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6 Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF ALAMEDA

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

Case No. RG08379099

**PLAINTIFFS' REVISED TRIAL
MANAGEMENT PLAN**

12 Plaintiffs,

Date: February 9, 2012
Time: 3:00 p.m.
Dept.: 20
Judge: Hon. Robert B. Freedman

13 v.

14 OAKLAND PORT SERVICES CORP. d/b/a
15 AB TRUCKING, and DOES 1 through 20,
inclusive,

16 Defendants.

17 **I. SUMMARY OF PLAINTIFFS' POSITION**

18 Judicial efficiency will be furthered and unnecessary duplication of effort prevented by
19 proceeding in a single case to determine the liability of Defendant Oakland Port Services d/b/a
20 AB Trucking ("AB" or "Defendant"). The Court has determined that the trial proceedings will
21 proceed in two phases: (1) liability and (2) damages. Plaintiffs propose that the damage phase
22 commence immediately following the liability phase.

23 Plaintiffs bring claims for: 1) Unfair Business Practices; 2) Failure to Pay for All Hours
24 Worked; 3) Failure to Pay for Any Hours Worked Due to Misclassification of Employment
25 Status; 4) Failure to Pay Overtime; 5) Failure to Pay Living Wage; 6) Failure to Provide Meal
26 and/or Rest Periods; 7) Failure to Pay Wages Owing at Discharge or Quitting; and 8) Failure to
27 Provide Accurate Itemized Wage Statements.

28 //

1 The class is: All drivers who performed work for Defendant out of its Oakland, California
2 facility from the period of March 28, 2004 through the date of notice to the class [March 15,
3 2011] (“Drivers”).

4 The statutory period¹ is March 28, 2004-March 15, 2011 for the five subclasses², March
5 28, 2005-March 15, 2011 for the Failure to Pay at Discharge/Quitting (Labor Code §§ 201, 202,
6 203) claim, and March 28, 2007-March 15, 2011 for the Failure to Provide Accurate Wage
7 Statements (Labor Code § 226) claim. The class consists of approximately 71 members.

8 All these claims may be adjudicated efficiently and effectively in a Court trial. The
9 parties have stipulated to a Court trial.

10 **A. PHASE I: LIABILITY PHASE**

11 Plaintiffs intend to prove AB’s liability with evidence based on AB’s own documents, the
12 testimony of its corporate designees, and through the testimony of representative class members
13 and of class representatives. Plaintiffs expect to introduce documents, data, and admissions of
14 Defendant as exhibits.

15 **B. PHASE II: DAMAGES PHASE**

16 Plaintiffs believe that injunctive relief under the labor laws of California (i.e., enjoining
17 AB to hereafter pay all hours worked, pay overtime, pay living wages, provide meal and rest
18 periods, keep time records, and provide accurate wage statements) can be judicially determined
19 promptly after liability rulings in the first phase of litigation.

20 Under well-established law, in employment class action and collective action litigation,
21 once plaintiffs establish liability on one or more claims for relief, aggregate damages can be
22 determined based on representative testimony and defendant’s payroll records. (See *Bell, et al. v.*
23 *Farmer Insurance Exchange*, Case No. 774013-0 in the Alameda County Superior Court.) The

24 _____
25 ¹ Plaintiffs also plead violation of the Bus. & Prof. Code § 17200 *et seq.*, which extends the statute of limitations for
26 restitution, including wages, from 3 years to 4. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th
27 163, 178-179.)

28 ² Subclasses: 1) All drivers who were not paid for all hours worked in any work week, 2) All drivers who were
misclassified as “non-employee trainees” and as a result were not paid for any hours worked, 3) All drivers who were
not paid for hours worked over eight in a day and/or forty in a week at an overtime rate of pay, 4) All drivers who
were paid less than the Oakland Living Wage for any hour worked, and 5) All drivers who were not provided rest
breaks and/or meal periods as required by California law.

