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FILED
ALAMEDA COUNTY

FEB 14 2012

CLERK OF THE SUPERIOR COURT
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9 OAKLAND PORT SERVICES CORP. d/b/a
10 AB TRUCKING, a California Corporation,

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ALAMEDA

13 LAVON GODFREY and GARY GILBERT,)
14 on behalf of themselves and all other similarly)
15 situated,)
16 Plaintiffs,)

17 vs.

18 OAKLAND PORT SERVICES CORP. d/b/a)
19 AB TRUCKING, and DOES 1-20)
20 Defendant.)

21 Case No.: RG 08-379099
22 **DEFENDANT'S TRIAL BENCH BRIEF-**
23 **OAKLAND LIVING WAGE ORDINANCE**
24 **("OLW")**
25 Action Filed: March 28, 2008
Date: February 14, 2012
Dept.: 20
Time: 9:30 p.m.
Set for Trial: February 14, 2012
Before Honorable Judge Robert B. Freedman

26 **INTRODUCTION**

27 Defendant OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, a California
28 Corporation, (collectively hereinafter referred to as "AB Trucking" or "Defendant") files this
29 Trial Bench Brief in response to Plaintiffs recent assertion that Defendant has employed more

1 than 20 employees as a Port of Oakland Contractor (“Port Contractor”) as defined under the
2 Federal Fair Labor Standards Act (“FLSA”) “enterprise” theory.¹

3 AB Trucking is a very small drayage company that works near the Port of Oakland
4 (“Port”). Defendant has never employed more than 20 employees. Plaintiffs have recently
5 conceded this point in their Trial Brief filed on February 9, 2012. (See Trial Brief at pp. 8-9.)
6 Plaintiffs now argues that AB Trucking is part of an “enterprise” as defined under the FLSA and
7 that if the Court adds the employees of Oakland Port Services (“OPS”) d/b/a AB Trucking, plus
8 Oakland Maritime Support Services, Inc. (“OMSS”), plus Baymodal (also a d/b/a of OPS), plus
9 JayGav corporation, then Plaintiffs will magically achieve the magic number of more than 20
10 employees. Plaintiffs’ effort to rely on the FLSA “enterprise” theory is misplaced.

11 In short, under section 728 of the Oakland City Charter (Oakland Living Wage Ordinance
12 “OLW”) a Port Assisted Business (“PAB”) means “ 1) any person involved in a Port Aviation or
13 Port Maritime Business receiving in excess of \$50,000 worth of financial assistance from the
14 Port, or 2) any Port Contractor involved in a Port Aviation or Port Maritime Business if the
15 person employs more than 20 persons per pay period, unless in the prior 12 pay periods the
16 person has not had more than 20 such employees and will not have more than 20 persons in the
17 next 12 pay periods.

18 A PAB shall be deemed to employ more than 20 persons if it is part of an ‘enterprise’ as
19 defined under the Fair Labor Standards Act. Plaintiffs argue that 1) AB Trucking was a “Port
20 contractor” because it is affiliated with OMSS through a lease agreement from January 10, 2005
21 through February 3, 2006, **[Plaintiffs only seek damages for this 1 year period of time]**, 2)
22 employed more than 20 employees as part of an “enterprise,” 3) that all of the employees for
23

24 ¹ The Court is keenly aware of Defendant’s other affirmative defenses to this wage & hour lawsuit as a result of
25 Defendant’s recent Motion To Reconsider Class Certification that was denied on February 9, 2012. In summary,
Defendant claims that it is regulated by the federal Department of Transportation and is not required to provide
overtime pay to employed truck drivers, does require that meals and breaks be available to employees, and paid
employees (including trainees) more than the OLW even if that ordinance is deemed applicable to Defendant.

1 these companies spent more than 25% of their time on Port related matters. (Trial Brief at p. 7.)
 2 As set forth more fully below, not all of these companies participated in “related activities” and
 3 thus can not be considered as part of a single “enterprise” as defined by the FLSA.

4 The following is a brief explanation of the business activities and structure of OPS, AB
 5 Trucking, Baymodal, OMSS and JayGav Corporation.

