

RCD  
P-20



1 Meredith E. Brown - 142134  
Guy A. Bryant -146190  
2 The Law Office of Bryant & Brown  
476 Third Street  
3 Oakland, CA 94607  
(510) 836-7563 (Telephone)  
4 (510) 836-7564 (Facsimile)  
5 Attorney for Defendant  
OAKLAND PORT SERVICES CORP. d/b/a  
6 AB TRUCKING, a California Corporation,

**FILED**  
ALAMEDA COUNTY

JAN 30 2012

CLERK OF THE SUPERIOR COURT  
By *Philipino*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF ALAMEDA

11	LAVON GODFREY and GARY GILBERT,	)	Case No.: RG 08-379099
12	on behalf of themselves and all other similarly	)	<b>DEFENDANT'S TRIAL MANAGEMENT</b>
13	situated,	)	<b>PLAN</b>
	Plaintiffs,	)	Action Filed: March 28, 2008
14	vs.	)	Dept.: 20
		)	Time: 9:30 a.m.
15	OAKLAND PORT SERVICES CORP. d/b/a	)	Set for Trial: February 14, 2012
16	AB TRUCKING, and DOES 1-20	)	Before Honorable Judge Robert B. Freedman
17	Defendant.	)	
18		)	
19		)	
20		)	

22 **I. SUMMARY OF DEFENDANT'S POSITION**

24 Defendant has scheduled a motion to reconsider class certification of this case for  
25 February 9, 2012, because new substantive evidence has emerged during the course of 2011 that

1 establish that common issues of fact do not predominate over individual issues in this case. If it  
2 is found the class action will splinter into individual trials, common questions do not  
3 predominate and litigation of the action in the class format is inappropriate. (See *Arenas v. El*  
4 *Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732.) The following is Defendant's  
5 position with regard to three of the larger class allegations raised in this litigation.

6 **AB Trucking Drivers Are Exempt From California Overtime Laws.**

7 AB Trucking drivers and trainees have always (including from March 28, 2004 to the  
8 present) utilized Class 8 commercial vehicle trucks ("CMV")(Class 8 definition means gross  
9 vehicle weight rating (GVWR) of anything above 33,000 pounds) which include tractor trailer  
10 trucks to carry out drayage operations in the state of California or locations in the state of  
11 Nevada. The United States Department of Transportation Code of Federal Regulations, Title 49  
12 section 383.5 defines a CMV more specifically as follows:

13 "*Commercial motor vehicle (CMV)* means a motor vehicle or combination of motor vehicles  
14 used in commerce to transport passengers or property if the motor vehicle—

15 (1) Has a gross combination weight rating or gross combination weight of 11,794 kilograms or  
16 more (26,001 pounds or more), whichever is greater, inclusive of a towed unit(s) with a gross  
17 vehicle weight rating or gross vehicle weight of more than 4,536 kilograms (10,000 pounds),  
18 whichever is greater; or

19 (2) Has a gross vehicle weight rating or gross vehicle weight of 11,794 or more kilograms  
20 (26,001 pounds or more), whichever is greater; or . . ."

21 Commercial Motor Vehicles are regulated by Title 49, Sections 395.1 to 395.13 of the  
22 Code of Federal Regulations. (See 49 C.F.R. Section 395.3.) Similarly, all drivers and trainees of  
23 AB Trucking were engaged in interstate commerce, had Class A commercial driver's licenses  
24 ("CDL") (a driver's license required by the DOT to operate any type of vehicle which has a gross  
25 vehicle weight rating (GVWR) of 26,000 lb) (See 49 C.F.R. Section 383.5), and hauled tractor  
trailers with containers as long as 53 feet. Most of the IWC Wage Orders (including the IWC

1 Wage Orders that are most likely to apply to drivers) exempt employees whose hours of service  
2 are regulated by . . . the United States Department of Transportation Code of Federal  
3 Regulations, Title 49, Sections 395.1 to 395.13.” (IWC Wage Order, 9-2001, §3; see also 29  
4 U.S.C. § 213(b) [exemption from FLSA over-time laws].) As a result, AB Trucking drivers and  
5 trainees should be deemed exempt from state overtime laws.

