportation
24 managers [GTMs] will use, but this gives them guidance.” *Id.* at 34. Rick Aurit, Senior Director
25 of Regional Transportation for the Central Plains region, was produced by Wal-Mart as the person
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28 ² The 2008 Driver Reference and Pay Manual states that drivers will not be compensated for a
DOT break if any portion of it is taken at home. Aurit Dep., Ex. 2 at 41. The Manual also states
that drivers must safely and legally park the tractor and trailer in a secure location. *Id.*

1 most qualified to discuss the work schedules of California-based drivers. Aurit Dep. at 130-131;
2 Aurit Decl., Docket No. 190-1 ¶ 1. Aurit stated in his deposition that the pay Manuals “are
3 definitely followed by the company.” Aurit Dep. at 54. Aurit also noted that “[t]here can always
4 be exceptions” to guidelines. *Id.* at 54-55. The 2001 Driver Pay Manual states that “[a]ny method
5 or type of pay accumulation that deviates from this pay manual is not authorized.” Wilson Dep.,
6 Ex. 12.

7 Plaintiffs argue that by using the Driver Pay Manuals as the basis on which class members
8 were paid, Wal-Mart has failed to pay at least minimum wage for all hours worked and services
9 performed. Motion at 8, 11. Specifically, plaintiffs contend that Wal-Mart has failed to pay class
10 members at least the minimum wage for completing the following duties and activities: pre-trip
11 and post-trip inspections, rest breaks, time spent completing paperwork, time spent fueling the
12 tractor, time spent washing the tractor and trailer, time spent at weigh scales, wait time and/or
13 unscheduled time, and layover time. Plaintiffs contend that the Driver Pay Manuals, on their face,
14 violate California law because they do not provide for payment for these mandatory duties.

15 16 **II. Driver Pay Plans and California Minimum Wage Law**

17 Plaintiffs move for partial summary judgment, arguing that each of the Driver Pay
18 Manuals, on its face, fails to provide compensation to drivers for all job duties. Reply at 6. They
19 request the Court’s determination of whether the published Manuals are inconsistent with
20 California law because they do not provide for payment of at least minimum wages for all
21 performed job duties. *Id.*

22 Employment in California is governed by the Industrial Welfare Commission (IWC) wage
23 orders. The transportation industry is government by IWC Wage Order 9-2001. Cal. Code Regs.,
24 tit. 8 § 11090. This Wage Order requires employers to pay employees at least the minimum wage
25 per hour for all hours worked. *Id.* § 2(G). “Hours worked” is defined as “the time during which
26 an employee is subject to the control of an employer, and includes all the time the employee is
27 suffered or permitted to work, whether or not required to do so.” *Id.* “Wages” are defined as “all
28 amounts for labor performed by employees of every description, whether the amount is fixed or

1 ascertained by the standard of time, task, piece, commission basis, or other method of calculation.”
2 *Id.* § 2(O).

3 Plaintiffs describe the pay plans detailed in the Driver Pay Manuals as plans that are
4 similar to those discussed in *Quezada v. Con-Way Freight, Inc.*, No. 09-03670- JW, 2012 WL
5 2847609 (N.D. Cal. July 11, 2012); *Cardenas v. McLane FoodServices, Inc.*, 796 F.Supp. 2d 1246
6 (C.D. Cal. 2011); and *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005).

7 The California Court of Appeal in *Armenta* addressed how minimum wage can be
8 calculated to determine whether California minimum wage law had been violated. 135 Cal. App.
9 4th at 316. In *Armenta*, employee hours were classified as productive or nonproductive,
10 depending on whether the hours were “directly related” to the work employees performed
11 maintaining utility poles in the field. *Id.* The employees argued that they were not compensated
12 for: travel time in company vehicles, time spent loading equipment and supplies into the company
13 vehicle, time spent doing daily and weekly paperwork, and time spent maintaining the company
14 vehicles. *Id.* at 317. The employer argued that the time spent on those tasks was considered
15 nonproductive time and asserted that it should be entitled to divide the total number of hours
16 worked into the amount the employee was paid to arrive at an average hourly wage to then
17 determine whether compensation complied with the minimum wage law (the method utilized to
18 determine minimum wage compliance under the FLSA). *Id.* at 322. The Court considered the
19 minimum wage provisions of the FLSA and California law, finding that they differed significantly
20 and that the method utilized for assessing violations of the FLSA did not apply to California.
21 Instead, “the minimum wage standard applies to each hour worked” by an employee “for which
22 they were not paid.” *Id.* at 324. The court upheld the trial court’s determination that the employer
23 violated California law by refusing or failing to pay for the “nonproductive time” spent driving
24 and completing paperwork. *Id.*

