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FILED
ALAMEDA COUNTY

OCT 19 2012

CLERK OF THE SUPERIOR COURT
Handwritten signature

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Guy A. Bryant -146190
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5 Attorney for Defendant
6 OAKLAND PORT SERVICES CORP. d/b/a
AB TRUCKING, a California Corporation,

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

11	LAVON GODFREY and GARY GILBERT,)	Case No.: RG 08-379099
12	on behalf of themselves and all other similarly)	DECLARATION OF GUY A. BRYANT IN
13	situated,)	
	Plaintiffs,)	
14	vs.)	
15	OAKLAND PORT SERVICES CORP. d/b/a)	
16	AB TRUCKING, and DOES 1-20)	Action Filed: March 28, 2008
	Defendant.)	Hearing Date: October 19, 2012
)	Dept.: 20
)	Time: 9:45 a.m.
)	Trial Date: February 14, 2012
)	Before Honorable Judge Robert B. Freedman
18)	
19)	
20)	

21 I, Guy A. Bryant, declare that I am an attorney licensed to practice before all courts of the
22 State of California, and am the attorney of record for Defendant OAKLAND PORT SERVICES
23 CORP. d/b/a AB TRUCKING, a California Corporation, (collectively hereinafter referred to as
24
25

1 “AB Trucking” or “Defendant”) in the above-entitled action. If called to testify I could
2 competently attest to the following from my personal knowledge:

3 1. The Court conducted a 10 day bench trial between February 14, 2012 and March 12,
4 2012, which included several rulings on motions that substantially reduced the number of claims.
5 On October 2, 2012, the Court issued its Notice of Intended Decision (“NOID”) and the
6 following important events have recently occurred:

- 7 • On October 11, 2012, Defendant filed a written Request for Statement of
8 Decision.
- 9 • On October 19, 2012, Defendant filed an objection to Plaintiffs Proposed
10 Judgment After Trial in the amount of \$1,376,160.99 pursuant to Cal. Rules of
11 Court, Rule 3.1590(j).
- 12 • The matter is currently scheduled for further compliance hearing on November
13 9, 2012.

14
15 2. Attached to this declaration is a true and correct copy of the filed October 19, 2012,
16 objection to Plaintiffs Proposed Judgment After Trial pursuant to Cal. Rules of Court, Rule
17 3.1590(j).

18 3. The aforementioned filed Request for Statement of Decision and Objection to Plaintiffs’
19 Proposed Judgment After Trial establish that Plaintiffs claims for damages are not “fixed and
20 ascertainable” as required by CCP § 483.010.

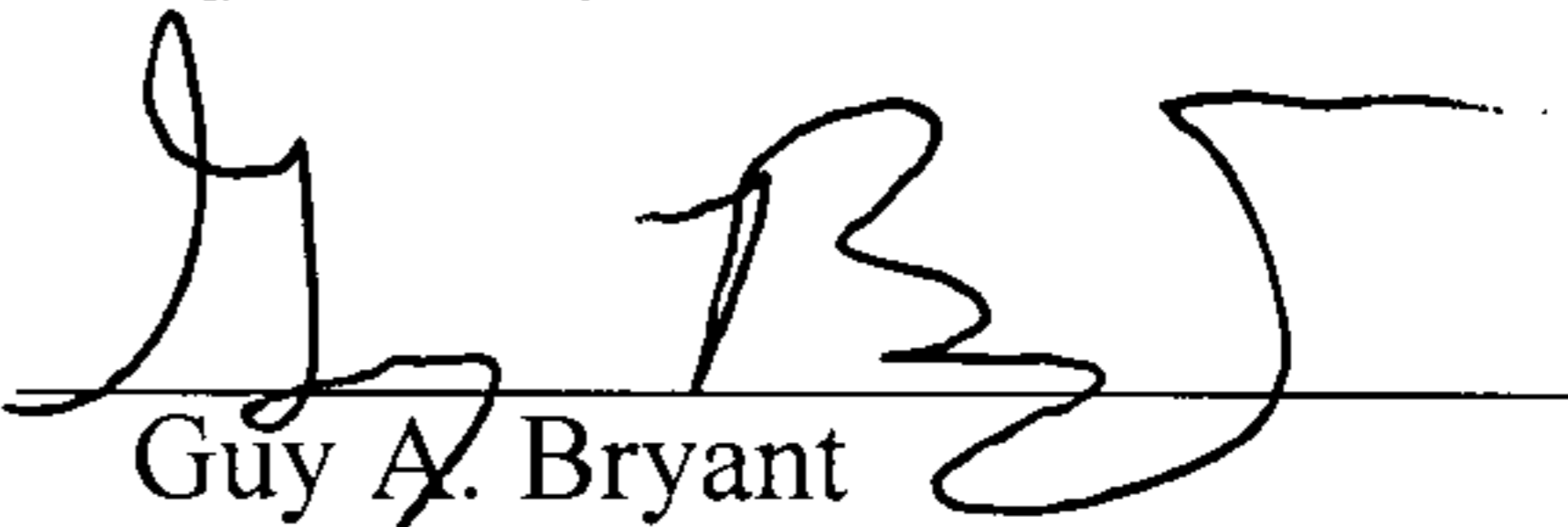
21 4. I telephoned Plaintiffs Counsel yesterday afternoon and explained that I would oppose
22 the pending Ex Parte Application on the grounds of lack of notice (CCP § 484.040) and the
23 uncertainty of the amount of the claimed damages (CCP § 483.010). Plaintiffs’ Counsel
24