6 **AB Trucking Drivers Are Exempt From Oakland Living Wage Ordinance.**

7 Section 728 of the Oakland City Charter applies to businesses involved in a Port of  
8 Oakland aviation or maritime business (i.e., those located at Oakland International Airport or in  
9 the seaport area or those providing aviation or maritime related services) that also:

- 11 • pay the Port \$50,000 or more by means of a contract, lease or license (for leases under  
12 one year, this applies if \$50,000 or more is paid over 5 years),
- 13 • hold service contracts with the Port, where the Port pays \$50,000 or more over the term  
14 of the contract,
- 15 • hold a subcontract, sublease, sublicense, management agreement, etc. with any of the  
16 above companies, or
- 17 • receive \$50,000 or more in financial assistance from the Port.
- 18 • have more than 20 employees spending more than 25% of their work time working on  
19 Port-related work.

20 City of Oakland Living Wage Ordinance, Oakland Code of Ordinances, Title 2, Chapter  
21 2.28, Section 2.28.010 [Title and Purpose] provides: “This chapter shall be known as the  
22 "Oakland living wage ordinance." The purpose of this chapter is to require that nothing less than  
23 a prescribed minimum level of compensation (a living wage) be paid to employees of service  
24 contractors of the city and employees of CFARs.

25 Section 2.28.020 [Definitions] provides in relevant part:

“City” means the city of Oakland and all city agencies, departments and offices.

“City financial assistance recipient” (CFAR) means any person who receives from the city  
financial assistance as contrasted with generalized financial assistance such as through tax

1 legislation, in an amount of one hundred thousand dollars (\$100,000.00) or more in a twelve (12)  
month period.

2 “Contractor” means any person that enters into a service contract with the city in an amount  
3 equal to or greater than twenty-five thousand dollars (\$25,000.00).

4 AB Trucking has never employed more than 20 employees at any time during its  
5 operations. Moreover, AB Trucking has never had a contract with the City of Oakland.

6 **New Evidence Shows AB Trucking Complied With Meal and Rest Period Rules.**

7  
8 In *Dilts v. Penske Logistics, LLC*, 2011 U.S. Dist. LEXIS 122421 (S.D. Cal. Oct. 19,  
9 2011) a federal court recently held that the Federal Aviation Authorization Act ("FAA Act")  
10 preempted the application of California's meal and rest break laws on truck drivers. According to  
11 this federal court, the meal and rest break law interfered with competitive market forces (price,  
12 route or service) in violation of the FAA Act. In this case, the testimony of Mr. David Blyth, Mr.  
13 Jose Navarro, and Mr. Bill Aboudi demonstrate that AB Trucking did not pressure its drivers to  
14 make a “certain number of trips during a work day” and did not create a work environment that  
15 effectively deprived drivers of an opportunity to take breaks. (*Cicairos v. Summit Logistics, Inc.*  
16 (2005) 133 Cal.App.4th 949, 962-963.)

17  
18 **Phase I: Liability Phase**

19 Defendant intends to prove AB’s non-liability with evidence based on AB’s own  
20 documents, the testimony of its corporate designees, past and current employees, and through the  
21 testimony of representative class members and of class representatives. Defendant will introduce  
22 documents, data, and admissions of class representatives as exhibits.

23 **Phase II: Damages Phase**

24 Defendant does not believe that injunctive relief under the labor laws of California (i.e.,  
25 enjoining AB to hereafter pay all hours worked, pay overtime, provide meal and rest periods,

1 keep time records, and provide accurate wage statements) will be appropriate in this case.

2 However, Defendant does agree that many of the factual questions and legal standards set forth  
3 below in Plaintiffs' Trial Management Plan may be relevant at the damages phase if AB is found  
4 to have violated the law.

