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OAKLAND PORT SERVICES CORPORATION
d/b/a AB TRUCKING (erroneously sued as AB TRUCKING, INC.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

OAKLAND PORT SERVICES CORPORATION d/b/a AB TRUCKING, and DOES 1 through 20, inclusive,

Defendants.

CASE NO. RG 08-379099

MEMORANDUM RE: (1) WHETHER PLAINTIFFS' MOTION COMPLETELY DISPOSES OF A CAUSE OF ACTION, AN AFFIRMATIVE DEFENSE, A CLAIM FOR DAMAGES, OR AN ISSUE OF DUTY; AND (2) WHETHER A CONTINUANCE OF THE TRIAL DATE MIGHT BE APPROPRIATE IN LIGHT OF THE NOVEMBER 8, 2011 HEARING DATE IN BRINKER RESTAURANT CORPORATION, ET AL. v. SUPERIOR COURT (HOHNBAUM) (CALIFORNIA SUPREME COURT CASE NO. S166350)

DATE: October 28, 2011
TIME: 2:00 p.m.
DEPT: 20, Fourth Floor
ACTION FILED: March 28, 2008
TRIAL DATE: November 29, 2011

Defendant OAKLAND PORT SERVICES CORPORATION d/b/a/ AB TRUCKING submits this memorandum addressing the following two questions posed by this Court's Tentative Ruling issued on October 27, 2011: **(1)** whether Plaintiff's motion, by which Plaintiffs seek a liability determination only, leaving all damages related determinations for trial, "completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." **(2)** In light of the fact that the California Supreme Court has set a hearing date in

Brinker (S166350) on November 8, 2011, the parties should be prepared to address whether a continuance of the trial date in this case might be appropriate in light of the pendency of a hearing on November 8, 2011 in the Supreme Court of California in the case of *Brinker Restaurant Corporation et al. v. Superior Court (Hohnbaum)* (S166350).

1. Plaintiff's Motion, By Which Plaintiffs Seek A Liability Determination Only, Leaving All Damages-Related Determinations For Trial, Does Not Even Seek To Completely Dispose Of A Cause Of Action, An Affirmative Defense, A Claim For Damages, Or An Issue Of Duty And Therefore The Motion Is Not Entitled To Be Viewed As One Seeking Such Complete Relief

As Defendant stated on page 5, lines 2-6 of its memorandum in opposition, "Plaintiffs' Second Amended Complaint alleges eight (8) purported causes of action" and yet "[t]hey bring their motion for summary *adjudication* only as to the sixth and second purported causes of action. Win or lose on their motion, the case continues; success by the plaintiffs on their motion does not and cannot entirely resolve the matter; success by the defendant does not and cannot entirely resolve the matter." Defendant adheres to this argument.

As the Court correctly points out in its Tentative Ruling, Plaintiffs (at page 11, footnote 7 of their Memorandum of Points and Authorities in Support) affirmatively state that they seek a liability determination only, leaving all damages-related determinations for trial.

Code of Civil Procedure ("CCP") section 437c(f)(1) clearly states that " A motion for summary adjudication shall be granted **only** if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." Piecemeal disposition of predicate facts and issues is inappropriate. (*Catalano v. Superior Court* (2000) 82 Cal. App. 4th 91, 97-98.) "'Cause of action' means '"a group of related paragraphs in the complaint reflecting a separate theory of liability."' [Citation.] The appellate court found the clear intent of Code of Civil Procedure section 437c, subdivision (f) is '"to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense."' [Citation.]" (*Catalano v. Superior Court, supra*, at p. 96.)

Procedurally, the California Supreme Court noted in *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, 60, without comment (for an issue of appropriateness apparently had not been raised) that in the trial court proceedings in that case "the trial court certified the suit as a class action and granted plaintiffs' motion for summary adjudication of issues based on *Sacramento I*," (e.g., *City of Sacramento v. State of California* (1984) 156 Cal. App. 3d 182).

Similarly, again without any discussion addressing it as an issue, the Second District Court of Appeal, in *Areso v. Carmax, Inc.* (2011) 195 Cal. App. 4th 996, stated *in light of a defendant's motion for summary adjudication*:

> Areso was a named plaintiff in a class action lawsuit filed on July 10, 2008, against CarMax, alleging that CarMax failed to pay overtime in violation of Labor Code section 1194, along with other allegations of violations of the Labor Code and the Business and Professions Code. CarMax filed a motion for summary adjudication, arguing that Areso's compensation under both the national pay plan and the California pay plan included payments which qualified under the "commissioned sales" exemption from the overtime pay requirement. Areso had undisputably [*sic*] earned more than one and a half times the minimum wage, and had received at least one half of her wages in "commissions," making her ineligible for overtime pay. [¶] The trial court granted the motion for summary adjudication.

