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 9 OAKLAND PORT SERVICES CORPORATION
 10 d/b/a AB TRUCKING (erroneously sued as AB
 11 TRUCKING, INC.)

FILED
 ALAMEDA COUNTY
 NOV 22 2010
 CLERK OF THE SUPERIOR COURT
 By [Signature]
 DEBURY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9
 10 FOR THE COUNTY OF ALAMEDA

11 LAVON GODFREY and GARY GILBERT, on
 12 behalf of themselves and all others similarly
 13 situated,
 14
 15 Plaintiffs,
 16
 17 v.
 18 OAKLAND PORT SERVICES
 19 CORPORATION d/b/a AB TRUCKING, and
 20 DOES 1 through 20, inclusive,
 21
 22 Defendants.

CASE NO. RG 08-379099

**DEFENDANT'S OBJECTION TO
 PLAINTIFFS' ATTEMPT TO USE
 GILBERT AND GODFREY
 DECLARATIONS IN SUPPORT OF
 THEIR MOTION FOR CLASS
 CERTIFICATION**

Date: December 3, 2010
 Time: 10:00 a.m.
 Place: Department 20
 Judge: Hon. Robert Freedman
 Action Filed: March 28, 2008

20 Defendant OAKLAND PORT SERVICES CORPORATION ("Defendant") hereby
 21 objects to the attempt that moving Plaintiffs have made to rely on the Declarations of Lavon
 22 Godfrey and Gary Gilbert in support of their presently-pending motion for class certification
 23 ("Motion") without service and filing of those declarations.

INTRODUCTION

25 In Plaintiffs' Notice of Motion and Motion for Class Certification ("Notice"), filed herein
 26 on October 29, 2010, Plaintiffs state that their motion is based on, among other documents, "the
 27 Declaration of Lavon Godfrey, [and] the Declaration of Gary Gilbert . . ." (Notice, at 3:3.) In a
 28

1 footnote attached to that statement, Plaintiffs declare: "The Declarations of Lavon Godfrey and
2 Gary Gilbert referenced in this motion and its supporting papers were filed with the Court on
3 July 19, 2010." (Notice, at 3:28.) No request for judicial notice accompanied the Notice.

4 Based upon that, the Plaintiffs then proceed to include in their Plaintiffs' Memorandum
5 of Points and Authorities in Support of Their Motion for Class Certification ("Pls.' Memo.") a
6 total of forty-seven (47) citations to those declarations. (Pls.' Memo., at 2:15-16; 2:19-20; 2:24-
7 25; 2:28; 7:28; 8:16; 8:18-19; 8:21; 8:26-9:2; 10:1; 10:28; 11:4; 11:10; 11:22; 12:4; 12:28;
8 13:17; 14:22; 16:8-9½; 16:13; 16:15; 17:7; 19:21; 20:21-22.)

9 PROCEDURAL BACKGROUND

10 Plaintiffs' filed their complaint herein on March 28, 2008. On January 23, 2009,
11 Plaintiffs filed their First Amended Complaint and that was the operative pleading when, eleven
12 months later, on December 15, 2009, Plaintiffs made their first motion for class certification.
13 Hearing on that motion was set for January 15, 2010 and on that hearing date the hearing was
14 commenced and first continued to March 12, 2010 and then again continued to May 7, 2010. On
15 April 19, 2010, the hearing on the motion for class certification was dropped from calendar and
16 the hearing eventually was reset for June 25, 2010. Opposition to the motion was filed on May 7,
17 2010 and a reply to the opposition was filed on June 11, 2010. For the June 25, 2010 hearing on
18 the motion the court published an uncontested tentative ruling that became the ruling of the
19 court, pointing out a number of failings in the Plaintiffs' motion under the First Amended
20 Complaint, continuing the hearing on the motion to August 20, 2010, and ordering Plaintiffs
21 "essentially, to start over," ordering Plaintiffs to file and serve a motion clearly articulating
22 classes and subclasses and presenting an "evidentiary record supporting each claim clearly
23 identified," setting July 19, 2010 as the due date for Plaintiffs' presentation, August 11, 2010 as
24 the due date for Defendant's opposition, and August 16, 2010 as the due date for Plaintiffs'
25 reply.

26 On July 19, 2010, Plaintiffs filed a wholly new motion for class certification, its second
27 motion, again for certification of a class under the First Amended Complaint. On August 11,
28

1 2010, Defendant filed its opposition to the motion. And on August 17, one day late, Plaintiffs
2 filed their reply to Defendant's opposition. On the August 20, 2010, the hearing on the motion
3 was commenced and continued to October 7, 2010. The court published a tentative ruling and it
4 was contested, whereupon the Court **dropped the motion**, directing that a newly revised Motion
5 for Class Certification be filed "no later than November 22, 2010").

6 On September 20, 2010, the parties stipulated that Plaintiffs would be entitled to file a
7 Second Amended Complaint, with the due date for the filing of the complaint set for the same
8 day the stipulation was filed, namely, Monday, September 20, 2010, and setting the due date for
9 the filing and service of a response to the complaint thirty days thereafter. Plaintiffs filed their
10 Second Amended Complaint on September 20, 2010 and on October 20, 2010, Defendants filed
11 and served their demurrer to the SAC.

