

1 the December 3, 2010 Order of Honorable Judge Robert B. Freedman (“Order”). Decertification
2 of the class is proper in this case because new substantive evidence and case law have emerged
3 during the course of 2011 that establish that common issues of fact do not predominate over
4 individual issues in this case. Plaintiffs “Opposition To Defendant’s Motion to Reconsider Class
5 Order” (“Plaintiffs’ Opposition”) fails to rebut the legal merit of AB Trucking’s reasonable
6 request to reconsider the Order.

7 **II. ARGUMENT**

8 **A. Plaintiffs’ Opposition was untimely filed and served.**

9 California Rules of Court, Rule 3.764 (c) (1) provides in relevant part:
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11 **“(c) Format and filing of motion**

12 **(1) *Time for service of papers***

13 Notice of a motion to certify or decertify a class or to amend or modify a certification order must
14 be filed and served on all parties to the action at least 28 calendar days before the date appointed
15 for hearing. Any opposition to the motion must be served and filed at least 14 calendar days
16 before the noticed or continued hearing, unless the court for good cause orders otherwise. Any
17 reply to the opposition must be served and filed at least 5 calendar days before the noticed or
18 continued date of the hearing, unless the court for good cause orders otherwise. The provisions
19 of Code of Civil Procedure section 1005 otherwise apply.” (Emphasis added.)

20 In this case, Plaintiffs’ Opposition was filed and served on January 27, 2012 (13 calendar days
21 before the hearing) and served via overnight mail (extended by 2 additional days per CCP §§
22 1005 and 1013). As a result of the method of service (overnight mail on a Friday), my office did
23 not receive Plaintiffs’ Opposition until Monday January 31, 2012 (only 9 days before the
24 hearing). Plaintiffs’ counsel should have filed and served their opposition papers on January 24,
25 2012 (16 days before the hearing) in order to comply with Rule 3.764. The filing and service of

1 the opposition papers are untimely given that the hearing on the matter is scheduled for February
2 9, 2012.

3 **B. Plaintiffs Are Not Prejudiced By a Corrected Order**

4 California Code of Civil Procedure section 473(b) explains: “The court may, upon any
5 terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal,
6 order, or other proceeding taken against him or her through mistake, inadvertence . . .” California
7 Code of Civil Procedure section 128(a)(8) provides that a Court has the power: “to amend and
8 control its process and orders so as to make them conform to law and justice.”

9 In *Le Francois v. Goel*, (2005) 35 Cal.4th 1094, 1108, the California Supreme Court
10 stated: “We agree that it should not matter whether the judge has an unprovoked flash of
11 understanding in the middle of the night or acts in response to a party’s suggestion. If a court
12 believes one of its prior interim orders was erroneous, it should be able to correct that error no
13 matter how it came to acquire that belief.” (Emphasis added.)¹

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15 **C. Legal Standard For Class Certification Not Met By Plaintiffs**

16 When determining whether common questions of law or fact predominate, a trial court
17 must examine the issues framed by the pleadings and the law applicable to the causes of action
18 alleged. (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) “Whether
19 common issues predominate over individual issues necessarily involves an examination of the
20 issues framed by the pleadings and the law applicable to the causes of action alleged so that the
21 court can consider the form a trial of those issues would take.” (*Hicks, supra*, 89 Cal.App.4th at
22 p. 916.) In summary, in determining whether common issues “predominate,” courts must
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25 ¹ After substituting into the case, this office immediately notified the Court and opposing counsel in an e-mail on
12/2/11 of its intention to file this pending motion. Defense counsel is mystified as to why the issues raised in our
pending motion have not been put before the Court prior to our representation given the legal talent involved in this
case over the past four years (Gordon & Rees; Weinberg, Rogers & Rosenfeld; Michael Broad, Jay Aboudi, etc.).

1 consider both plaintiff's legal theories and defendant's affirmative defenses. (*Walsh v IKON*
2 *Office Solutions, Inc., supra*, 148 Cal.App.4th at p. 1450.)

3 Based on the foregoing, if it is shown from the record that the alleged legal violations are
4 without merit, it would be inappropriate for any plaintiff to be allowed to move forward as part
5 of a putative class action. For example, the allegations of overtime violations are patently
6 without legal merit. Thus, it would be inappropriate to permit plaintiffs to proceed as a class on
7 such a meritless claim.

8 1. AB Trucking Drivers Are Exempt From California Overtime Laws.

