SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

MICHAEL OLIVER, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

KONICA MINOLTA BUSINESS SOLUTIONS, USA; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 1-14-CV-263183

ORDER AFTER HEARING ON AUGUST 26, 2016

(1) Motion by Plaintiffs for Summary Adjudication; (2) Motion by Defendant Konica Minolta Business Solutions USA, Inc. for Summary Adjudication

This Order was lodged on August 29, 2016 by the Court and issued conditionally under seal to the parties. Pursuant to California Rules of Court, Rule 2.551(b)(3)(B), the Clerk will remove this document from its sealed envelope and place it in the public file unless a motion or application to seal the record is filed within 10 days from the date the Order was lodged under seal.

The above-entitled matter came on for hearing on Friday, August 26, 2016 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Peter H. Kirwan presiding. A tentative ruling was issued conditionally under seal by the Court on August 25, 2016. The appearances are as stated in the record. The Court, having reviewed and considered the written submission of all parties, having heard and considered the oral argument of counsel, and being

fully advised, orders that the tentative ruling from August 25, 2016, attached as Exhibit A, be adopted and incorporated herein as the Order of the Court.

IT IS SO ORDERED.

Dated: 9/6/16

Honorable Peter H. Kirwan
Judge of the Superior Court

EXHIBIT A

Calendar Line 8

Case Name: *Michael Oliver, et al. v. Konica Minolta Business Solutions, USA, Inc., et al.*
Case No.: 2014-1-CV-263183

In this class action, plaintiffs allege various Labor Code violations by defendant Konica Minolta Business Solutions, USA, Inc. ("KMBS"). Currently at issue are the parties' motions for summary adjudication of issues pursuant to Code of Civil Procedure section 437c, subdivision (t).

I. Factual and Procedural Background

Plaintiffs worked as service technicians for KMBS. (First Amended Complaint ("FAC"), ¶ 5.) They allege that KMBS required them and similarly situated service technicians to drive their personal vehicles to and from the first and last job of the day while transporting the tools and equipment necessary to do their jobs, but did not provide compensation for the time spent driving. (*Id.*, ¶ 6.) KMBS also failed to reimburse its technicians for all expenses incurred, including those for miles driven, and failed to provide accurate wage statements (among other things, KMBS did not provide hard copies of the statements and did not list all hours worked). (*Ibid.*)

The FAC sets forth the following causes of action: (1) Failure to Pay Overtime Wages Pursuant to California Labor Code § 1194; (2) Failure to Reimburse for Work Related Expenses in Violation of Labor Code § 2802; and (3) Unlawful, Unfair and Fraudulent Business Practices Pursuant to Business & Professions Code § 17200, et seq.

Currently before the Court are plaintiffs' motion for summary adjudication of issues and KMBS's motion for summary adjudication of issues, which initially came on for hearing in May. At that time, the Court denied the motions as procedurally improper, without prejudice to the parties filing a stipulation pursuant to Code of Civil Procedure section 437c, subdivision (t). On June 1, 2016, the parties filed a stipulation to the summary adjudication of the following issues presented by their earlier motions:

(1) Based on the record evidence, is Defendant legally obligated under California Labor Code Sections 510 and 1194, and the applicable Industrial Welfare Commission ("IWC") Order, to pay class members wages for the time spent driving their personal vehicles from their non-work site homes to the first work site of the day and from the last work site of the day back to their homes? and

(2) Based on the record evidence, is Defendant legally obligated under California Labor Code Section 2802 to reimburse class members for the miles driven in their personal vehicles from their non-work site homes to the first work site of the day and from the last work site of the day back to their homes?

These issues are now properly before the Court upon the parties' renewed motions. Of course, in addressing the motions, the usual rules governing summary adjudication apply. (See

Code Civ. Proc., § 437c, subd. (t)(5) [motion filed pursuant to subdivision (t) "shall proceed in all procedural respects as a motion for summary judgment"]; *Magana Cathcart McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106, 116-120 [parties may not stipulate to a procedure that does not comply with the statutory requirements and rules of court governing summary judgment motions].) Notably, notwithstanding the parties' apparent request for a definitive ruling by the Court on each issue "[b]ased on the record evidence," the Court must determine whether it may find in favor of one party or another based on the undisputed material facts, or whether factual disputes preclude it from finding in favor of either party. (See Code Civ. Proc., § 437c, subd. (c).)