1 Court can then either distribute the aggregate damages *pro rata*, using Plaintiffs' damages model,
2 or establish procedures under which class members may make individual claims against the
3 resulting aggregate fund. Plaintiffs propose the Court use Plaintiffs' damages model.

4 This proposed trial plan is meant to aid the Court in its determination of how best to
5 manage the trial of this case.

6 Plaintiffs do not purport to here list all evidence, including witnesses or exhibits, which
7 will be offered.

8 **C. LIABILITY: KEY FACTUAL QUESTIONS, LEGAL STANDARDS AND PLAN**
9 **OF PROOF**

10 **1. Failure to Pay for All Hours Worked**

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

20 The California Labor Code ("Labor Code") requires employers to pay each employee not
21 less than the applicable minimum wage for all hours worked in the payroll period. When an
22 employee works instead of taking a meal period, this is time worked for which the employee must
23 be compensated. (See Industrial Welfare Commission Wage Order No. 9 ("Wage Order"),
24 section 3, codified at 8 California Code of Regulations 11090; Labor Code § 510.) The employer
25 fails to pay at least minimum compensation for each hour worked when employees miss meal
26 periods yet have wages deducted. (See *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314,
27 324 [holding the minimum wage standard applies to each hour worked by an employee for which
28 they were not paid].) As a direct and proximate result of AB's failure to compensate all drivers

1 properly because it automatically deducts one hour of pay for meal periods that are not taken, AB
2 has failed to pay drivers for “all hours worked.”

3 Wage Order 9(2)(H) defines “hours worked” as “the time during which an employee is
4 subject to the control of an employer, and includes all the time the employee is suffered or
5 permitted to work, whether or not required to do so”: “The “suffered or permitted to work”
6 language does not limit whether time spent “subject to the control of an employer” is
7 compensable.” (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582); see e.g.,
8 *Martinez v. Combs* (2010) 49 Cal.4th 35, 69: “The language thus “cast a duty upon the owner or
9 proprietor to prevent the unlawful condition, and the liability rest[ed] upon principles wholly
10 distinct from those relating to master and servant. *The basis of liability is the owner's failure to*
11 *perform the duty of seeing to it that the prohibited condition does not exist.”)*

12 Where an employer fails to keep records of hours worked, employees may establish the
13 hours worked solely by their testimony, and the burden of overcoming such testimony shifts to
14 the employer. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.)

15 **Plan of Proof:** Plaintiffs will present admissions of corporate designees in deposition
16 testimony, documents provided by AB, testimony of class members and class representatives.

17 **2. Failure to Pay for Any Hours Worked Due to Misclassification**

- 18 • Did AB have a policy, pattern, and/or practice of misclassifying drivers as non-
19 employees?
20 • Did AB misclassify drivers as non-employees?
21 • Did AB suffer or permit misclassified drivers, i.e. “trainees,” to work?
22 • Did AB fail to pay misclassified drivers for any hours worked?

23 Labor Code sections 510, 1194 and Wage Order 9 require employers to pay each
24 employee not less than the applicable minimum wage for all hours worked in the payroll period.
25 AB suffers and permits drivers it classifies as “trainees” to work; however these “trainees” are
26 misclassified, not paid at all for work they perform, and not paid a learner³ rate.

27 ³ Wage Orders define “learners” as “employees.” (See Wage Order 9(4)(a).) Wage Order 9 allows for a learner rate
28 of no less than 85% of the minimum wage for the first 160 hours of work if the employee has no previous similar or
related experience. As of January 1, 2008, this rate was \$6.80 per hour. (Available at

1 Likewise, where an employer fails to keep records of hours worked, employees may
2 establish the hours worked solely by their testimony, and the burden of overcoming such
3 testimony shifts to the employer. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.)

4 **Plan of Proof:** Plaintiffs will present admissions of corporate designees in deposition
5 testimony, documents provided by AB, testimony of class members and class representatives.