25 The Central District of California in *Cardenas* considered the lawfulness of the
26 defendant’s piece-rate pay formula for paying truck drivers. *Cardenas*, 796 F.Supp. 2d at 1248.
27 There, the piece-rate formula for paying drivers consisted of: the number of cases of product
28 delivered on a route, the number of miles driven on a route, and the number of delivery stops made

1 on a route. *Id.* Plaintiffs argued that the piece-rate pay formula failed to compensate them for
2 duties they were required to perform pre- and post-shift, including vehicle inspections and
3 completion of paperwork. *Id.* Defendant argued these duties were compensated as part of the
4 piece-rate formula. Plaintiffs also argued that they were not paid for rest breaks, and the first 30
5 minutes of delay time while waiting for customers, but defendant argued that drivers were paid for
6 rest breaks and delay time at hourly or other rates of pay. *Id.* Defendant argued that in
7 combination, plaintiffs were paid significantly more than minimum wage for all of their working
8 time. Both parties moved for summary judgment as to whether the pay formula violated
9 California law. The court addressed the defendant’s argument that its piece-rate system did not
10 violate California law because, when averaged out, plaintiffs earned more than minimum wage.
11 *Id.* at 1250. Citing *Armenta* and a 2002 DLSE (Division of Labor Standards Enforcement)
12 opinion letter,³ the court noted the clear legislative intent to protect the minimum wage rights of
13 California employees—specifically, that the averaging method used by federal courts to assess
14 violations of the federal minimum wage law does not apply to California minimum wage
15 violations. *Id.* at 1251. The court reasoned that “a piece-rate formula that does not compensate
16 directly for all time worked does not comply with California Labor Codes, even if, averaged out, it
17 would pay at least minimum wage for all hours worked.” *Id.* at 1252.

18 In *Quezada*, the district court considered the parties’ cross motions for summary judgment
19 on the question of whether defendant’s compensation system was permissible under the California
20 Labor Code. 2012 WL 2847609, at * 2. The parties agreed that plaintiff, a linehaul truck driver,
21 was compensated at a “per-mile rate for all miles driven and at an hourly rate for some work
22 performed at Defendant’s facilities.” *Id.* The parties also agreed that plaintiff was not
23 compensated at the hourly rate “for vehicle inspections, paperwork completion, and the first house
24 of wait time in a shift.” *Id.* The court addressed the question of “whether Defendant’s pay scheme
25 of ‘building in’ compensation for these activities to the per-mile rate is permissible under the
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27 ³ This letter analyzed both federal and California law on averaging of wages for piece-rate
28 formulas and concluded that the averaging of wages paid within a particular pay period to
determine if the employer complied with minimum wage violations is not permitted.

1 California Labor Code.” *Id.* The court concluded that “California law does not allow an employer
2 to ‘build in’ time for non-driving tasks into a piece-rate compensation system” and that
3 “employees must be directly compensated for all time worked.” *Id.* at *6. The court noted that
4 because the defendant admitted that the pay scheme of “building in” compensation for non-driving
5 tasks on a per-mile rate was its practice, liability was established.

6 7 **III. Wal-Mart’s Pay Policy**

8 Wal-Mart argues that this case is distinguishable from the pay policies discussed in
9 *Armenta*, *Cardenas*, and *Quezada*. Specifically, Wal-Mart contends that: (1) activities like
10 inspections, fueling, washing, weighing, and paperwork are subsumed within other activities for
11 which drivers are paid; (2) drivers are not subject Wal-Mart’s control during layovers, and thus
12 need not be paid at least minimum wage; and (3) plaintiffs ignore pay records that demonstrate
13 that plaintiffs were paid for time spent on these activities through discretionary pay. *Opp.* at 7, 13-
14 14, 16-17. Plaintiffs assert that the Wal-Mart pay policies do not pay minimum wages for all
15 hours worked and all services performed and therefore violate California law. *Motion* at 5; 14.