II. Evidentiary Issues

KMBS's request for judicial notice of the district court opinion addressed by *Stevens v. GCS Service, Inc.* (9th Cir. 2008) 281 Fed. App'x. 670, discussed below, is GRANTED. (Evid. Code, § 452, subd. (d).) The Court declines to rule on KMBS's objections to evidence filed in support of plaintiffs' motion and plaintiffs' opposition to KMBS's motion, as these objections are immaterial to the disposition of the parties' motions. (Code Civ. Proc., § 437c, subd. (q).)

III. Undisputed and Disputed Facts

While the parties indicate in their oppositions to one another's separate statements that nearly every fact at issue is disputed, an examination of the oppositions and supporting evidence reveals that many assertedly contested facts are disputed only in part or not at all. The Court's discussion will attempt to distinguish salient facts that are truly in dispute from those that are not based on the Court's independent reading of the separate statements and supporting evidence.

The following facts are essentially undisputed. KMBS, which provides business printing, copying, and scanning products and services to its customers, employs plaintiffs and other class members as service technicians (or "ST"s). (Plaintiff's Separate Statement of Material Facts ISO Opp. to Defendant's Mot. ("PSMF ISO Opp."), issue 1, nos. 1 and 3.) Technicians usually travel to the customer's place of business to do their jobs, although there are occasions when they are able to resolve a customer's problem over the phone without travel. (*Id.*, issue 1, nos. 4-6.) They do not report to an office and instead go directly to their first work location of the day from their homes and return home from their last work location at the end of the day. (*Id.i,* issue 1, no. 14.) Their first and last stops are usually at a customer location, but sometimes they are a Field Stocking Location ("FSL") or a KMBS branch location. (*Id.*, issue 1, nos. 15-16.) All three types of sites are considered work locations. (*Id.*, issue 1, no. 25.)

Service technicians typically drive their personal vehicles to work. (PSMF ISO Opp., issue 1, nos. 8-9.) They are generally expected to report to their first work location around 8 A.M. and to leave their last location at 5 P.M., and KMBS's policies prohibit technicians from working overtime. (*Id.*, issue 1, nos. 18 and 19.) Technicians are compensated for their travel time and reimbursed for their mileage between their first and last work locations during business hours (*Id.*, issue 1, no. 24, issue 2, nos. 45-46), but are not reimbursed for mileage or

compensated for commute time between home and the first and last work locations, at least when these locations are within their normal territories (*Id.*, issue 1, no. 21, issue 2, no. 42).[1]

Service technicians are expected to have in their vehicles the tools and parts required to support their customers. (Defendant's Separate Statement of Material Facts ISO Opp. to Plaintiffs' Mot. ("DSMF ISO Opp."), no. 8.) The technician's vehicle is "the primary stock location that's assigned to the technician." (*Id.*, nos. 12-14.) KMBS's Field Parts Inventory Practice Guide reflects targets of 150-200 pieces of inventory assigned to each service technician, with a value of $9,000-$14,000, and indicates that this equipment should not be stored in the employee's house or garage. (*Id.*, no 17.) Its Driver Policy Booklet indicates that drivers participating in KMBS's reimbursement policy "shall maintain a late-model vehicle in good repair and appearance with no less than twenty-five (25) cubic feet of lockable cargo space." (*Id.*, no. 4.) Technicians are evaluated on their ability to appropriately manage their inventory, with at least some technicians being evaluated on their "First Time Fix Percentage" (presumably, their ability to fix a customer's problem using the materials brought on the initial service call). (*Id.*, nos. 19, 28-30.)