1 presented no evidence during our conversation of exigent circumstances to support an Ex Parte
2 Application or an Order Shortening Time to warrant bypassing the CCP § 1005 procedures.

3 I declare under the penalty of perjury that the foregoing is true and correct. Executed in
4 Oakland, California.

5
6 Dated this 19th day of October, 2012.

7 Respectfully Submitted,

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9 Guy A. Bryant
10 Bryant & Brown
11 Attorney for Defendant
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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.

) Case No.: RG 08-379099

) **DEFENDANT'S OBJECTION TO**
) **[PROPOSED] JUDGEMENT AFTER**
) **TRIAL; CCP § 634**

) Action Filed: March 28, 2008

) Hearing Date: November 9, 2012

) Dept.: 20

) Time: 2:00 p.m.

) Trial Date: February 14, 2012

) Before Honorable Judge Robert B. Freedman

) Cal. Rules of Court, Rule 3.1590 (j).

21 **I. Introduction**

22 Pursuant to California Code of Civil Procedure Section 634, Defendant OAKLAND
23 PORT SERVICES CORP. d/b/a AB TRUCKING, a California Corporation, (collectively
24 hereinafter referred to as "AB Trucking" or "Defendant") respectfully object to the proposed
25 judgment after trial attached to Plaintiffs' Supplemental Memorandum ("PSM") in the amount of

1 \$1,376,160.99 pursuant to Cal. Rules of Court, Rule 3.1590(j). The Court conducted a 10 day
2 bench trial between February 14, 2012 and March 12, 2012, which included several rulings on
3 motions that substantially reduced the number of claims. On October 2, 2012, the Court issued
4 its Notice of Intended Decision (“NOID”). On October 11, 2012, Defendant filed a written
5 Request for Statement of Decision. The matter is scheduled for further compliance hearing on
6 November 9, 2012.

7 **II. Eliminated Claims:**

8 Plaintiffs originally filed a complaint against Defendant and Mr. Aboudi personally
9 requesting damages for the following claims: 1) Unfair Business Practices; 2) Failure to Pay for
10 All Hours Worked; 3) Failure to Pay for Any Hours Worked Due to Misclassification of
11 Employment Status; 4) Failure to Pay Overtime; 5) Failure to Pay Living Wage; 6) Failure to
12 Provide Meal and/or Rest Periods; 7) Failure to Pay Wages Owing at Discharge or Quitting; and
13 8) Failure to Provide Accurate Itemized Wage Statements.

14 Since the original filing of the complaint the following claims have been eliminated:

15 **A. Multi-Million Dollar Overtime Claim Was Dismissed During Trial.**

16 During the trial in February 2012, Plaintiffs dismissed the over-time claim.¹ Plaintiffs
17 admitted AB Trucking drivers and trainees have always been required to obtain a Class A
18 commercial driver’s license and follow the Department of Transportation (“DOT”) Safety
19 regulations due to the weight and size of the commercial vehicles they drive (Class 8), weight
20 and size of the containers transported, and because of the various federal, state and Port of
21 Oakland operational requirements commercial truck drivers must follow. Exempted from
22 California overtime compensation requirements are “employees whose hours of service are
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25 ¹ It was also conceded at trial that Plaintiffs are exempt from FLSA over time coverage per 29 U.S.C. § 213(b) [exemption from FLSA over-time laws].