6 **3. Failure to Pay Overtime**

- 7
- 8 • Did AB have a policy, pattern, and/or practice of not paying overtime wages to
9 drivers for work performed after eight (8) hours in a day and/or forty (40) hours in
10 a week?
 - 11 • Did AB fail to pay overtime wages to drivers for work performed after eight (8)
12 hours in a day and/or forty (40) hours in a week?
 - 13 • Did drivers regularly work nine (9) hours, but AB compensate them only for eight
14 (8) hours, or less?

15 Labor Code section 510 and Wage Order 9(3) provide that employees shall be
16 compensated at the rate of one and one-half times such employee's regular rate of pay for hours
17 worked beyond eight (8) in a workday and forty (40) in a week.

18 **Plan of Proof:** Plaintiffs will present admissions of corporate designees in deposition
19 testimony, documents provided by AB, testimony of class members and class representatives.

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

- 21 • Was AB a "Port-Assisted Business" during the statutory period?
- 22 • Did AB have a policy, pattern and/or practice of paying drivers a wage rate of less
23 than the Oakland Living Wage?
- 24 • If it is, or was, a Port-Assisted Business, did AB pay drivers less than the OLW
25 during that time period?

26

27 http://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm) The Oakland Living Wage does not provide a separate
28 learner rate. (See Plaintiff's Request for Judicial Notice ("RJN") granted 6/25/10.) When and if the OLW Ordinance
is in effect, it is the default for any wage analysis, (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire
Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 778), and trainees must receive no less than the OLW as a result.

1 Oakland City Charter section 728 requires that all Port-Assisted Businesses provide
2 compensation not less than the OLW. Plaintiffs allege Defendant was a Port-Assisted Business
3 during the period of January 10, 2005 through February 3, 2006. As a result, Plaintiffs narrow
4 this claim only to this time period.

5 **Plan of Proof:** Documents provided by AB, documents provided by the Port of Oakland
6 in response to subpoena for business records, *Defendant has tentatively indicated it would be*
7 *willing to stipulate to the authentication of the documents provided by the Port of Oakland.*

8 **5. Meal and Rest Periods**

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

27 State law requires employers to provide employees with meal periods and paid rest
28 breaks. Employers must provide employees who work more than five hours in one day with at

1 least a 30-minute, off-duty meal period and an additional 30-minute meal period when employees
2 work more than 10 hours in one day. (Labor Code § 512(a); Wage Order 9(11).) Furthermore,
3 Wage Order 9(7) requires employers to record and retain accurate information with respect to
4 each employee, including information regarding employees' meal periods. (Wage Order
5 9(7)(A)(3), (7)(C).) The Labor Code and the Wage Order require an employer to pay an
6 employee one hour of pay at the employee's regular rate as compensation for each workday that a
7 meal period is not provided. (Labor Code § 226.7(b); Wage Order 9(11)(D).) The remedy
8 provided by Section 226.7 constitutes a wage or premium pay, and is subject to a three-year
9 statute of limitations. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.)

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

16 Where an employer fails to keep records of hours worked, employees may establish the
17 hours worked solely by their testimony, and the burden of overcoming such testimony shifts to
18 the employer. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.)

19 **Plan of Proof:** Plaintiffs will present admissions of corporate designees in deposition
20 testimony, documents provided by AB, testimony of class members and class representatives.

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

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

26 Labor Code sections 201, 202 and 203 require an employer to pay all wages owed to an
27 employee at the time of separation of employment. Because Plaintiffs contend AB never paid
28 monies owed for its failure to pay for all hours worked, any hours worked, overtime, meal and

1 rest period violations, and Labor Code section 226 violations, AB owes drivers for Section 203
2 violations.

3 **Plan of Proof:** Plaintiffs will present admissions of corporate designees in deposition
4 testimony, documents provided by AB, testimony of class members and class representatives.