The above facts do not appear to be in dispute. However, it is disputed whether technicians are *required* to drive their personal vehicles to work and store their tools and parts in their personal vehicles overnight. In opposition to plaintiffs' motion, KMBS introduces evidence that some technicians are "on premise" technicians assigned to only one customer, and these technicians can take any form of transportation to work; other technicians work in urban areas where they can walk from one customer to another. (See DSMF ISO Opp., no. 2.) Even assuming that some portion of the class is required to drive non-company vehicles for work (which does not appear to be in dispute), it is not clear whether these class members are actually required to store their tools and parts in their vehicles outside of business hours. At least some service technicians are provided with FSLs to store parts within their territories, which may be self-storage facilities, storage areas at a branch office, or storage space at customer locations. (PSMF ISO Opp. nos. 10-13.) The parties dispute the consistency with which FSLs are provided and whether they are available to all technicians. (*Ibid.*) Several technicians indicate that it is their own decision where to store their parts and tools, although most choose to keep some tools and small parts in their cars for convenience.[2] Others were not provided with a storage location

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[1] It is disputed whether technicians are reimbursed for mileage between home and their first and last work locations when they are required to travel beyond their normal territory.

[2] See, e.g., Decl. of Eric Hill ISO Defendant's Opp., Ex. I, Depo. of Jeff Stankey, p. 116:12-18 (agreeing it was his decision what parts or tools to carry in his car); Decl. of Alan Chan ISO Defendant's Opp., ¶¶ 10-11 ("I have a parts storage location in the downtown SF KMBS office where I can store parts at any time. … My managers have never dictated where I keep my parts and have never said I need to keep all or any percentage of my parts in my car. I generally bring along the smaller parts, more commonly used parts in my vehicle and leave the larger parts in my storage area."); Decl. of Mike Doss ISO Defendant's Opp., ¶ 11 ("[F]or the first eight months of my employment as a service technician, I did not carry parts in my car during my commute."); Decl. of Nair Ifeishat ISO Defendant's Opp., ¶ 15 ("I never carry parts or tools in my car on the weekends. On the weekends and holidays, my trunk is empty and I leave all of my KMBS work materials in my storage facility."); Decl. of Jeffrey Mendez ISO Defendant's Opp., ¶ 11 ("Because I almost always report to the main library at the beginning of my shift, I could keep my tools, lap top, vacuum, paper and parts in my office/storage area at the main library if I wanted, but I prefer to keep some items in my car."); Decl. of Vincent Sanchez ISO Defendant's Opp., ¶ 8 ("It is entirely up to me what parts and tools I keep in my car or in storage …").

other than their own car or garage.[3] It is disputed whether technicians drive vehicles with twenty-five cubic feet of cargo space in practice, and whether they have at times been permitted to store equipment in their homes or garages. (See DSMF ISO Opp., nos. 4, 15.)

With this general factual landscape in mind, the Court will determine whether it would be appropriate to enter summary adjudication in favor of either plaintiffs or KMBS.

IV. Applicable Law

The IWC is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581.) The wage orders covering different industries generally contain the same definition of "hours worked" (*ibid.*), which the parties agree governs plaintiffs' employment. Under the governing definition, "hours worked" is "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal. Code Regs., tit. 8, § 11040(2)(K).) California Labor Code sections 510 and 1194 require non-exempt employees to be compensated at one and a half times the regular rate of pay for overtime hours worked.

Labor Code section 2802 requires employers to reimburse employees "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." (Lab. Code, § 2802, subd. (a).) While "wages and expense reimbursement are conceptually distinct and subject to different statutory and sometimes also contractual constraints" (*id.* at p. 572), "rules regarding the payment of wages are often used to develop rules regarding reimbursement by way of analogy" (*Morse v. ServiceMaster Global Holdings Inc.* (N.D. Cal., June 21, 2011, No. C 10-00628 SI) 2011 WL 2470252, at *4).