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10 AB Trucking drivers and trainees have always (including from March 28, 2004 to the present)
11 utilized Class 8 commercial vehicle trucks ("CMV")(Class 8 definition means gross vehicle
12 weight rating (GVWR) of anything above 33,000 pounds) which include tractor trailer trucks to
13 carry out drayage operations in the state of California or locations in the state of Nevada.
14 Commercial Motor Vehicles are plainly regulated by Title 49, Sections 395.1 to 395.13 of the
15 Code of Federal Regulations. (See 49 C.F.R. Section 395.3.) Similarly, all drivers and trainees of
16 AB Trucking were engaged in interstate commerce, had Class A commercial driver's licenses
17 ("CDL") (a driver's license required by the DOT to operate any type of vehicle which has a gross
18 vehicle weight rating (GVWR) of 26,000 lb) (See 49 C.F.R. Section 383.5), and hauled tractor
19 trailers with containers as long as 53 feet. Most of the IWC Wage Orders (including the IWC
20 Wage Orders that are most likely to apply to drivers) exempt employees whose hours of service
21 are regulated by . . . the United States Department of Transportation Code of Federal
22 Regulations, Title 49, Sections 395.1 to 395.13." (IWC Wage Order, 9-2001, §3; see also 29
23 U.S.C. § 213(b) [exemption from FLSA over-time laws].) As a result, AB Trucking drivers and
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25

1 trainees should be deemed exempt from state overtime laws and class decertification is
2 appropriate.

3 2. AB Trucking Is Not Covered Under The Oakland Living Wage Ordinance
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5 Plaintiffs Opposition alleges that Oakland Maritime Support Services (“OMSS”) is a Port
6 Assisted Business (“PAB”) that has a contract with the Port of Oakland. (See Declaration of Lisl
7 Duncan in support of Plaintiff’s Opposition, at p. 2.) Plaintiffs also allege that because AB
8 Trucking rents office space from OMSS that AB Trucking falls under the Oakland Living Wage
9 Ordinance (“OLW”). The problems with these arguments are twofold:

10 A) OMSS has never employed more than 20 people. Plaintiffs have proffered no
11 evidence that OMSS has employed the requisite number of Oakland employees to qualify as
12 subject to the OLW. Plaintiffs have proffered no evidence other than a 2005 “Standard Tariff
13 Assignment” to assert that OMSS has from 2004- 2011 been subject to the OWL by a contract
14 relationship. Plaintiffs argument at best is an admission that OMSS (and/or AB Trucking by
15 proxy) was not subject to the OLW until 2005.
16

17 B) AB Trucking is a separate corporation recognized by the Secretary of State as is
18 OMSS.² Plaintiffs assert without providing any evidence that payroll records for AB Trucking
19 suggest that more than 20 employees have worked for AB Trucking in 2006 and 2007.³ The
20 record is clear that AB Trucking had two offices (an Oakland office and Vallejo office) and
21

22 ² Attached as Exhibit E to the Declaration of Lisl Duncan in support of Plaintiffs Opposition are the Secretary of
23 State records regarding OMSS. Also listed are 40 “Business Associates” which include AB Trucking and 39 other
24 businesses that have office space at 11 Burma Rd, Oakland Ca. and/or 1401 Georgia St., Vallejo Ca. Are Plaintiffs
25 seriously arguing that all of these other separate companies are also PABs subject to the OLW?

³ This office has not seen any evidence that AB Trucking ever employed more than 20 people. AB Trucking was
never authorized to have more than 20 drivers by the Department of Transportation and they have never had more
than 12 trucks at any point during its existence. Mr. Aboudi has repeatedly stated over the past 4 years that AB
Trucking never employed more than 20 people. Plaintiffs have presented no admissible evidence to contradict Mr.
Aboudi’s declaration or deposition testimony attached to Mr. Bryant’s declaration in support of the pending motion.

1 Plaintiffs' argument fails for the following reasons: 1) Employees in Vallejo should not be
2 counted with regard to the OLW; 2) The payroll records often show an employee terminated and
3 a new employee hired in the same month as two employees working instead of just one for that
4 period. Unfortunately, turnover has occurred at AB Trucking and this could explain the
5 purported numbers proffered by Plaintiffs.

6 3. No Evidence David Blyth and Jose Navarro are Biased

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8 On June 10, 2011, the deposition of former AB Trucking truck driver/trainee David Blyth
9 occurred. On June 13, 2011 the deposition of former AB Trucking truck driver/trainee Jose Luis
10 Navarro occurred. Both of these men provided new factual testimony under oath about AB
11 Trucking's meal and break policy. Their testimony included the following: 1) they were
12 employed with AB Trucking during the relevant time period of this litigation and were made
13 aware of AB Trucking's policy to encourage employees to take meal breaks and rest periods by
14 supervisors; 2) dispatchers would contact them on occasion and remind them to take their breaks,
15 3) they took breaks when ever they needed to, 4) they could take breaks without interruption,
16 "with the engine turned off" and away from their vehicles, and 5) they filled out their own time
17 records.

