



1 DAVID A. ROSENFELD, Bar No. 058163
 2 CAREN P. SENCER, Bar No. 233488
 3 LISL R. DUNCAN, Bar No. 261875
 WEINBERG, ROGER & ROSENFELD
 4 A Professional Corporation
 1001 Marina Village Parkway, Suite 200
 5 Alameda, California 94501-1091
 Telephone 510.337.1001
 Fax 510.337.1023

FILED
 ALAMEDA COUNTY

JUN 11 2010

CLERK OF THE SUPERIOR COURT
 By [Signature] Deputy

6 Attorneys for Plaintiffs
 LAVON GODFREY and GARY GILBERT

8 IN THE 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) 12 situated,) Plaintiffs,) 13 v.) 14 OAKLAND PORT SERVICES CORP. d/b/a) 15 AB TRUCKING, and DOES 1 through 20,) 16 inclusive,) Defendants.)	Case No. RG08379099 PLAINTIFFS' OBJECTION TO AND MOTION TO STRIKE THE DECLARATION OF WILLIAM I. ("BILL") ABOUDI IN OPPOSITION TO MOTION TO CERTIFY CLASS Date: June 25, 2010 Time: 11:00 a.m. Dept: 20 Judge: Robert B. Freeman
---	--

18 **I. INTRODUCTION**

19 Plaintiffs hereby move to strike the Declaration of William I. ("Bill")Aboudi ("W. Aboudi
 20 Declaration") submitted in support of Defendant's opposition to Plaintiffs' motion for class
 21 certification. Alternatively, Plaintiffs object to the content of the declaration as set forth herein.

22 **II. FACTUAL HISTORY**

23 Plaintiffs filed their motion for class certification on December 15, 2009. Defendant filed
 24 its opposition to Plaintiffs' motion on May 7, 2010. Defendant filed the W. Aboudi Declaration in
 25 support of its opposition to Plaintiffs' motion for class certification. Plaintiffs' reply brief is filed
 26 concurrently herewith.

27 //

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
26
27
28

III. ARGUMENT

A. THE W. ABOUDI DECLARATION CONTAINS INADMISSIBLE AND IMPROPER EVIDENCE AND SHOULD BE STRICKEN

Exclusion of the declaration is warranted primarily because the declaration offers legal conclusions made by an unqualified lay person and interested witness. The Court has the authority to exclude this improper evidence: “The court’s inherent power to curb abuses and promote fair process extends to the preclusion of evidence. Even without such abuses the trial court enjoys ‘broad authority of the judge over the admission and exclusion of evidence.’ (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 1707, p. 1667.)” (*Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288.) The court may exclude improperly obtained evidence or take other appropriate action to achieve justice and ameliorate the effect of improper conduct. (*See Peat, Marwick, supra*, 200 Cal.App.3d at p. 286 [“a trial court has inherent authority to preclude evidence to police an abuse of the litigation process.”]; *In re Katrina W.* (1994) 31 Cal.App.4th 441, 448; *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 144.)

The W. Aboudi declaration makes a statement of fact in the first paragraph about the identity of W. Aboudi. Paragraphs 2-5 are inadmissible for several reasons. Although Plaintiffs do not dispute W. Aboudi’s ability to identify himself, all substantive portions, following paragraph 1, of the declaration are inappropriate and must be stricken. As a result, the declaration should be stricken in its entirety as inadmissible and improper evidence.

Plaintiffs object to the W. Aboudi declaration on the grounds of lack of foundation for W. Aboudi’s alleged personal knowledge beyond mere speculation regarding “not paid for any hours worked in any work week” due to the fact that the parties dispute the time for which the drivers in question must be paid, and which drivers (trainees or otherwise) must be paid. (W. Aboudi Decl. ¶ 2; see Evid. Code § 702(a).) There is no indication as to how, why or from where he forms a basis for this testimony. There is also a lack of foundation for W. Aboudi’s alleged personal knowledge beyond mere speculation regarding “not paid for any hours worked over eight in a day” due to the

1 fact that the parties dispute the time for which the drivers in question must be paid, and which
2 drivers (trainees or otherwise) must be paid. (W. Aboudi Decl. ¶ 3; see Evid. Code § 702(a).)
3 There is no indication as to how, why or from where he forms a basis for this testimony. There is
4 also a lack of foundation for W. Aboudi's alleged personal knowledge beyond mere speculation
5 regarding "not paid provided rest breaks or meal periods" due to the fact that there is no indication
6 as to how, why or from where he forms a basis for this testimony. (W. Aboudi Decl. ¶ 4; see Evid.
7 Code § 702(a).) Finally, there is a lack of foundation for W. Aboudi's alleged personal knowledge
8 beyond mere speculation regarding "employs" due to the fact that the parties dispute which drivers
9 (trainees or otherwise) are employed by Defendant. (W. Aboudi Decl. ¶ 5; see Evid. Code §
10 702(a).) There is no indication as to how, why or from where he forms a basis for this testimony.