V. Issue 1: Whether the Travel Time at Issue Constitutes "Hours Worked"

As an initial matter, plaintiffs characterize the "control" and "suffer and permit" portions of the definition of "hours worked" as two separate and independently sufficient tests, and argues that the "suffer and permit" test is the relevant one here. KMBS takes issue with this characterization, noting that courts have focused on the element of control when deciding travel time cases. (See *Morillion, supra,* 22 Cal.4th 575 [applying the control test as discussed below]; *Rutti v. Lojack Corp., Inc.* (9th Cir. 2010) 596 F.3d 1046, 1062 [stating that under California law it is the level of the employer's control over its employees that is determinative in travel time cases]; *Novoa v. Charter Communications, LLC* (E.D. Cal. 2015) 100 F.Supp.3d 1013, 1019-1020 ["In general, the time an employee spends commuting is not compensable. [Citation.] However, such time could be compensable if the employer exercised sufficient control over the employee."].)

[3] See, e.g., Decl. of Robin G. Workman ISO Plaintiffs' Mot., Ex. W, Depo. of Norris Cagonot, p. 114:3-15 (did not have a storage location other than his garage); Ex. O, Depo. of John Rosenberger, p. 72:18-23 (did not have a storage facility other than his car).

The plain language of the regulations would appear at first glance to support KMBS's position that employer control is the defining test and "suffered or permitted to work" is an "include[d]" aspect of that concept. (Cal. Code Regs., tit. 8, § 11040(2)(K).) However, the California Supreme Court has stated that the "suffered or permitted to work" part of the definition can be independently satisfied. (See *Morillion, supra,* 22 Cal.4th at p. 584 [it is incorrect to assume that the "suffered or permitted to work" portion of the definition cannot be independently satisfied].) While recognizing that the Supreme Court's statement is dictum, the Court accepts it as a correct statement of the law for purposes of these motions, and will address whether there are triable issues of material fact under either the "control" or the "suffer or permit" standards.[4]

A. "Suffered or Permitted to Work"

"Suffered or permitted to work" most often encompasses "unauthorized overtime, which the employer has not requested or required." (*Morillion, supra,* 22 Cal.4th at p. 585.) The key consideration in such cases is whether the employer knew or should have known that the employee was working overtime. (*Ibid.*) Significantly, "the concept of a benefit is neither a necessary nor a sufficient condition for liability under the 'suffer or permit' standard. Instead, … the basis of liability is the defendant's knowledge of and failure to prevent the work from occurring." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 70, italics omitted.) "[T]he touchstone is the failure to prevent *work*." (*Frlekin v. Apple Inc.* (N.D. Cal., Nov. 7, 2015, No. C 13-03451 WHA) 2015 WL 6851424, at *10, italics original [holding that time spent allowing searches of employees' bags and packages was not compensable].) Passive activities unrelated to employees' job responsibilities do not constitute work, even if they ultimately benefit the employer. (*Id.* at *11.)

It is beyond dispute that merely commuting to work in one's own vehicle does not constitute "work" under this standard. (See *Morillion, supra,* 22 Cal.4th at p. 579, fn. 2 [distinguishing between "travel to and from a work site that an employer controls and requires," which may comprise "hours worked," and "an ordinary commute from home to work and back that employees take on their own"]; *Frlekin, supra,* 2015 WL 6851424 at *11 [rejecting the possibility that "an employee's commute in his own vehicle would be compensable [simply] because the employer benefits by physically having its employees on premises"].) Plaintiffs contend, however, that because they transport their tools to and from the first and last job sites of the day, they are working during this travel time. (FAC, ¶ 6.)

In support of this argument, they cite a Division of Labor Standards and Enforcement ("DLSE") opinion letter discussing time spent *delivering* equipment for an employer (see Decl. of Robin G. Workman ISO Mot., Ex. K at p. 3), as well as cases arising in the distinguishable

[4] *Morillion* held that the "control" test, rather than the "suffer and permit" test, can be independently satisfied. (At pp. 584-585.) However, the Court agrees with the observation that the "suffer or permit" standard must be independent of the "control" standard given that its classic application is to cases of unrequired overtime, which must logically be interpreted as "time an employee is working but is *not* subject to an employer's control." (At pp. 584-585, italics added.)

worker's compensation context.[5] As noted by KMBS, the DLSE letter only cursorily addresses the "delivery" issue and does not suggest that an employee's daily travel to a worksite with his or her personal tools and equipment constitutes "hours worked"; to the contrary, the letter discusses how employees in certain occupations, such as the construction industry, "are not assigned to a specific workplace and have a reasonable expectation that they will be routinely required to travel reasonable distances to job sites on a daily basis." (*Id.* at p. 2.) Such travel time is considered uncompensable, ordinary commute time, and bears a clear resemblance to the circumstances here.