18 Plaintiffs chose to attach excerpts from Mr. Blyth's June 10, 2011 deposition to argue
19 that Mr. Blyth was biased in favor of Mr. Aboudi and suggested that he colored his testimony to
20 help Mr. Aboudi. (See Exhibit G to the Declaration of Lisl Duncan in support of Plaintiffs'
21 Opposition.) Similarly, Plaintiffs chose to attach excerpts from Mr. Navarro's June 13, 2011
22 deposition to argue that Mr. Navarro was intimidated by Mr. Aboudi and that he colored his
23 testimony to be favorable to Mr. Aboudi. (See Exhibit H to the Declaration of Lisl Duncan in
24 support of Plaintiffs' Opposition.)
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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) **PROOF OF SERVICE**
12 situated,)
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
17)
Defendant.)
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 February 3, 2012, I served the foregoing documents described as:

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION TO RECONSIDER CLASS CERTIFICATION ORDER, AMEND, MODIFY**
3 **OR DECERTIFY A CLASS ACTION; CCP § 1008 AND CAL. RULES OF COURT,**
4 **RULE 3.764**

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

7 **SEE MAILING LIST INCLUDED HEREIN**

8

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

13

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

16

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

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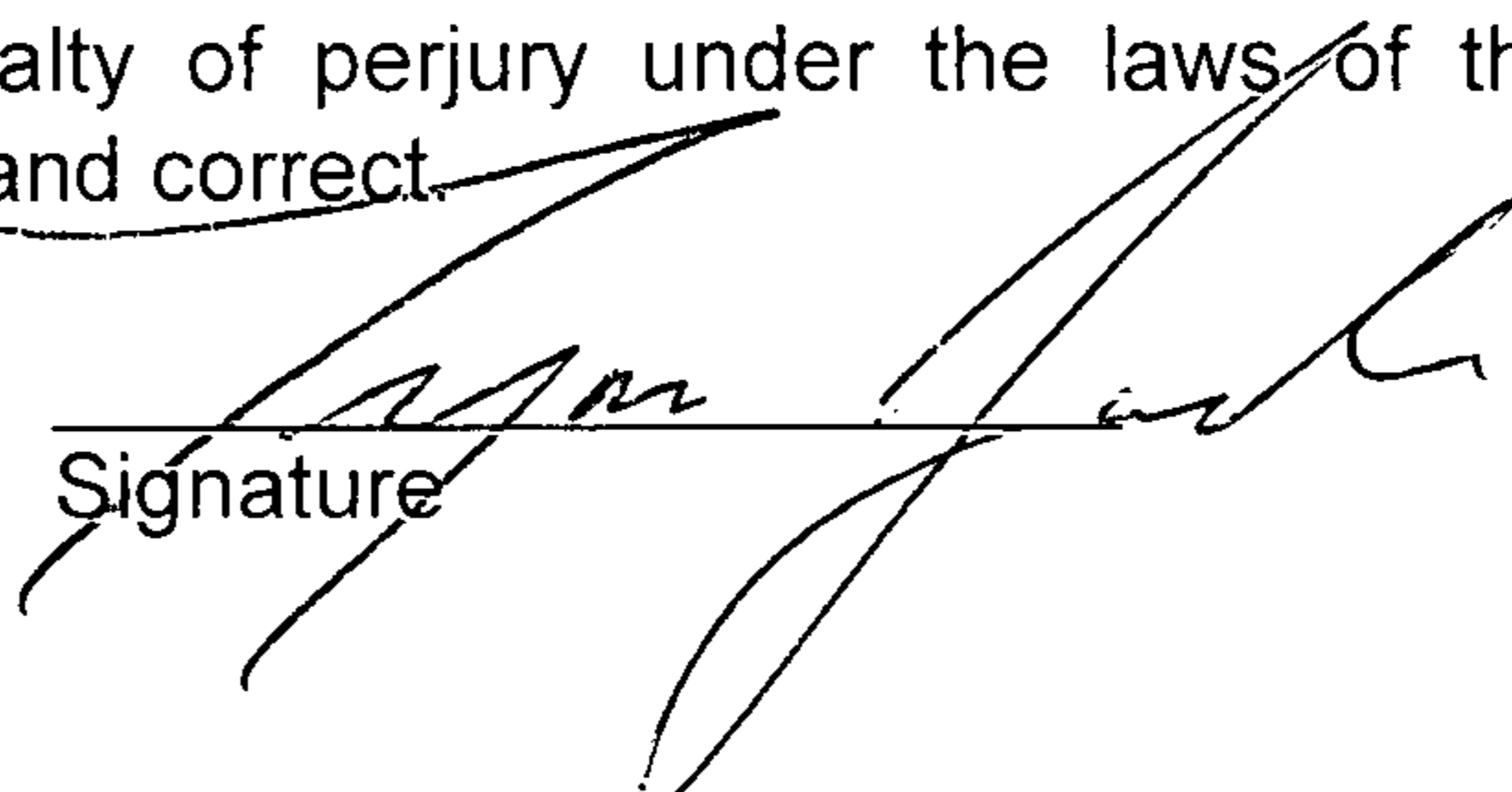
21 (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand
22 to the offices of the addressee.

23

24 (FEDERAL) I declare that I am employed in the office of a member of the bar
25 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

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SERVICE LIST

VIA PERSONAL SERVICE ON ALL PARTIES LISTED HEREIN:

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