16 17 **A. Activities Subsumed into Other Paid Activities**

18 Wal-Mart first argues that its pay plan compensated drivers for inspections, washing and
19 cleaning, wait time, and fueling because they are subsumed into other activities for which they
20 earn activity pay. For example, Wal-Mart asserts that inspections are subsumed within other
21 activities for which drivers are paid, citing the declarations of drivers Mitchell and Suvanto which
22 state that they perform inspections at the same time as they perform other activities like “arrive,”
23 “hook,” “live unload,” and “live load” and are paid for the time spent on the inspection through
24 that activity code. *Opp.* at 7; Mitchell Decl. ¶ 9; Suvanto Decl. ¶ 10. Similarly, Wal-Mart states
25 that washing and cleaning were part of “live load,” “wait time,” or “hook.” *Opp.* at 9, n.7. Wal-
26 Mart also argues that drivers were paid for wait time as part of an activity, like live load or live
27 unload. *Opp.* at 20. As to rest breaks, Wal-Mart argues that drivers were permitted to take rest
28 breaks during “wait time” or during any other paid task, such as a stop.” *Opp.* at 16. Wal-Mart

1 also argues that the driver declarations reveal that some drivers did not want to and did not take
2 rest breaks.

3 Wal-Mart asserts trucks are fueled by a fueling associate in connection with a hook, arrive,
4 depart or other activity. Opp. at 14 citing Aurit Dep. 96-97; Suvanto Decl ¶ 6; Mitchell Decl. ¶ 4.
5 As to weighing tractors and trailers, Wal-Mart states that this an act performed when drivers are
6 completing other activities, like hook or live load. Opp. at 14. Additionally, Wal-Mart argues that
7 drivers receive mileage pay for time spent weighing because the wheels of the truck are moving as
8 they drive across the scale. *Id.* citing Ridgeway Dep. 91-92; Opitz Dep. 140; Second Hammann
9 Decl. ¶ 5.

10 Again, Wal-Mart argues that paperwork is an act that drivers perform “in connection with
11 and at the same time” as other activities, like arrive, hook, live load or while on wait time,
12 unscheduled time, or down time. Opp. at 14. Wal-Mart cites the declarations of Hammann ¶ 23,
13 Mitchell ¶ 7, and Suvanto ¶ 10 to argue that drivers received activity pay for paperwork. Opp. at
14 14. Wal-Mart also cites the declaration of Red Bluff GTM Baker who stated that drivers “fill out
15 paperwork in connection with and at the same time as arriving at a location, hooking and departing
16 from a location, during a live load or while on paid wait time, unscheduled time or down time.”
17 Baker Decl. ¶ 4.

18 The argument Wal-Mart has presented here—that the activities are paid through activity
19 pay for other tasks—is analogous to the argument brought by the employer in *Quezada*. In
20 *Quezada*, driver compensation was calculated by multiplying a pre-set mileage rate by the number
21 of miles in a trip; drivers also received a separate hourly rate for work performed at the company
22 facilities, like loading and unloading. *Quezada v. Con-Way Freight, Inc.*, 2012 WL 4901423, at
23 *1. The drivers in *Quezada* were not paid at their hourly rate for the non-driving activities, and
24 the employer argued the time spent on these activities was built into the per-mile rate. *Id.* at *2.
25 Similarly, in the present case the Driver Manuals explain that drivers are paid by mileage rate and
26 for activity pay, unscheduled time, and scheduled time. Wilson Dep. at 42-44. Activity pay is for
27 duties like arrive, hook, layover, live load pay and chain pay. *See e.g.*, Wilson Dep., Ex. 13 at 2;
28 Ex. 14 Driver Pay Manual 2006 at 1; Aurit Dep., Ex. 2 at 5. The Driver Pay Manuals specify

1 activities for which drivers are not paid, and Wal-Mart here argues that the time drivers spend on
2 these activities are subsumed into activity pay.