5 **A. Liability: Key factual questions, legal standards and plan of proof.**

6 1. Failure to Pay for All Hours Worked

- 7 • Did AB establish and utilize a uniform timekeeping and payroll system that  
8 automatically deducted compensation from each driver per each work day for a  
9 meal period, regardless of whether a meal period was provided?
- 10 • Did AB establish and utilize a uniform timekeeping and payroll system that  
11 automatically deducted compensation from each driver per each eight (8) hour  
12 work day for a meal period, regardless of whether a meal period was provided?
- Did AB have a policy, pattern, and/or practice of failing to pay drivers for all  
hours worked?
- Did AB fail to pay drivers for all hours worked?
- Did AB willfully fail to pay drivers for all hours worked?

13 The California Labor Code ("Labor Code") requires employers to pay each employee not less  
14 than the applicable minimum wage for all hours worked in the payroll period. If an employee  
15 works instead of taking a meal period, this is time worked for which the employee must be  
16 compensated. (See Industrial Welfare Commission Wage Order No. 9 ("Wage Order"), section  
17 3, codified at 8 California Code of Regulations 11090; Labor Code § 510.)

18 2. Failure to Pay for Any Hours Worked Due to Misclassification

- 19 • Did AB have a policy, pattern, and/or practice of misclassifying drivers as non-  
20 employees?
- Did AB misclassify drivers as non-employees?
- Did AB suffer or permit misclassified drivers, i.e. "trainees," to work?
- Did AB fail to pay misclassified drivers for any hours worked?
- Did AB hire new employees on a case by case basis depending on the unique  
21 background and qualifications of each individual employee?
- Did AB classify drivers on a case by case basis depending on the background and  
22 qualifications of each individual employee?

23 Labor Code sections 510, 1194 and Wage Order 9 require employers to pay each employee not  
24 less than the applicable minimum wage for all hours worked in the payroll period. AB hired  
25 employees at different levels of experience and qualifications. Determining new employee  
training and what level of pay such "trainees" would receive was done on a case by case basis.

1 Plan of Proof: Defendant will present admissions of class representative designees in deposition  
2 testimony, documents provided by AB, testimony of former and current AB employees and class  
3 representatives.

4 3. Failure to Pay Overtime

- 5 • Did AB have a policy, pattern, and/or practice of not paying overtime wages to  
6 drivers for work performed after eight (8) hours in a day and/or forty (40) hours in  
7 a week?
- 8 • Did AB fail to pay overtime wages to drivers for work performed after eight (8)  
9 hours in a day and/or forty (40) hours in a week?
- 10 • Did drivers regularly work nine (9) hours, but AB compensate them only for eight  
11 (8) hours, or less?
- 12 • Was AB a motor carrier regulated by the DOT?
- 13 • Did AB have a DOT number?
- 14 • Did AB employees drive Commercial Motor Vehicles?
- 15 • Did AB engage in interstate commerce?

16 Labor Code section 510 and Wage Order 9(3) provide that employees shall be compensated at  
17 the rate of one and one-half times such employee's regular rate of pay for hours worked beyond  
18 eight (8) in a workday and forty (40) in a week. Wage Order 9(3) also provides exemptions from  
19 overtime compensation for employees regulated by the Federal Department of Transportation.

20 Plan of Proof: Defendant will present admissions of class representatives in deposition  
21 testimony, documents provided by AB, testimony of current and former employees, class  
22 members and class representatives.

23 4. Failure to Pay Oakland Living Wage ("OLW")

- 24 • Was AB a "Port-Assisted Business" during the statutory period?
- 25 • Did AB have a policy, pattern and/or practice of paying drivers a wage rate of less  
than the Oakland Living Wage?
- If it is, or was, a Port-Assisted Business, did AB pay drivers less than the OLW  
during that time period?
- Did AB ever employ more than 20 employees for a continuous 12 month period  
of time?
- Did AB ever have a contract of more than \$50k with the Port of Oakland or \$25k  
with the City of Oakland?
- Did AB pay employees more than the OLW?