(*Areso, supra*, 195 Cal. App. 4th at 1000.) (*See also Futrell v. Payday California, Inc.* (2010) 190 Cal. App. 4th 1419 (without discussion of it as an issue, trial court grants summary adjudication in class action case, finding that a payroll company was not an employer) *Morgan v. United Retail Inc.* (2010) 186 Cal. App. 4th 1136 (without discussing it as an issue, trial court grants summary adjudication in favor of the employer on a claim alleging that the wage statements it had provided did not comply with Lab. Code, § 226, subd. (a));

It seems that this Court perhaps might be the first court to address this specific issue. While the Plaintiffs here not only bring their motion to seek adjudication of only two of the eight causes of action, they necessarily also seek adjudication of fewer than all claims for damages. "A motion for summary adjudication shall be granted only if it completely disposes of . . . a claim for damages . . . ." (CCP § 437c, subd. (f)(1).) When a plaintiff asserts a claim for relief both

individually and on behalf of a certified, it is not clear that a trial court may summarily adjudicate only the representative aspect of the claim.

It is not possible in the instant case for all of the claims of the various subclasses to be disposed of by summary adjudication (plaintiffs do not seek it). Because a grant of summary adjudication therefore cannot entirely dispose of all causes of action as to all plaintiffs and all class members, any relief granted in response to plaintiffs' motion necessarily would render any summary adjudication order non-appealable as to some parties, even though it might otherwise be appealable as to other parties or subclasses. (*Jennings v. Marralle* (1994) 8 Cal. 4th 121, 128, 876 P.2d 1074; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 806 [appeal may not be taken from a judgment which does not dispose of all of the causes of action between the parties].)

In *Green v. Obledo* (1981) 29 Cal.3d 126, 146, the court reiterated that Federal Rule of Civil Procedure, rule 23(c)(1), applies to California class actions and permits an order certifying the class to be altered or amended only "before the decision on the merits." *Green* explained, however, "[w]e have always recognized that it is desirable for the trial court to retain some measure of flexibility in handling a class action." (*Green, supra*, 29 Cal.3d at p. 148.) When rule 23(c)(1) was amended in 2003, explicitly to permit amendment of an order certifying a class action at any time "before final judgment," the amendment was consistent with a number of federal court decisions that had equated the decision on the merits with the final judgment. (*In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation* (3rd Cir. 1955) 55 F.3d 768, 792, fn. 14 ["Under Rule 23(c)(1), the court retains the authority to re-define or decertify the class until the entry of final judgment on the merits."]; *Officers for Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 633 ["Rule 23(c)(1) specifically provides that the district court's determination on the maintainability of a class action 'may be conditional, and may be altered or amended before the decision on the merits.' Consequently, before entry of a final judgment on the merits, a district court's order respecting class status is not final or irrevocable, but rather, it is inherently tentative"].) As explained in the advisory committee notes to the 2003 amendment, "This change avoids the

possible ambiguity in referring to 'the decision on the merits.' Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation." Given that procedural context, summary adjudication here seems most inappropriate. If this Court were to grant the motion and then decertify, confusion would ensue.

2. In Light Of The Fact That The California Supreme Court Has Set A Hearing Date In Brinker (S166350) On November 8, 2011, A Continuance Of The Trial Date In This Case Indeed Would Probably Be Appropriate

Trial in this case presently is scheduled for November 29, 2011. Notwithstanding they have withdrawn their original request for a jury trial, the plaintiffs have left open the possibility they may still request a jury trial. (*See* "Joint Complex Case Management Conference Statement," filed May 2011, at page 4, lines 7-12) The issues presented for review in *Brinker Restaurant Corporation et al. v. Superior Court (Hohnbaum)* include the following:

> 1. *Meal Period Compliance Issue*: Under the Labor Code (§§226.7 and 512) and Industrial Welfare Commission ("IWC") Wage Orders (¶11), must an employer actually relieve workers of all duty so they can take their statutorily-mandated meal periods, as held in *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005), *review & depub. denied*, no. S139377 (01/18/06)? Or may employers comply simply by making meal periods "available," as held in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum),* 165 Cal.App.4th 25 (Jul. 22, 2008)?
>
> 2. *Meal Period Timing Issue*: Do the Labor Code (§§226.7 and 512) and Wage Orders (¶11) impose a timing

requirement for meal periods? Or can employers provide a meal period at any time during a shift of up to ten hours without becoming liable for an extra hour of pay under section 226.7(b), as held in *Brinker*?

3. *Rest Break Compliance Issue*: Under the Labor Code (§226.7) and Wage Orders (¶12), which require ten minutes' rest time "per four (4) hours or major fraction thereof," must employers provide a ten-minute rest break to employees who work between two and six hours, a second ten-minute rest break to employees who work more than six hours and up to ten, a third ten-minute rest break to employees who work more than ten hours and up to fourteen (etc.), as stated in DLSE Op.Ltr. 1999.02.16? Or may an employer compel employees to work an eighthour shift with only a single rest break, as held in Brinker?

(*See* Plaintiffs', Real Parties in Interest, and Petitioners' Opening Brief on the Merits, *Brinker Restaurant Corporation et al. v. Superior Court (Hohnbaum)* (S166350), at pages 1-2.) These same issues are to be litigated in the present case. If this case were to go to trial on November 29, 2011, and especially as a jury trial, it is virtually assured that a ruling from the Supreme Court of the State of California will not have yet been issued in *Brinker* and thus the state of legal principles germane to resolution of the issues in this case will be in flux, which would be especially troublesome if the parties were to be pressed to the necessity of fashioning jury instructions.