3 In *Quezada*, the court reasoned that California law requires that employees must be
4 directly compensated for all time worked, and therefore does not allow an employer to “build in”
5 time spent on non-driving tasks into a piece-rate compensation system. 2012 WL 2847609, at *6.
6 California minimum wage standards apply to each hour worked by an employee, thus an employer
7 may not refuse to pay for time spent on tasks like completing paperwork. *Armenta*, 135 Cal. App.
8 4th at 316. Although Wal-Mart contends its pay method should not be characterized as a “piece-
9 rate compensation plan,” the Court finds that the differences in pay structure are non-dispositive of
10 the issue at hand: whether plaintiffs must be paid for all hours worked. *See Cardenas*, 796
11 F.Supp. 2d at 1249. Here, certain required tasks are specifically designated as unpaid activities.⁴
12 “[A] piece-rate formula that does not compensate directly for all time worked does not comply
13 with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all
14 hours worked.” *Id.* at 1252. The Court finds that activities that are not separately compensated
15 (and are explicitly listed and recognized as unpaid activities) may not properly be built in or
16 subsumed into the activity pay component of Wal-Mart’s pay policies, under California law.

17 18 **B. Layovers**

19 Pursuant to Department of Transportation regulations, drivers must take mandatory
20 “layover” periods. “A driver may not drive without first taking 10 consecutive hours off duty.”
21 49 C.F.R. § 395.3(a)(1). Plaintiffs were paid \$42.00 for these layover periods. Plaintiffs argue

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23 ⁴ For example, the 2008 Driver Reference and Pay Manual specifically states that “no pay is
24 earned when” a driver: drops a trailer for fueling, is at a weigh scale, or is waiting on a work
25 assignment at driver’s home domicile. *Aurit Dep.*, Ex. 2 at 14. The 2001 Wal-Mart Driver Pay
26 Manual states that wait time is a compensable job duty after 2 hours of waiting after arrival at a
27 store, but drivers are not compensated for the first 2 hours of wait time. *Wilson Dep.* Ex. 12 at 13.
28 Similarly, the 2008 Wal-Mart Pay Manual states that wait time “applies when waiting 45 minutes
at any location (except the home domicile or Driver’s First Load of the Week).” *Aurit Dep.* Ex. 2
at 30. Paperwork and inspections are also not separately compensated. *Wilson Dep.* at 219-221;
Aurit Dep. Ex. 2 at 5; *Wilson Dep.* Exs. 12, 13 at 2, 14 at 1. Washing the trailer is not included in
the listings of paid activities, but drivers “are responsible for the cleanliness of the tractor cab and
driving [the] tractor and trailer through the automatic wash... once per week.” *Aurit Dep.*, Ex. 1
at 85. Similarly, the Manuals do not separately identify and pay rest breaks. *Wilson Dep.* 217-18.

1 that under California law, drivers must be paid for all of the time that they are subject to the
2 control of their employer and that drivers were subject to Wal-Mart's control during layover
3 periods. Wal-Mart contends that plaintiffs are not subject to Wal-Mart's control during layovers,
4 and therefore are not entitled to minimum wage payment for each hour of the layover. Opp. at 16-
5 18.

6 Under California law, employers must pay employees at least the minimum wage per hour
7 for all hours worked. Cal. Code Regs., tit. 8 § 11090. "Hours worked" is defined as "the time
8 during which an employee is subject to the control of an employer, and includes all the time the
9 employee is suffered or permitted to work, whether or not required to do so." *Id.* In *Morrillion v.*
10 *Royal Packing Co.*, 22 Cal. 4th 575 (2000), the California Supreme Court explained that the
11 phrases "time during which an employee is subject to the control of an employer" and "time the
12 employee is suffered or permitted to work, whether or not required to do so" each define "whether
13 certain time spent is compensable as 'hours worked.'" *Morrillion*, 22 Cal. 4th at 582.
14 Accordingly, "an employee who is subject to an employer's control does not have to be working
15 during that time to be compensated." *Id.*