1 Oakland City Charter section 728 requires that all Port-Assisted Businesses (e.g., employed more  
2 than 20 employees for 12 continuous months) provide compensation not less than the OLW. The  
3 July 2007-June 2008 minimum compensation was \$11.58 without benefits and \$10.07 with  
4 benefits according Oakland Municipal Code section 2.28. The current minimum compensation  
5 as of July 2011 is \$13.05 without benefits and \$11.35 with benefits.

6 Plan of Proof: Defendant will present admissions of class representatives in deposition  
7 testimony, documents provided by AB, testimony of current and former employees, class  
8 members and class representatives

9 5. Meal and Rest Periods

- 10 • Did AB have a policy, pattern, and/or practice of failing to provide thirty minute,  
11 uninterrupted, off-duty meal periods to drivers each workday of eight (8) hours?
- 12 • Did AB fail to provide thirty minute, uninterrupted, off-duty meal periods to  
13 drivers each workday of eight (8) hours?
- 14 • Did AB have a policy, pattern, and/or practice of failing to provide, authorize or  
15 permit, ten minute, uninterrupted rest periods to drivers per every four (4) hours  
16 worked?
- 17 • Did AB fail to provide, authorize or permit, ten minute, uninterrupted rest periods  
18 to drivers per every four (4) hours worked?
- 19 • Did AB have a policy, pattern, and/or practice of failing to record drivers' meal  
20 periods?
- 21 • Did AB fail to record drivers' meal periods?
- 22 • Did AB pressure drivers to record that they had received a meal period, even  
23 when they had not?
- 24 • Did AB have a policy, pattern, and/or practice of not paying an hour of pay at the  
25 drivers' regular wage rate for a missed meal and/or rest period?
- Did AB fail to pay an hour of pay at the drivers' regular wage rate for a missed  
meal and/or rest period?
- Did AB provide an opportunity for employees to take breaks?
- Did AB provide an opportunity for employees to take meal breaks?
- Did AB make manual adjustments to time sheets or employee compensation if a  
meal/break was improperly deducted?
- Did AB pressure employees not to take breaks or meal breaks?

20 State law requires employers to provide employees with meal periods and paid rest breaks. The  
21 remedy provided by Section 226.7 is subject to a three-year statute of limitations. (*Murphy v.*  
*Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.)

22 In addition, Wage Order 9(12), states that employers must authorize and permit employees with  
23 a minimum of 10 minutes of rest for every four hours worked in a day, or any major fraction  
24 thereof. Rest breaks are counted towards hours worked and must be paid. (Wage Order  
25 9(12)(A).) Where an employer fails to provide a required paid rest break, the employer must pay  
the employee one hour of pay at the employee's regular rate of compensation for each workday  
that the rest period is not provided. (Labor Code § 226.7(b); Wage Order 9(12)(B).)

1 Plan of Proof: Defendant will present admissions of class representatives in deposition  
2 testimony, documents provided by AB, testimony of current and former employees, class  
3 members and class representatives.

4 6. Failure to Pay All Wages Owed at Discharge or Quitting

- 5 • Did AB have a policy, pattern, and/or practice of failing to pay drivers all wages  
6 they are owed at the time of their discharge or quit?
- 7 • Did AB willfully fail to pay drivers all wages owed at the time of their discharge  
8 or quit?

9 Labor Code sections 201, 202 and 203 require an employer to pay all wages owed to an  
10 employee at the time of separation of employment. Waiting-time penalty claims usually are  
11 dependent upon plaintiffs' wage and meal-period payment claims, and therefore should fail if the  
12 other claims fail. (*Barnick v. Wyeth, supra*, 346 F.Supp. 1102.) Moreover, a company should not  
13 be found to have "willfully" failed to pay wages if it can show that there was a good faith  
14 dispute, in law or fact, that the claimed wages were due at the time of termination. (*See* 8 Cal.  
15 Code of Regs. §13520.)