In *Brinker* the Real Parties in Interest, in response, essentially argue that, notwithstanding by statute and regulation, California workers have the right to take meal and rest breaks, and no one in that case disputes that right, nevertheless, the plaintiffs in that case want the California Supreme Court to declare – contrary to the plain language of the governing statutes and contrary

to the Court of Appeal's well-reasoned opinion – that California employers must not only *provide* meal periods to their employees but also *ensure* that the meal periods are taken, that meal and rest periods must be scheduled according to Plaintiffs' strict formula rather than with the flexibility mandated by the Legislature, and that notwithstanding the necessarily individual reasons particular employees might have for skipping or shortening a meal period, Plaintiffs' claims are susceptible to class treatment. (Real Parties in Interest's Answer Brief on the Merits, *Brinker Restaurant Corporation et al. v. Superior Court (Hohnbaum)* (S166350), at page 1.)

> Here in this present case, defendant argues the same:
> While it may be true that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken. As the federal court in Brown v. Federal Express Corporation explained:
>
> > It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time.
>
> (249 F.R.D. 580, 585 (C.D.Cal. 2008)). In addition, numerous, other federal courts in California have similarly held that employers are not obligated to ensure that their employees take meal periods. They include *White v. Starbucks* (N.D.Cal. 2007) 497 F.Supp.2d 1080; *Perez v. Safety-Kleen Systems, Inc.* (N.D.Cal. July 28, 2008) 2008 WL 2949268; *Kenny v. Supercuts* (N.D.Cal. June 2, 2008) 2008 WL 2265194, *Salazar v. Avis Budget Group* (S.D.Cal, July 2, 2008) 251 F.R.D. 529; *Kimoto v. McDonald's Corp.* (C.D.Cal. August 28, 2008) 2008 WL 4069611; and *Gabriella v. Wells Fargo Financial, Inc.* (N.D.Cal August 4, 2008) 2008 WL 3200190.
>
> In *Cicairos v. Summit Logistics, Inc.*, the California Court of Appeal stated that employers have "an affirmative obligation to ensure that workers are actually relieved of all duty." (*Cicairos v Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962). It has been contended that this means that employers have an affirmative obligation to force employees to take their meal periods and that employees cannot refrain or refuse to take their meal periods.
>
> For several reasons, this interpretation of California's meal period requirements is not compelling.

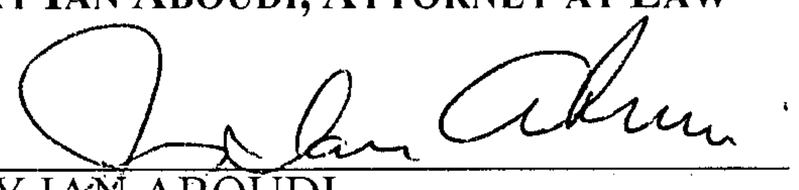
(DEFENDANT OAKLAND PORT SERVICES CORPORATION'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION at page 8, line 24 through page 9, line 18.)

Thus, in light of the fact that the California Supreme Court has set a hearing date in Brinker (S166350) on November 8, 2011, and because the issues to be addressed therein match those raised here, with a ruling there almost surely to emerge perhaps months after trial

otherwise might occur here, a continuance of the trial date in this case indeed would probably be most appropriate.

Dated: October 28, 2011

JAY IAN ABOUDI, ATTORNEY AT LAW



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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: 1855 Olympic Blvd., Ste. 210, Walnut Creek, CA 94596. On the date below, I served the within documents:

(1) MEMORANDUM RE: (1) WHETHER PLAINTIFFS' MOTION COMPLETELY DISPOSES OF A CAUSE OF ACTION, AN AFFIRMATIVE DEFENSE, A CLAIM FOR DAMAGES, OR AN ISSUE OF DUTY; AND (2) WHETHER A CONTINUANCE OF THE TRIAL DATE MIGHT BE APPROPRIATE IN LIGHT OF THE NOVEMBER 8, 2011 HEARING DATE IN BRINKER RESTAURANT CORPORATION, ET AL. v. SUPERIOR COURT (HOHNBAUM) (CALIFORNIA SUPREME COURT CASE NO. S166350); and

(2) REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MEMORANDUM RE: (1) WHETHER PLAINTIFFS' MOTION COMPLETELY DISPOSES OF A CAUSE OF ACTION, AN AFFIRMATIVE DEFENSE, A CLAIM FOR DAMAGES, OR AN ISSUE OF DUTY; AND (2) WHETHER A CONTINUANCE OF THE TRIAL DATE MIGHT BE APPROPRIATE IN LIGHT OF THE NOVEMBER 8, 2011 HEARING DATE IN BRINKER RESTAURANT CORPORATION, ET AL. v. SUPERIOR COURT (HOHNBAUM) (CALIFORNIA SUPREME COURT CASE NO. S166350).

☒ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 9:00a.m.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 28, 2011 at Walnut Creek, California.

Jay Aboudi, Esq.