16 "The level of the employer's control over its employees, rather than the mere fact that the
17 employer requires the employee's activity, is determinative." *Morrillion*, 22 Cal. 4th at 587
18 (citations omitted). In *Morrillion*, the employer required its agricultural worker employees to
19 meet for work each day at specific parking lots or assembly areas and transported them to and
20 from the fields on buses the employer provided and paid for. *Id.* at 579. Employees were
21 prohibited from using their own transportation to get to and from the fields. *Id.* The employer
22 argued that employees were not subject to its control during bus rides because "they could read on
23 the bus or perform other personal activities." *Id.* at 586. The California Supreme Court rejected
24 this argument, and found that "[p]ermitting plaintiffs to engage in limited activities such as
25 reading or sleeping on the bus does not allow them to use 'the time effectively for [their] own
26 purposes.'" *Id.* (quoting *Bono Enterprises v. Bradshaw*, 32 Cal. App. 4th 968 (1995)). The Court
27 reasoned that when "an employer requires employees to meet at designated places to take its buses
28 to work and prohibits them from taking their own transportation" the employees are "subject to the

1 control of an employer” and the time spent traveling on the buses “is compensable as ‘hours
2 worked.’” *Id.* at 587.

3 Similarly, in *Bono Enterprises v. Bradshaw*, 32 Cal. App. 4th 968 (1995), the California
4 Court of Appeal considered a policy where workers had to remain on the work-site premises
5 during their 30-minute lunch period unless they made prior arrangements. The workers were
6 relieved of all work duties during the lunch period and an on-site cafeteria and relaxation area was
7 available for them to use during the lunch period. *Bono*, 32 Cal. App. 4th at 972. The court
8 reasoned that “[w]hen an employer directs, commands or restrains an employee from leaving the
9 work place during his or her lunch hour and thus prevents the employee from using the time
10 effectively for his or her own purposes, the employee remains subject to the employer’s control,”
11 and therefore must be paid. *Bono*, 32 Cal. App. 4th at 975.

12 Here, plaintiffs argue that they remain under Wal-Mart’s control during layovers. To
13 support their position, plaintiffs cite the 2008 Driver Pay Manual which defines layover time: “A
14 layover is earned when taking a mandatory DOT break and is not paid in conjunction with any
15 other type of pay. The intent is to pay Drivers for layovers taken in the tractor cab.” Aurit Dep.
16 Ex 2 at 13. The 2008 Manual further states that any exceptions, such as taking a layover at the
17 driver’s residence “must be approved prior to the Layover.” *Id.* Additionally, the 2008 Manual
18 states that drivers “should always park [the] tractor in a safe, legal and secure location” and the
19 Tractor Assignment Forms that states drivers are responsible for the safekeeping of the vehicle at
20 all times. Aurit Dep. Ex. 1 at 59; Docket No. 181-2, Ex. E. Similarly, the 2001 Driver Pay
21 Manual states that a layover will not be paid when the driver “takes a layover at their residence”
22 and “any layover at home requires prior management approval.” Aurit Dep. Ex. 12 at 13.

23 The intent of the policy, as stated in the 2008 Driver Pay Manual, is for drivers to be paid
24 for layovers when they are taken in the tractor cab. The 2008 and 2001 Manuals explicitly state
25 that layovers are not paid when taken at the driver’s residence, without management approval
26 prior to the layover. Aurit Dep. Ex 2 at 13; Ex. 12 at 13. Wal-Mart argues that driver admissions
27 and witness testimony confirm that drivers often left their trucks during layovers to eat at
28 restaurants, hang out with other drivers, exercise, go shopping, or watch movies. Opp. at 18-19

1 citing Mitchell Decl. ¶ 18; Suvanto Decl. ¶ 11. While drivers may have been able to leave their
2 trucks to eat a meal, shop, or exercise, the physical location of the layover—inside the tractor cab
3 and not at the driver’s residence—was specified and controlled by Wal-Mart. Drivers were not
4 paid for layovers taken at their residences without prior approval from management and the 2008
5 Manual states that the intent of the policy is for drivers to take the layover in a specific location—
6 inside the tractor cab. Wal-Mart exercised a high level of control over its drivers by specifying the
7 location for a paid layover and prohibiting payment for layovers taken at the driver’s residence
8 without prior authorization. The policies described in the Driver Pay Manuals are analogous to
9 the policies enforced upon the employees in *Morrillion*; Wal-Mart’s drivers were required to take
10 layovers in “designated places” and were prohibited from taking layovers at their own homes. *See*
11 *Morrillion*, 22 Cal. 4th at 587 (where an employer required employees “to meet at designated
12 places to take its buses to work” and “prohibit[ed] them from taking their own transportation,” the
13 employees were “subject to the control of an employer.”). And like the employees in *Bono*, the
14 Wal-Mart drivers were relieved of work duties during layovers and may have engaged in
15 relaxation or taken meals during the layover. *See Bono*, 32 Cal. App. 4th at 972. However, the
16 Manuals restrict the location of the layover to the tractor cab and specifically exclude the driver’s
17 residence. The drivers, like the employees in *Bono*, were restricted and directed to specific
18 locations by the policies described in the Manuals. The Court finds that the policies in the Driver
19 Pay Manuals subjected drivers to Wal-Mart’s control during layover periods. Under California
20 law, the drivers must be paid for all of the time that they were subject to Wal-Mart’s control.