16 Plan of Proof: Defendant will present admissions of class representatives in deposition  
17 testimony, documents provided by AB, testimony of current and former employees, class  
18 members and class representatives

19 7. Failure to Provide Accurate Wage Statements

- 20 • Did AB have a policy, pattern, and/or practice of failing to provide drivers with  
21 accurate wage statements?
- 22 • Did AB fail to provide drivers with accurate wage statements?
- 23 • Did AB willfully fail to provide drivers with accurate wage statements?

24 Labor Code section 226 and Wage Order 9 require Defendant to provide accurate itemized wage  
25 statements showing the correct number of hours worked, the applicable hourly rate for each hour  
worked, and each category of compensation received, among other details.

26 Plan of Proof: Defendant will present admissions of class representatives in deposition  
27 testimony, documents provided by AB, testimony of current and former employees, class  
28 members and class representatives.

29 8. Business & Professions Code



- 1                   • Did AB engage in unfair competition because it violated the California Labor  
2                   Code?

3                   Based on liability determinations as to the alleged violations of the California Labor  
4 Code discussed above, the Court may determine whether Defendant violated the California  
5 Business & Professions Code (“B&P Code”). B&P Code section 17203 provides that the Court  
6 may restore to any person in interest any money or property which may have been acquired by  
7 means of such unfair competition and to which that person or persons have an ownership  
8 interest. An action based on the UCL “borrows” violations of other laws when committed  
9 pursuant to business activity. (*Farmers Ins. Exchange v. Superior Court*, (1992) 2 Cal.4th 377,  
10 383.) Claims under the UCL are derivative of other claims and should fail if the other claims fail.  
11 (*Cortez v. Purolator Air Filtration Products Co.*, (2000) 23 Cal.4th 163.)

8                   **B. Evidence: Witness List and Exhibit List.**

9                   At the present time, Defendant intends to call the following individuals at trial:

- 10                   1. William Aboudi (“Bill”)  
11                   2. Jovi Aboudi  
12                   3. David Blyth  
13                   4. Jose Luis Navarro  
14                   5. Miguel Silva  
15                   6. Lavon Godfrey  
16                   7. Gary Gilbert

17                   Defendant reserves the right to call additional witnesses for rebuttal evidence.

18                   At the present time, defense counsel expects to rely on the following information at trial:

- 19                   1. Deposition transcripts and attached exhibits.  
20                   2. Employee payroll records that have been produced during discovery.  
21                   3. Exhibits attached to the pending Motion to Reconsider Class Certification.

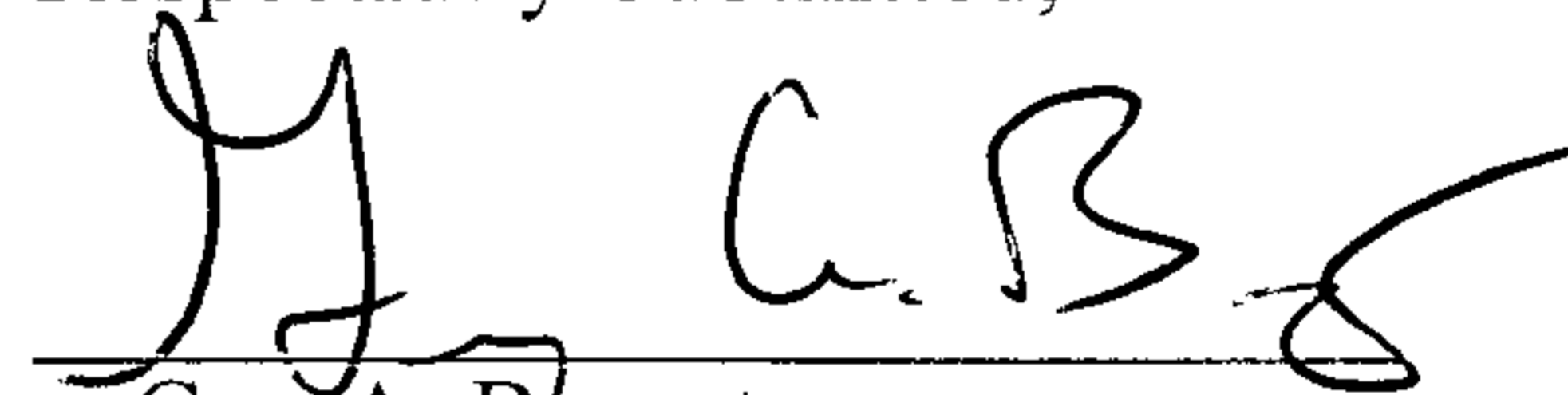
22                   Defendant will provide a more detailed list of Exhibits on February 6, 2012 in accordance with  
23 Rule 3.35.  
24  
25