Plaintiffs also cite cases addressing federal law. Like the worker's compensation cases, these cases are distinguishable because they apply a different legal standard; furthermore, they address distinct factual circumstances where employees hauled large, specialized equipment and/or stopped at an employer's property to pick up and load equipment before proceeding to their worksite. The primary cases concern employees of oil and gas companies who were responsible for hauling large, specialized equipment in a company truck, as opposed to carrying their own personal tools and equipment in their personal vehicles. (See *D A & S Oil Well Servicing, Inc. v. Mitchell* (10th Cir. 1958) 262 F.2d 552, 553 [employees transported pulling and swabbing units "weighing 30,000 pounds or more" and "butane gas tanks of 109 gallon capacity"]; *Crenshaw v. Quarles Drilling Corp.* (10th Cir. 1986) 798 F.2d 1345, 1350 [employee drove "a specially equipped truck containing many of the tools that he needed to service drilling rigs scattered across several states"], *disapproved of on another ground by McLaughlin v. Richland Shoe Co.* (1988) 486 U.S. 128.) In other cases, employees in the construction industry loaded and unloaded materials for use by an entire team of workers at the employer's property before proceeding to join the team at the worksite (see *Lacy v. Reddy Elec. Co.* (S.D. Ohio, July 11, 2013, No. 3:11-CV-52) 2013 WL 3580309, at *8–9; *Herman v. Rich Kramer Const., Inc.* (8th Cir. 1998) 163 F.3d 602, 1998 WL 664622, at *1), and sleep study technicians "were required to pick up equipment at defendant's office" before traveling to the facility where the studies were conducted and to "wake the patient in the morning, clean the equipment, leave the facility when the patient was ready, [and] return to defendant's office and download the data" when the night ended (*McLaughlin v. Somnograph, Inc.* (D. Kan., Dec. 21, 2005, No. CIV.A. 04-1274-MLB) 2005 WL 3489507, at *5). Finally, in *Baker v. Barnard Const. Co., Inc.* (10th Cir. 1998) 146 F.3d 1214, plaintiffs were required to provide their own fueled and stocked welding rigs each work day, and sought compensation for "their return travel time associated with refueling and restocking the welding rigs in the evenings," implicating both the transport of large, specialized equipment and loading and fueling work to be performed before employees returned home. (At p. 1215.) The facts at issue in these cases are readily distinguishable from the transportation of personal tools and equipment from home to work. Notably, one of the cases cited by plaintiffs, *Smith v. Aztec Well Servicing Co.* (10th Cir. 2006) 462 F.3d 1274, specifically held that oil and gas employees who merely transport their own personal safety equipment are not working (at p. 1289); another, *Preston v. Settle Down Enterprises, Inc.* (N.D. Ga. 2000) 90

[5] The worker's compensation cases apply a different and more lenient course and scope of employment standard than the one at issue here. (See *Aguilar v. Zep Inc.* (N.D. Cal., Aug. 27, 2014, No. 13-CV-00563-WHO) 2014 WL 4245988, at *17, fn. 8 [distinguishing worker's compensation "going and coming" cases in analyzing whether commute expenses were reimbursable under section 2802]; *Blackman v. Great American First Savings Bank* (1991) 233 Cal.App.3d 598, 605 ["courts heed statutory admonitions for a liberal construction favoring coverage in worker's compensation cases"].)

F.Supp.2d 1267, distinguished *D A & S* and *Crenshaw* where employees reported to the employer's offices but "loaded no tools on the vans" (at p. 1280).