5 **7. Failure to Provide Accurate Wage Statements**

- 6 • Did AB have a policy, pattern, and/or practice of failing to provide drivers with
7 accurate wage statements?
8 • Did AB fail to provide drivers with accurate wage statements?

9 Labor Code section 226 and Wage Order 9 require Defendant to provide accurate itemized
10 wage statements showing the correct number of hours worked, the applicable hourly rate for each
11 hour worked, and each category of compensation received, among other details. Plaintiffs
12 contend they suffered injury as a result of this violation because the incorrect number of hours
13 worked set forth on wage statements made it impossible for employees to calculate the wages to
14 which they were entitled. (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1143.)

15 **Plan of Proof:** Plaintiffs will present admissions of corporate designees in deposition
16 testimony, documents provided by AB, testimony of class members and class representatives.

17 **8. Business & Professions Code**

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

20 Based on liability determinations as to the alleged violations of the California Labor Code
21 discussed above, the Court may determine whether Defendant violated the California Business &
22 Professions Code (“B&P Code”). B&P Code section 17203 provides that the Court may restore
23 to any person in interest any money or property which may have been acquired by means of such
24 unfair competition and to which that person or persons have an ownership interest. Here,
25 Plaintiffs allege the class has suffered direct and economic injury in that they have not been paid
26 all wages and/or compensation due in a timely manner.

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1 **Plan of Proof:** derivative of other violations and proof.

2 **D. REMEDIES**

3 1. **Injunctive Relief**

4 The Court may issue injunctive relief to assure future compliance with the state labor
5 code.

6 2. **Damages may properly be determined on an aggregate basis.**

7 Class action lost wage damages are commonly determined on an aggregate basis, after
8 which the aggregate award is allocated among and distributed to individual class members. (2
9 Newberg on Class Actions, §10.5 at pp. 483-487; see also *Bell v. Farmers Ins. Exchange* (2004)
10 115 Cal. App. 4th 715, 759 [“It is well established that “the allocation of that aggregate sum [of
11 the judgment] among class members is an internal class accounting question that does not directly
12 concern the defendant” (2 Conte & Newberg, *Newberg on Class Actions*, supra, § 4:26, p.
13 233.)].)

14 Here, AB’s payroll records contain information on class members’ hourly wages and
15 periods of employment. These records are in hard copy form. *Defendant has not provided a*
16 *“key” that corresponds the unique identifiers used in its document production, i.e. “D1,” with*
17 *the drivers’ names. As a result, Plaintiffs have made reasonable and conservative assumptions*
18 *based on other available data.*

19 An independent contractor hired by Plaintiffs to review this material and compile a
20 damages model, will testify at the damages phase. This information will create an aggregate sum,
21 though it will also be calculated as to each class member.

22 3. **Representative Testimony is used to establish liability and damages in wage**
23 **and hour cases.**

24 Where an employer fails to keep records of hours worked, employees may establish the
25 hours worked solely by their testimony, and the burden of overcoming such testimony shifts to
26 the employer. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727; see also *Anderson v. Mt.*
27 *Clemens Pottery* (1946) 328 U.S. 680, 687 [finding that when an employer has not complied with
28 its legally mandated record-keeping requirements the solution is not to penalize the employee by

1 denying him any recovery on the ground that he is unable to prove the precise extent of
 2 uncompensated work[.]

3 Driver testimony will substantiate the all hours worked, any hours worked, and meal
 4 period claims as Plaintiffs contend Defendant failed to keep records of hours worked and meal
 5 periods. Driver testimony will additionally fill in any areas not covered by Defendant's
 6 admissions or documents to provide evidence for all claims. Plaintiffs intend to call between 4-8
 7 drivers to testify, as representative of the 71 class members.