6
 7 **Trucking: OPS, AB Trucking and Baymodal are part of one company. The whole
 company had 12 trucks total, 4 AB Trucks, 4 BayModal Trucks, 4 OPS Trucks at its peak.**

8 Oakland Port Services Corporation
 9 dba: AB Trucking
 dba: BayModal

10 **Embroidery:**

11 JayGav Corporation
 dba: JayGav Embroidery

12 **Parking for Tractor/Trailers and related services:**

13 Oakland Maritime Support Services, Inc
 14 dba: OMSS

OLW	Ordinance	/	PAB	rates	of	pay
Year	with/benefit		w/o		benefit	
1998			\$8.00			\$9.25
2002			\$9.13			\$10.50
2003			\$9.45			\$10.87
2004						
2005			\$9.90			\$11.39
2006			\$10.07			\$11.39
2007			\$10.39			\$11.95
2008			\$10.83			\$12.45
2009						

1	2010	\$11.15	\$12.82
2	2011	\$11.35	\$13.05

3
4 The evidence at trial will also demonstrate that Defendant AB Trucking paid its employees a
5 minimum wage of more than \$11.00/hr and provided benefits.

6 **Memorandum of Points and Authorities**

7 There is a three prong test Plaintiffs will have to meet in order to prove that AB Trucking
8 is part of an “enterprise”. (*Chao v. A-One Med. Serv., Inc.*, 346 F.3d 908 (9th Cir 2003).)² The
9 term “enterprise” under the FLSA means businesses engaged in related activities performed
10 (either through unified operation or common control) by any person or persons for a common
11 business purpose.” (29 U.S.C. section 203(r)(1). If these three elements- 1) related activities, 2)
12 unified operation or common control, and 3) common business purpose- are present, different
13 separate corporations or businesses are grouped together for the purpose of determining FLSA
14 coverage. (*Brennan v. Arnheim & Neely, Inc.*, (1973, U.S. Supreme Court) 410 U.S. 512, 518;
15 *Chao v. A-One Med. Serv., Inc., supra.*, 346 F.3d 908, 914-915.) The activities of two companies
16 are "related" if they are "the same or similar." (*Arnheim & Neely*, 410 U.S. at 518, (quoting
17 S.Rep. No. 145, at 41 (1961))).

18 Here, the Plaintiffs will not be able to argue successfully that JayGav Corp. (embroidery
19 company) is engaged in related activities with AB Trucking and work associated with the Port.
20 The evidence at trial will show that JayGav’s owner, Jovi Aboudi, did not spend more than
21 approximately 20% of her time looking over payroll on behalf of AB Trucking. JayGav is
22 located in Vallejo and it has been engaged in the embroidery industry for over ten years. Thus,
23

24
25 ² Plaintiffs concede that Plaintiffs are exempt from FLSA over time coverage per 29 U.S.C. § 213(b) [exemption from FLSA over-time laws].

1 JayGav can not be considered as part of an “enterprise” with AB Trucking and JayGav
2 employees, including Ms. Aboudi, can not be added to AB Trucking for OLW coverage.

3 Similarly, OMSS is a completely separate business from AB Trucking (a drayage
4 company) and survives independently from the business activities of AB Trucking. OMSS is a
5 company that provides leased parking for trailers and trucks only. While there is some small
6 shared employment between OMSS and AB Trucking and shared management, the activities of
7 the two companies are vastly different and do not directly promote a shared common business
8 purpose. Lastly, OPS is a d/b/a with AB Trucking. OPS was also a d/b/a with Baymodal. As a
9 result, these three companies are indeed one and the same.

10 The problem for Plaintiffs in this case is the fact that if you add up all the employees at
11 OMSS, OPS, AB Trucking and Baymodal, Defendant still employed less than 20 people even if
12 considered an “enterprise” under the FLSA. At its peak, AB Trucking employed 12 drivers, four
13 office staff in Oakland and up to three intermittent staff in Vallejo (a total of 19 employees
14 max.).

15 The evidence at trial will show driver turnover which meant that often only 11 trucks
16 were running. Moreover, AB Trucking had an outreach training program that provided free truck
17 driver training to ex-cons to learn the trade of becoming a licensed commercial vehicle truck
18 driver.³ These trainees never worked as trainees in excess of 4 pay periods (less than two
19 months) and they would normally go off and be hired by other companies. Many of the trainees
20 were paid a minimum of \$11.00/hr while in trainee status just like Plaintiff Lavon Godfrey. Only
21 when AB Trucking had an open truck would such a trainee be hired as a regular truck driver.
22
23
24

25 ³ Normally, in order for students to gain access to truck driving skills commensurate with what AB Trucking provided they would have to pay approximately \$7,200.00.