The parties also cite unpublished federal cases that do address the apposite California law. An unpublished Ninth Circuit opinion addressing the "suffer or permit" standard is almost directly on point and supports the conclusion that an employee's time spent transporting him- or herself along with personal equipment between home and a job site is not "work." (See *Stevens v. GCS Service, Inc.* (9th Cir. 2008) 281 Fed. App'x. 670, 672–673 [employees "must be engaged in work-related tasks or exertion in addition to mere transportation of themselves and their tools and equipment in order to be compensated for being 'suffered or permitted to work' "; however, there was a triable issue of fact regarding whether employees worked by receiving phone calls during their commutes].) As reflected in the underlying district court opinion, *Stevens* involved employees of a kitchen equipment repair company. (See Decl. of Eric Hill ISO Defendant's Opp. to Plaintiff's Mot., Ex. Q, p. 1.) Like KMBS's technicians, the defendant's technicians had no fixed job site and drove to customer locations along with the tools used in their repair jobs; they were not compensated for driving between home and their first and last job sites. (*Id.* at pp. 2-3, 6.)

The Court find *Stevens* to be persuasive, and distinguishes the two unpublished district court cases cited by plaintiffs. In *Aguilar v. Zep Inc.* (N.D. Cal., Aug. 27, 2014, No. 13-CV-00563-WHO) 2014 WL 4245988, at *3, it was held that sales representatives who "maintained a home office" from which they made sales calls and entered sales orders online must be reimbursed for driving to and from the first and last off-site sales calls of the day. Here, plaintiffs have not alleged that they work from home or perform work during their commutes other than transporting tools and equipment.[6] In *Pehle v. Dufour* (E.D. Cal., Sept. 28, 2012, No. 2:06-CV-1889-EFB) 2012 WL 4490955, at *13, the court held that an employee's time "spent at defendants' shop and traveling between defendants' shop and the job sites is compensable under California law since he was 'suffered or permitted to work' during that time" and also because "loading the van at defendants' shop and/or supply house and driving it to the job sites, and then returning the van to the shop at the end of the day, was for defendants' benefit and was under defendants' control and direction." Here, technicians are already paid and reimbursed for time spent picking up equipment at an FLS or other work location and subsequently driving to a customer location.

Stevens is consequently the most analogous case, and the Court agrees with its conclusion that otherwise normal commute time is not transformed into "hours worked" merely because employees carry a reasonable amount of personal tools and equipment with them from home to work.

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[6] In opposition to KMBS's motion, plaintiffs present evidence that technicians perform work other than carrying tools and equipment while at home and during their travel to and from their first and last job sites. (See PSMF ISO Opp., issue 1, no. 17 [citing declarations by several technicians who state that they checked and loaded inventory at home and responded to emails and phone calls before and during their commutes].) However, this work is beyond the scope of the FAC, the Court's order granting class certification, and consequently, the instant motions. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 [on summary judgment, the pleadings delimit the scope of issues and frame the outer measure of materiality].) Notably, the stipulation governing these motions itself defines technicians' homes as "non-work site[s]."

Given this conclusion, plaintiffs' motion must fail as to issue no. 1, since it relies entirely upon the "suffer or permit" test. It remains for the Court to address whether there are triable issues of material fact with respect to the "control" test in the context of KMBS's motion.

B. "Subject to the Control of an Employer"

Morillion is the controlling California Supreme Court case applying the "control" test. It held that agricultural workers who were required to meet for work each day at specified parking lots or assembly areas, and were then transported back and forth in company buses to the fields where they actually worked, were subject to the employer's control and were thus working while on the buses. (*Morillion, supra,* 22 Cal.4th at p. 579.) The Supreme Court emphasized that employees were prohibited from using their own transportation to get to and from the fields (*ibid.*), and, while they could engage in limited personal activities such as reading or sleeping on the bus, they could not use their commute time effectively for their own purposes because they could not, for example, "drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car" like a typical commuter (*id.* at p. 586).