11 Plaintiffs also object to the declaration on the grounds that the assertions made are
12 ambiguous and vague as to time in paragraphs 2-5. W. Aboudi's declaration is unclear as to
13 whether he is stating current employees are "paid for any hours [worked]," "paid for hours," or
14 "provided rest breaks or meal periods," or, if W. Aboudi is stating his company simply terminated
15 the employment of all employees who had been subject to pay violations.

16 Plaintiffs object on the grounds that paragraphs 2 and 3 of the declaration are demonstrably
17 false as to current practices regarding overtime pay. W. Aboudi gave contradictory deposition
18 testimony. (See W. Aboudi Depo at 119:20-120:4 attached as Exhibit B to the Declaration of Lisl
19 R. Duncan filed in support of Plaintiffs' Motion for Class Certification.)

20 Plaintiffs object on the grounds that paragraphs 2-4 of the declaration contain hearsay
21 statements. (See Evid. Code § 1200.) W. Aboudi is not physically with all drivers at all times and
22 cannot offer these statements for the truth of the matter asserted.

23 Plaintiffs object to paragraphs 2-5 on the grounds that the assertions made are improper
24 legal conclusions made by a lay person and an interested witness. For instance, W. Aboudi is not
25 qualified for purposes of this lawsuit to make a determination as to whether current employees are
26 paid all wages due and owing for any work week. Permitting any witness, including a presumed
27 *expert*, to give his or her opinion on the legal conclusions to be drawn from the evidence both

1 invades the court's province and is irrelevant. (See *Communications Satellite Corp. v. Franchise*
 2 *Tax Bd.* (1984) 156 Cal.App.3d 726, 747 (expert precluded from giving his views on provisions of
 3 the Uniform Act); *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal.App.3d 650, 654.)

4 Plaintiffs object to the information provided in paragraphs 2-5 on the grounds it is
 5 irrelevant. The paragraphs make reference to those whom Defendant "currently employs."
 6 However, liability applies to all drivers subject to violations during the statutory period, regardless
 7 of what Defendant asserts exists in the present. (See Evid. Code §§ 210, 350-351.)

8 Plaintiffs object to paragraph 4 on the grounds that it is ambiguous and compound because
 9 whether drivers received all rest breaks is a separate inquiry from whether they received all meal
 10 periods.

11 **B. THE W. ABOUDI DECLARATION CONTAINS INADMISSIBLE AND**
 12 **IMPROPER EVIDENCE RENDERING A SIGNIFICANT PORTION OF IT**
 13 **INADMISSIBLE**

14 Should the Court find that striking the W. Aboudi Declaration is not an appropriate remedy,
 15 it is nevertheless subject to the following objections:

OBJECTIONABLE STATEMENT OR MATERIAL	OBJECTION	COURT'S RULING
Paragraph 1: I am the president of Oakland Port Services Corporation dba AB Trucking ("AB Trucking), erroneously sued herein as "Oakland Port Services Corp. dba AB Trucking." I am the person most knowledgeable about the following facts and have personal knowledge thereof. If called as a witness I could and would testify as set forth below.	No objection.	
Paragraph 2: AB Trucking currently employs no employee driver who is "not paid for any hours worked in any work week."	Lack of foundation for W. Aboudi's alleged personal knowledge beyond mere speculation. There is no indication as to how, why or from where he forms a basis for this testimony. Evid. Code § 702(a).	Sustained: _____ Overruled: _____

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
26
27
28

OBJECTIONABLE STATEMENT OR MATERIAL	OBJECTION	COURT'S RULING
	Ambiguous and vague as to time.	Sustained: _____ Overruled: _____
	Demonstrably false as to current practices regarding overtime pay at the time of W. Aboudi's deposition where W. Aboudi gave contradictory testimony. See W. Aboudi Depo at 119:20-120:4.	Sustained: _____ Overruled: _____
	Hearsay. Evid. Code § 1200.	Sustained: _____ Overruled: _____
	Improper legal conclusion as to whether current employees are paid all wages due and owing for any work week.	Sustained: _____ Overruled: _____
	Irrelevant as liability applies to all drivers subject to violations during the statutory period. Evid. Code §§ 210, 350-351.	Sustained: _____ Overruled: _____
Paragraph 3: AB Trucking currently employs no employee driver who is "not paid for hours worked over eight in a day or over forty in a week at time and a half pay."	Lack of foundation for W. Aboudi's alleged personal knowledge beyond mere speculation. There is no indication as to how, why or from where he forms a basis for this testimony. Evid. Code § 702(a).	Sustained: _____ Overruled: _____
	Ambiguous and vague as to time.	Sustained: _____ Overruled: _____
	Demonstrably false as to current practices regarding overtime pay at the time of W. Aboudi's deposition where W. Aboudi gave contradictory testimony. See W. Aboudi Depo at 119:20-120:4.	Sustained: _____ Overruled: _____
	Hearsay. Evid. Code § 1200.	Sustained: _____