**PROPOSED TRIAL PREPARATION SCHEDULE:**

Witness list & Exhibit List	February 6, 2012
Filing of Motions in Limine	February 9, 2012
Pretrial Conference	February 9, 2012
TRIAL DATE  (LIABILITY PHASE)	February 14 - 2012  <ul style="list-style-type: none"> <li>• Plaintiffs anticipate 6-10 witnesses: <ul style="list-style-type: none"> <li>○ approximately 2 days</li> </ul> </li> <li>• Defendant anticipates 7-10 witnesses: <ul style="list-style-type: none"> <li>○ approximately 3 days</li> </ul> </li> </ul>
TRIAL DATE  (DAMAGE PHASE)	February 16- 2012  <ul style="list-style-type: none"> <li>• Plaintiffs anticipate 1-2 witnesses: <ul style="list-style-type: none"> <li>○ approximately 0.5 days</li> </ul> </li> <li>• Defendant anticipates 1-2 witnesses: <ul style="list-style-type: none"> <li>○ approximately 1 day</li> </ul> </li> </ul>

Dated this 30th day of January, 2012.

Respectfully Submitted,



Guy A. Bryant  
Bryant & Brown  
Attorneys for Defendant

1 Meredith E. Brown - 142134  
Guy A. Bryant -146190  
2 The Law Office of Bryant & Brown  
476 Third Street  
3 Oakland, CA 94607  
(510) 836-7563 (Telephone)  
4 (510) 836-7564 (Facsimile)

5 Attorney for Defendant  
OAKLAND PORT SERVICES CORP. d/b/a  
6 AB TRUCKING, a California Corporation,

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF ALAMEDA

10  
11 LAVON GODFREY and GARY GILBERT, ) Case No.: RG 08-379099  
on behalf of themselves and all other similarly )  
12 situated, ) **PROOF OF SERVICE**  
Plaintiffs, ) Action Filed: March 28, 2008  
13 ) Date: February 9, 2012  
14 ) Dept.: 20  
vs. ) Time: 2:00 p.m.  
15 ) Reservation Number: R-1249926  
OAKLAND PORT SERVICES CORP. d/b/a ) Set for Trial: February 14, 2012  
16 AB TRUCKING, and DOES 1-20 ) Before Honorable Judge Robert B. Freedman  
Defendant. )  
17 )  
18 )  
19 )  
20 )

21  
22 **PROOF OF SERVICE**

23 I am employed in the County of Alameda, State of California. I am over the age of 18  
24 and not a party to the within action. My business address is 476 Third Street, Oakland,  
California, 94607.

25 On January 30, 2012, I served the foregoing documents described as:

**DEFENDANT'S TRIAL MANAGEMENT PLAN**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

**SEE MAILING LIST INCLUDED HEREIN**

(BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Oakland, California in the ordinary course of business.

(BY FACSIMILE) by faxing a true and correct copy thereof to the person(s) at the fax number set forth above.