Here, there is no dispute that KMBS does not directly instruct technicians what route to take between work and home or prohibit them from running personal errands on the way. (See PSMF ISO Opp. issue 1, nos. 27-33.) Plaintiffs attempt to show that they are nonetheless effectively prohibited from taking a route other than the fastest route and from carrying personal materials and passengers in their vehicles during their commutes. But none of the testimony they cite indicates that technicians could not feasibly use their vehicles for personal purposes during their commutes; at most, it shows that some technicians' back seats as well as trunks were used to transport equipment, and that some technicians preferred to unload their equipment at times, mostly on weekends.[7] Similarly, none of the cited testimony shows that plaintiffs were required to take a particular route or the very fastest route.[8] It is undisputed that technicians did, in fact, complete personal errands on their commutes: for example, plaintiff Michael Oliver often drove

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[7] See Supplemental Decl. of Robin G. Workman ISO Plaintiff's Mot., Ex. E, Depo. of Hector Cortez, p. 180:14-23 (Cortez unloaded his equipment on the weekends, and did not use his vehicle for personal reasons on weekdays "because I – as soon as I would get done from work I would just go home, rest"), Ex. H, Depo. of Don Beckman, p. 28:16-21 ("when I wanted to use my personal vehicle for personal reasons on the weekends[,] I'd have to unload it"; not addressing whether he could use his vehicle for personal purposes during his commute), Ex. D, Depo. of John Rosenberger, p. 109:22-111:23 (describing how he would "lay down the seats in the back" to transport his equipment "because it's a coup," but not addressing whether he could use his vehicle for personal purposes during his commute), Ex. F., Depo. of John Knowles, pp. 81:5-85:12 (Knowles's equipment filled the truck and back seat of his car; not addressing whether he could use his vehicle for personal purposes during his commute), Ex. L, Depo. of Norris A. Cagonot, p. 95:13-16 (Cagonot used his wife's vehicle for personal reasons because he "didn't want to remove all the parts out of the vehicle and then put them back in"; no indication that this was required or that he could not use his vehicle for personal errands during his commute); Decl. of Rick Borges ISO Opp., ¶ 4 [routinely carried 400 pounds of equipment and tools in his van, including in the back seat; not addressing whether he could use his vehicle for personal purposes during his commute).

[8] See Supplemental Workman Decl., Ex. G, Depo. of Antony Pauza, p. 183:9-25 ("[t]here's no company policy that I'm aware of at this time as to what I could do or what I should do prior to being at my customer at 8:00," although "[i]f you all of a sudden had some crazy miles between a call that's not very far apart, they would always question you on the phone and say what's up with this"), Ex. E, Cortez Depo., p. 184:21-185:3 (chose his commute route "[d]epending on the traffic and where the location" was).

his daughters to school during his morning commute and picked them up on the way home, and Frank Troccoli and Anthony Pauza often stopped at restaurants or coffee shops during their commutes. (See PSFM ISO Opp., issue 1, nos. 31-32.)

The undisputed facts thus show that technicians' commutes were not controlled by KMBS in the manner contemplated by *Morillion*. KMBS is entitled to summary adjudication on issue 1.

VI. Issue 2: Whether the Mileage at Issue Must Be Reimbursed

The parties' briefing primarily focuses on the "hours worked" issue, and does not present any reason for a different analysis on mileage reimbursement. The Court also finds no reason that the analysis should differ. As noted in *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, an interpretive bulletin issued by the Labor Commissioner stated that section 2802 requires "an employer who requires an employee to furnish his/her own car or truck to be used in the course of employment … to reimburse the employee for the costs necessarily incurred by the employee in using the car or truck *in the course of employment.*" (At pp. 563-564, internal citation omitted, italics added.) For the reasons already discussed, the mileage at issue here is in the nature of a normal commute rather than "in the course of employment." (See *Sullivan v. Kelly Services, Inc.* (N.D. Cal., Oct. 16, 2009, No. C 08-3893 CW) 2009 WL 3353300, at *7 [where travel time was not compensable, mileage was not incurred within the course of employment].) Again, while *Aguilar* held that mileage was reimbursable for sales representatives with home offices, those circumstances are distinguishable because the representatives had already begun their work day when the mileage at issue was incurred; thus the mileage was incurred "in the course of employment."

Accordingly, KMBS is entitled to summary adjudication on issue 2 as well.

VII. Conclusion and Order

Plaintiffs' motion for summary adjudication is DENIED. KMBS's motion is GRANTED as to issues 1 and 2 set forth in the parties' stipulation.