8 **II. PROPOSED TRIAL PREPARATION SCHEDULE:**

Filing of Motions in Limine	February 9, 2012
Pretrial Conference	February 9, 2012
LIABILITY PHASE	<p>February 14, 2012, Tuesday</p> <p>Plaintiffs anticipate calling the following witnesses (Plaintiffs reserve the right to proceed in a different order from that listed here, or add additional witnesses):</p> <ul style="list-style-type: none"> • Lavon Godfrey – 25 minutes on direct • Gary Gilbert – 20 minutes on direct • Ike Cooper – 20 minutes on direct • Saga Llewellyn – 20 minutes on direct • Steve Wellemeyer – 20 minutes on direct • Gina Williams – 20 minutes on direct <p>February 15, 2012, Wednesday</p> <p>Plaintiffs anticipate calling the following witness who has a scheduling conflict on Feb. 14:</p> <ul style="list-style-type: none"> • Raquel Anderson – 20 minutes on direct • Bill Aboudi – 30 minutes
DAMAGE PHASE	<p>February 15, 2012, Wednesday</p> <p>Plaintiffs anticipate calling the following witnesses (Plaintiffs reserve the right to proceed in a different order from that listed here,</p>

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	or add additional witnesses): • Andrea Don – 35 minutes on direct
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III. CONCLUSION

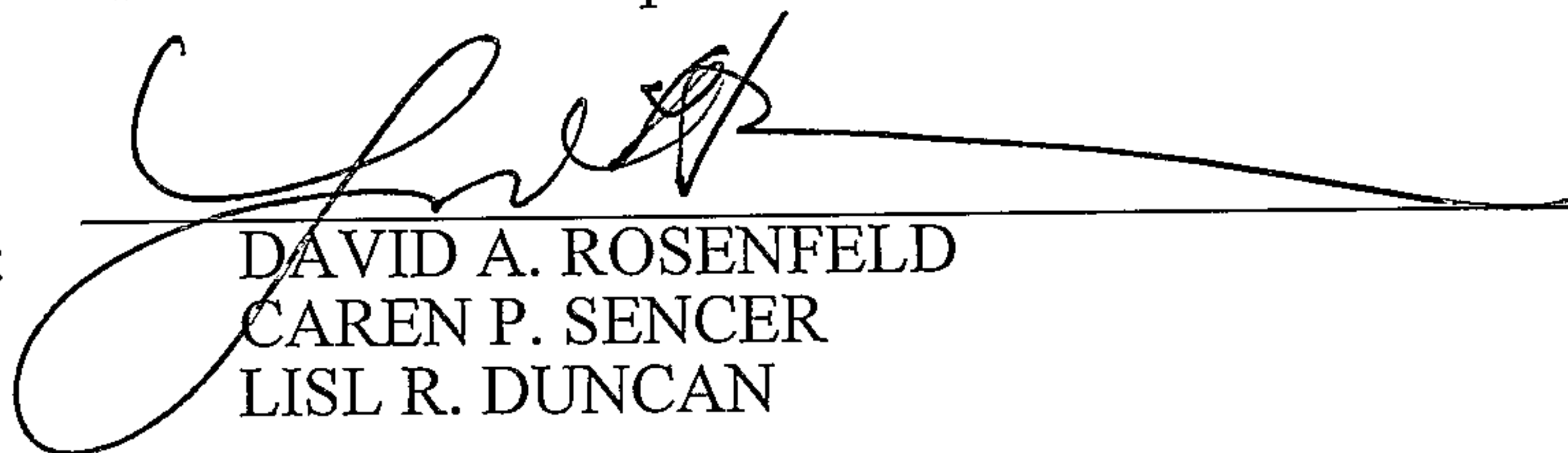
A. PLAINTIFFS' POSITION

Plaintiffs' Proposed Trial Plan demonstrates that this case can be manageably tried in two phases through the use of AB's own documents, the testimony of its corporate designees, the testimony of representative class members and of class representatives, and the testimony and damages model prepared by Plaintiffs' independent contractor.

Dated: February 9, 2012

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