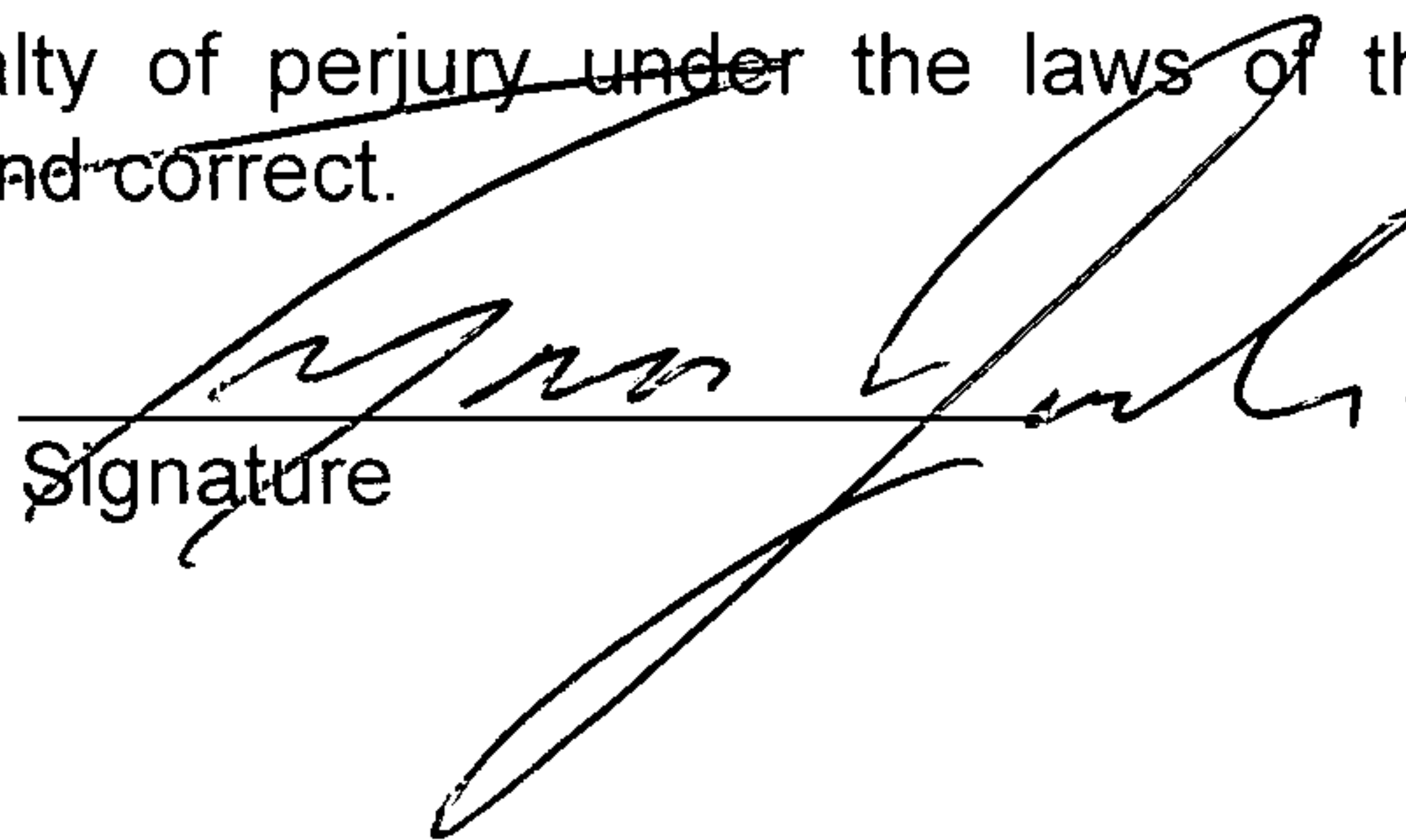
(BY FEDERAL EXPRESS) by using express mail service and causing to be delivered overnight next day delivery a true copy thereof to the person(s) at the address set forth above.

(BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

TYRON JORDAN

  
Signature

SERVICE LIST

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

VIA FACSIMILE & U.S. MAIL ON ALL PARTIES LISTED HEREIN:

**Attorney for:** LAVON GODFREY and GARY GILBERT, ET AL.

David A. Rosenfeld  
Lisl R. Duncan  
Weinberg, Roger & Rosenfeld  
A Professional Corporation  
1001 Marina Village Parkway, Suite 200  
Alameda, California 94501-1091