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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By M. Oik Deputy

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,) 13 Plaintiffs,) 14 v.) 15 OAKLAND PORT SERVICES CORP. d/b/a) 16 AB TRUCKING, and DOES 1 through 20,) 17 inclusive,) 18 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: August 20, 2010 Time: 10:00 a.m. Dept: 20 Judge: Robert B. Freeman
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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 originally filed their motion for class certification on December 15, 2009.
24 Defendant filed its original opposition to Plaintiffs' motion on May 7, 2010. Defendant filed the
25 W. Aboudi Declaration in support of its opposition to Plaintiffs' motion for class certification.
26 Thereafter, the Court ordered additional class certification briefing. As part of its opposition,
27 Defendant filed a Declaration of W. Aboudi which is identical to the prior declaration, with

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1 changes to the relevant dates. Plaintiffs' reply brief is filed concurrently herewith.

2 **III. ARGUMENT**

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

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

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

22 Plaintiffs object to the W. Aboudi declaration on the grounds of lack of foundation for W.
23 Aboudi's alleged personal knowledge beyond mere speculation regarding "not paid for any hours
24 worked in any work week" due to the fact that the parties dispute the time for which the drivers in
25 question must be paid, and which drivers (trainees or otherwise) must be paid. (W. Aboudi Decl. ¶
26 2; see Evid. Code § 702(a).) There is no indication as to how, why or from where he forms a basis
27 for this testimony. There is also a lack of foundation for W. Aboudi's alleged personal knowledge

1 beyond mere speculation regarding “not paid for any hours worked over eight in a day” due to the
2 fact that the parties dispute the time for which the drivers in question must be paid, and which
3 drivers (trainees or otherwise) must be paid. (W. Aboudi Decl. ¶ 3; see Evid. Code § 702(a).)
4 There is no indication as to how, why or from where he forms a basis for this testimony. There is
5 also a lack of foundation for W. Aboudi’s alleged personal knowledge beyond mere speculation
6 regarding “not paid provided rest breaks or meal periods” due to the fact that there is no indication
7 as to how, why or from where he forms a basis for this testimony. (W. Aboudi Decl. ¶ 4; see Evid.
8 Code § 702(a).) Finally, there is a lack of foundation for W. Aboudi’s alleged personal knowledge
9 beyond mere speculation regarding “employs” due to the fact that the parties dispute which drivers
10 (trainees or otherwise) are employed by Defendant. (W. Aboudi Decl. ¶ 5; see Evid. Code §
11 702(a).) There is no indication as to how, why or from where he forms a basis for this testimony.

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

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

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

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

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

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

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

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

15 Should the Court find that striking the W. Aboudi Declaration is not an appropriate remedy,
 16 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: _____

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OBJECTIONABLE STATEMENT OR MATERIAL	OBJECTION	COURT'S RULING
	<p>Ambiguous and vague as to time.</p> <p>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.</p> <p>Hearsay. Evid. Code § 1200.</p> <p>Improper legal conclusion as to whether current employees are paid all wages due and owing for any work week.</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>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."</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>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.</p> <p>Hearsay. Evid. Code § 1200.</p>	<p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p> <p>Sustained: _____</p> <p>Overruled: _____</p>

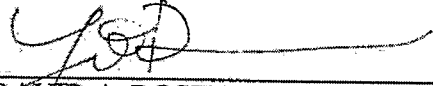
1 2	OBJECTIONABLE STATEMENT OR MATERIAL	OBJECTION	COURT'S RULING
3 4 5 6 7		Improper legal conclusion as to whether current employees are paid all wages due and owing. Irrelevant as liability applies to all drivers subject to violations during the statutory period. Evid. Code §§ 210, 350-351.	Sustained: _____ Overruled: _____ Sustained: _____ Overruled: _____
8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Paragraph 4: AB Trucking currently employs no employee driver who is "not provided rest breaks or meal periods."	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). Ambiguous and vague as to time. Ambiguous and compound because whether drivers received all rest breaks is a separate inquiry from whether they received all meal periods. Hearsay. Evid. Code § 1200. Improper legal conclusion as to whether current employees are provided all rest breaks and/or meal periods. Irrelevant as liability applies to all drivers subject to violations during the statutory period. Evid. Code §§ 210, 350-351.	Sustained: _____ Overruled: _____ Sustained: _____ Overruled: _____ Sustained: _____ Overruled: _____ Sustained: _____ Overruled: _____ Sustained: _____ Overruled: _____
24 25 26 27 28	Paragraph 5: AB Trucking presently employs six (6) employee truck drivers.	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: _____

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OBJECTIONABLE STATEMENT OR MATERIAL	OBJECTION	COURT'S RULING
	Improper legal conclusion because a dispute exists as to whether trainee drivers are employees.	Sustained: _____ Overruled: _____
	Irrelevant as liability applies to all drivers subject to violations during the statutory period. Evid. Code §§ 210, 350-351.	Sustained: _____ Overruled: _____

Dated: August 16, 2010

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: 

 DAVID A. ROSENFELD
 CAREN P. SENCER
 LISL R. DUNCAN
 Attorneys for Plaintiffs

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PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On August 16, 2010, I served upon the following parties in this action:

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

copies of the document(s) described as:

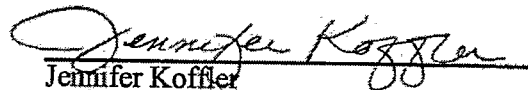
**PLAINTIFFS' OBJECTION TO AND MOTION TO STRIKE THE
DECLARATION OF WILLIAM I. ("BILL") ABOUDI IN OPPOSITION TO
MOTION TO CERTIFY CLASS**

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

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

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

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on August 16, 2010.


Jennifer Koffler

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