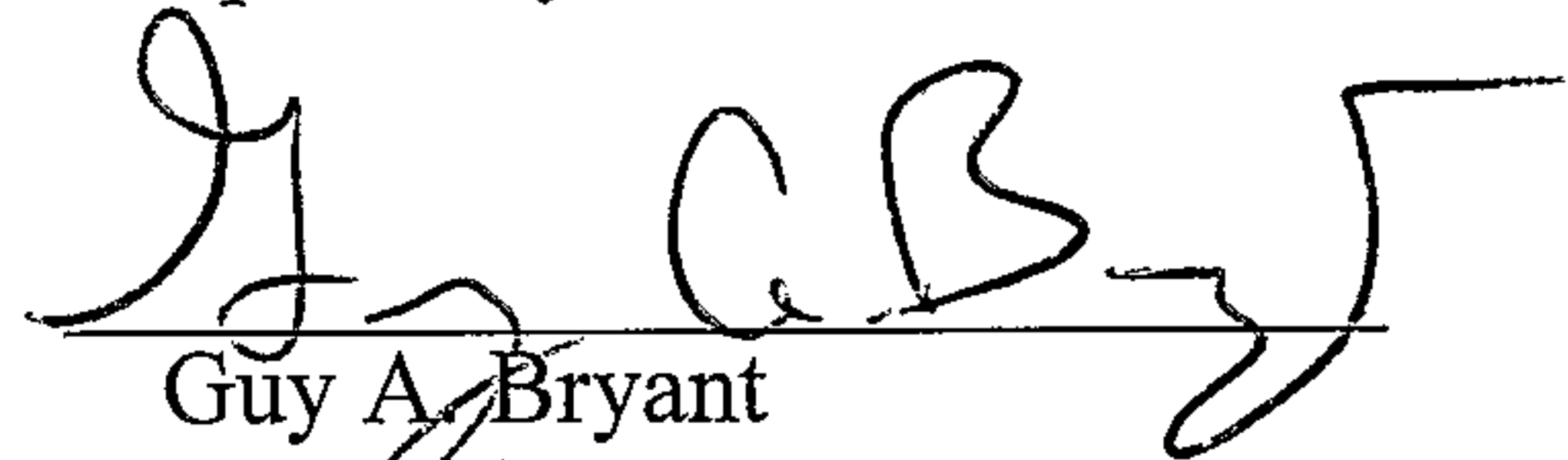
1 Lastly, the evidence will show that normally trainees were paired up with only a couple of
2 experienced drivers only.⁴

3 **Conclusion**

4 Based on the foregoing, AB Trucking respectfully requests that this court conclude that
5 the OLW is not applicable to this case.

6 Dated this 14th day of February, 2012.

7
8 Respectfully Submitted,

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10 Guy A. Bryant
11 Bryant & Brown
12 Attorney for Defendant
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23 ⁴ AB Trucking only took on a couple of trainees at a time as driver helpers. This is a classic example of the old
24 adage “no good deed goes unpunished.” Almost all the trainees were individuals that had been incarcerated or had a
25 substance abuse problem (or both). AB Trucking created a bridge for these individuals to return to productive
society. While AB Trucking may have arguably had 20 individuals on the payroll on occasion due to the trainees,
AB Trucking never had 12 pay periods of more than 20 employees previous and 12 pay periods of more than 20
employees post this time. This was often due to the volatile nature of the trainees and the fluctuating business
climate.

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) Case No.: RG 08-379099

) **PROOF OF SERVICE**

) Action Filed: March 28, 2008

) Date: February 14, 2012

) Dept.: 20

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) Set for Trial: February 14, 2012

) Before Honorable Judge Robert B. Freedman

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 14, 2012, I served the foregoing documents described as:

1 **AB TRUCKING'S TRIAL BENCH BRIEF AND DEFENDANT'S AMENDED EXHIBIT**
2 **LIST FOR TRIAL**

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

5 **SEE MAILING LIST INCLUDED HEREIN**

6

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

11

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

14

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

18

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

21

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

24

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

GUY A. BRYANT

Signature 

1
2 **SERVICE LIST**
3
4

5 **VIA PERSONAL ON ALL PARTIES LISTED HEREIN:**

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

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