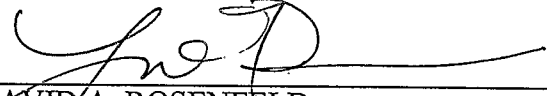
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

OBJECTIONABLE STATEMENT OR MATERIAL	OBJECTION	COURT'S RULING
	<p>Improper legal conclusion as to whether current employees are paid all wages due and owing.</p> <p>Irrelevant as liability applies to all drivers subject to violations during the statutory period. Evid. Code §§ 210, 350-351.</p>	<p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p>
<p>Paragraph 4: AB Trucking currently employs no employee driver who is "not provided rest breaks or meal periods."</p>	<p>Lack of foundation for W. Aboudi's alleged personal knowledge beyond mere speculation. There is no indication as to how, why or from where he forms a basis for this testimony. Evid. Code § 702(a).</p> <p>Ambiguous and vague as to time.</p> <p>Ambiguous and compound because whether drivers received all rest breaks is a separate inquiry from whether they received all meal periods.</p> <p>Hearsay. Evid. Code § 1200.</p> <p>Improper legal conclusion as to whether current employees are provided all rest breaks and/or meal periods.</p> <p>Irrelevant as liability applies to all drivers subject to violations during the statutory period. Evid. Code §§ 210, 350-351.</p>	<p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p>
<p>Paragraph 5: AB Trucking presently employs six (6)</p>	<p>Lack of foundation for W. Aboudi's alleged personal</p>	<p>Sustained: _____</p>

OBJECTIONABLE STATEMENT OR MATERIAL	OBJECTION	COURT'S RULING
employee truck drivers.	<p>knowledge beyond mere speculation. There is no indication as to how, why or from where he forms a basis for this testimony. Evid. Code § 702(a).</p> <p>Improper legal conclusion because a dispute exists as to whether trainee drivers are employees.</p> <p>Irrelevant as liability applies to all drivers subject to violations during the statutory period. Evid. Code §§ 210, 350-351.</p>	<p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p>

11 Dated: June 10, 2010

12 WEINBERG, ROGER & ROSENFELD
 13 A Professional Corporation

14 By: 
 15 DAVID A. ROSENFELD
 16 CAREN P. SENCER
 17 LISL R. DUNCAN
 18 Attorneys for Plaintiffs

118212/575244

28

PROOF OF SERVICE
(CCP 1013)

1
2
3 I am a citizen of the United States and an employee in the County of Alameda, State of
4 California. I am over the age of eighteen years and not a party to the within action; my business
5 address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On June
6 10, 2010, I served upon the following parties in this action:

7 Jay Ian Aboudi
8 The Law Office of Jay Ian Aboudi
9 1855 Olympic Blvd., Ste. 210
10 Walnut Creek, CA 94596

copies of the document(s) described as:

11 **PLAINTIFFS' OBJECTION TO AND MOTION TO STRIKE THE DECLARATION**
12 **OF WILLIAM I. ("BILL") ABOUDI IN OPPOSITION TO MOTION TO CERTIFY**
13 **CLASS**

13 **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope,
14 addressed as indicated herein, and caused each such envelope, with postage thereon fully
15 prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar
16 with the practice of Weinberg, Roger & Rosenfeld for collection and processing of
17 correspondence for mailing, said practice being that in the ordinary course of business, mail
18 is deposited in the United States Postal Service the same day as it is placed for collection.

17 **BY OVERNIGHT DELIVERY SERVICE** I placed a true copy of each document listed
18 herein in a sealed envelope, addressed as indicated herein, and placed the same for
19 collection by Overnight Delivery Service by following the ordinary business practices of
20 Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice
21 of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery
22 Service correspondence, said practice being that in the ordinary course of business,
23 Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service
24 offices for next day delivery the same day as Overnight Delivery Service correspondence is
25 placed for collection.

22 **BY E-MAIL** I caused to be transmitted each document listed herein via the e-mail
23 address(es) listed above or on the attached service list.

23 I certify under penalty of perjury that the above is true and correct. Executed at Alameda,
24 California, on June 10, 2010.

25 
26 Jennifer Koffler

26 118212/555975