21 22 **C. Discretionary Pay**

23 Wal-Mart also argues that its pay policy differs from those discussed in *Armenta*,
24 *Cartenas*, and *Quezada* because GTMs regularly used their discretion to provide separate and
25 additional pay to drivers, and contend that plaintiffs ignore these pay records. *Opp.* at 3. Wal-
26 Mart cites the GTM declarations to support this argument. For example, Wal-Mart cites the
27 declaration of Robert Mosley, the GTM for the Apple Valley, California distribution center.
28 Mosley Decl. ¶ 4. His declaration cites specific pages of the attached exhibits as examples of

1 instances where drivers received separate pay for fueling, trailer weighing, inspections, and wait
2 time. Mosley describes these as “examples of which I am aware of ways in which Apple Valley
3 management exercised discretion in paying drivers separately for tasks performed in ways that are
4 different than, or go above and beyond, what is set forth in the pay manuals.” Mosley Decl. ¶ 4.
5 Wal-Mart also cites the declaration of John Vincent, GTM for the Red Bluff, California
6 distribution center. His declaration cites examples in the attached documents where drivers were
7 awarded additional pay for certain activities, including fueling and weighing the trailer. Vincent
8 Dec., Ex. A at 420, 379, 333, 114.

9 Plaintiffs contend that the examples of individual discretionary exceptions to the pay
10 Manuals may present factual questions pertaining to the amount of damages an individual driver
11 may be entitled to but have no bearing on the issue of liability for the purposes of this motion.
12 Reply at 5. The Court agrees. That Wal-Mart has identified some examples of instances where
13 drivers were awarded discretionary pay cannot defeat summary judgment as to the issue of
14 whether the pay policies, as enunciated in the Driver Pay Manuals, violate California law.
15 Further, that the pay drivers received in these instances was discretionary indicates that payment
16 for these tasks was a deviation from the standard pay policy. The Court finds that the pay policies
17 detailed in the Manuals violate California wage law by failing to pay drivers at least minimum
18 wage for all of the time they work and GRANTS the motion as to plaintiffs’ minimum wage
19 claims.

20 21 **IV. Wal-Mart’s Good Faith Defense**

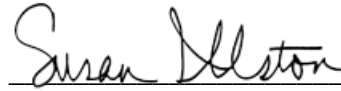
22 In their motion, plaintiffs seek summary judgment as to Wal-Mart’s eighth affirmative
23 “good faith” defense, arguing that Wal-Mart has refused to respond to Plaintiff’s Special
24 Interrogatory No. 16, seeking facts, witnesses or documents to support this defense. Motion at 19.
25 In its opposition, Wal-Mart counters that it has responded to the interrogatory. Opp. at 24 (citing
26 Docket No. 190, Ex. 16). A review of Wal-Mart’s cited exhibit reveals that it was submitted April
27 9, 2015, nearly a month after plaintiffs filed their motion for summary judgment. In their reply
28 plaintiffs do not provide any response to the argument raised in Wal-Mart’s opposition. The Court

1 cannot grant the motion for summary judgment as to Wal-Mart's eighth affirmative defense solely
2 upon the argument offered by plaintiffs, as Wal-Mart has responded to the interrogatory. The
3 Court DENIES the motion as to Wal-Mart's eighth affirmative defense.

4
5 **CONCLUSION**

6 The Court GRANTS the motion for partial summary judgment as to plaintiff's minimum
7 wage liability claims and DENIES the motion for partial summary judgment as to Wal-Mart's
8 eighth affirmative defense.

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10 Dated: May 28, 2015



11 _____
12 SUSAN ILLSTON
13 United States District Judge
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United States District Court
Northern District of California