12 On October 29, 2010, Plaintiffs filed their newly revised third motion for class
13 certification, this being the first one under the Second Amended Complaint. That motion is the
14 one presently before the Court and in part seeks to rely on the Godfrey and Gilbert declarations
15 that were filed in a motion that the Court later dropped, declarations of which the Plaintiffs do
16 not request that this Court take judicial notice, declarations that the Plaintiffs neither served with
17 their presently-pending motion nor filed with the Court in connection with their presently-
18 pending motion.

19 **ARGUMENT**

20 Evidence Code section 452, subdivision (d) provides, in relevant part, that judicial notice
21 may be taken of the records of "any court of record of the United States or of any state of the
22 United States." Evidence Code section 453 requires the trial court to take judicial notice of any
23 matter specified in Section 452 **if a party requests it and** has given the adverse party sufficient
24 notice and furnishes the court with sufficient information to enable it to take judicial notice of the
25 matter. Evidence Code sections 452 and 453 permit the trial court to take judicial notice of the
26 existence of judicial opinions and court documents, along with the truth of the results reached—
27 in the documents such as orders, statements of decision, and judgments—but the court "**cannot**
28

1 take judicial notice of the truth of hearsay statements in decisions or court files, including
2 pleadings, affidavits, testimony, or statements of fact.' (*Williams v. Wraxall* (1995) 33 Cal. App.
3 4th 120, 130, fn. 7 ("We . . . cannot take judicial notice of the truth of hearsay statements in . . .
4 affidavits, testimony, or statements of fact . . ."); *Gilmore v. Superior Court* (1991) 230 Cal.
5 App. 3d 416, 418.) Here, the Plaintiffs did not request that the Court take judicial notice of the
6 declarations.

7 Moreover, Plaintiffs, even if they had made a request for judicial notice, would be limited
8 solely to pointing the Court to the *existence* of the declarations, not their content, and surely not
9 the purported truthfulness of their content:

10 A trial court may properly take judicial notice of the records of any
11 court of record of any state of the United States. (Evid. Code, §
12 452, subd. (d); *Flores v. Arroyo* (1961) 56 Cal. 2d 492, 496-497.)
13 But, as is stated in Jefferson, California Evidence Benchbook
14 (1972) Judicial Notice, section 47.3, at page 840: "Caveat:
15 Limitations on judicial notice of court records. What is meant by
16 taking judicial notice of court records? There exists a mistaken
17 notion that this means taking judicial notice of the existence of
18 facts asserted in *every document* of a court file, including pleadings
19 and affidavits A court may take judicial notice of the
20 *existence* of each document in a court file, but can only take
21 judicial notice of the truth of facts asserted in documents such as
22 orders, findings of fact and conclusions of law, and judgments.

23 (*Day v. Sharp* (1975) 50 Cal. App. 3d 904, 914-915; emphasis in original; *see also Bach v.*
24 *McNelis* (1989) 207 Cal. App. 3d 852, 865 (court may take judicial notice of the existence of
25 documents in a court file but not the truth of facts asserted in pleadings and affidavits contained
26 therein).)

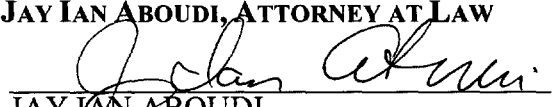
27 CONCLUSION

28 The citations to the Godfrey and Gilbert declarations should be ignored in the Motion.

Dated: November 22, 2010

Respectfully submitted,

JAY IAN ABOUDI, ATTORNEY AT LAW


JAY IAN ABOUDI
Attorney for Defendant
OAKLAND PORT SERVICES
CORPORATION d/b/a AB TRUCKING
(erroneously sued as AB TRUCKING, INC.)

3 **PROOF OF SERVICE**

4 I am a resident of the State of California, over the age of eighteen years, and not a party
5 to the within action. My business address is: 1855 Olympic Blvd., Ste. 210, Walnut Creek, CA
6 94596. On the date below, I served the within documents:

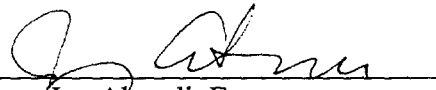
- 7
- 8 1) **DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN**
9 **OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; and**
 - 10 2) **DEFENDANT'S OBJECTION TO PLAINTIFFS' ATTEMPT TO USE GILBERT**
11 **AND GODFREY DECLARATIONS IN SUPPORT OF THEIR MOTION FOR**
12 **CLASS CERTIFICATION**

13 by placing the documents listed above in a sealed envelope and caused the same to be personally
14 delivered by hand to the persons at the address set forth below:

15 Lisl Duncan, Esq.
16 Weinberg, Roger & Rosenfeld
17 A Professional Corporation
18 1001 Marina Village Parkway, Suite 200
19 Alameda, CA 94501-1091

20 I am readily familiar with the firm's practice of collection and processing correspondence
21 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
22 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
23 motion of the party served, service is presumed invalid if postal cancellation date or postage
24 meter date is more than one day after the date of deposit for mailing in affidavit.

25 I declare under penalty of perjury under the laws of the State of California that the above
26 is true and correct. Executed on November 22, 2010 at Walnut Creek, California.

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Jay Aboudi, Esq.