1 regulated by . . . the United States Department of Transportation Code of Federal Regulations,
2 Title 49, Sections 395.1 to 395.13.”(IWC Wage Order, 9-2001, §3.)

3 This admission is very important for two reasons. First, this admission confirms that
4 Defendant was acting in good faith when it reasonably believed that Truck drivers and trainees
5 were exempt from certain California wage & hour requirements. Defendant respectfully requests
6 the Court to consider this issue if any determination about whether the Defendant acted
7 “willfully” with regard to any purported violation must be determined.

8 Second, this admission supports Defendant’s contention that the application of the over-
9 time exemption was readily apparent at the time this lawsuit was filed, and therefore, a
10 determination of any right to obtain statutory attorney fees (e.g., labor Code § 218.5) must be
11 subject to a properly noticed motion.

12 **B. Plaintiffs OLW Liability Claim Denied.**

13 During trial in February 2012, Plaintiffs revised their claim to limit the Oakland Living
14 Wage Ordinance (“OLW”) liability period to January 28, 2005- February 10, 2006 (this
15 represented an elimination of approximately 5 years of purported liability [i.e., alleged liability
16 originally extended to March 15, 2011]). At the conclusion of Plaintiffs’ case, Defendant orally
17 moved for a “*non-suit*” on the ground that not a single Plaintiff class member that testified had
18 been employed by AB Trucking during the relevant liability period. (e.g., Ike Cooper – hired
19 March 2008; Gary Gilbert- started training December 2008; Steve Wellemeyer – hired October
20 2007; Saga LLeweylan- hired October 2007; Gina Williams- hired 2007; Lavon Godfrey –
21 employed December 2006- May 2007.) The Court granted Defendant’s non-suit motion in
22 accordance with California Code of Civil Procedure 581(c)(a).² The Court denied the remaining
23 OLW claim in its NOID.

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25 ² Nonsuit is available in a bench trial immediately after the close of plaintiff’s opening statement. (*Lingenfelter v. County of Fresno* (2007) 154 Cal.App.4th 198.)

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III. Specific Objections to Proposed Judgment After Trial

A. **Objection- FAAAA Preempts Wage and Hour Claim Against Defendant.**

In *Dilts v. Penske Logistics, LLC, supra.*, (S.D. Cal. Oct. 19, 2011) 267 F.R.D. 625, cited by *Brinker*, a federal court held that the Federal Aviation Administration Authorization Act ("FAAA Act") preempted the application of California's meal and rest break laws on truck drivers. According to this federal court, the meal and rest break law interfered with competitive market forces (price, route or service) in violation of the FAAA Act. The goal of the FAAA Act is to deregulate the motor carrier industry and to help ensure that transportation rates, routes, and services rely on competitive market forces. The Act contains a broad preemption statute which declares that a state may not enact or enforce a law or regulation that is related to a price, route, or service of any motor carrier. (49 U.S.C. § 14501(c)(1).) The term "motor carrier" means a person providing commercial motor vehicle transportation for compensation. (49 U.S.C. § 13102 [14]; Mr. Aboudi testified at trial that AB Trucking's Motor Carrier number is **MC-310575**.) Relation to price, route, or service is found where "the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." Even if the law does not directly regulate motor carriers, preemption will apply if the effect of the regulation would be to make carriers offer different services than what the market would dictate. In *Dilts*, the court concluded the California meal break laws imposed conditions that affected the "frequency and scheduling of transportation" and the laws impacted Penske's "prices" because of the increased cost of additional drivers, helpers, tractors, and trailers necessary to ensure off-duty breaks under California law.

The fact that *Dilts* was specifically cited by *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 without disapproval is worth noting. It strongly suggests that the Supreme Court is indeed sensitive to the fact that the commercial trucking industry may deserve special consideration to be deemed exempt from California meal break laws. This interpretation

1 is consistent with the following statement: "What will suffice may vary from industry to
2 industry, and we cannot in the context of this class certification proceedings delineate the full
3 range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker* at p.
4 1040.)³ Based on the foregoing, Defendant files this objection to the proposed judgment.

5
6 **B. Objection- Notice Motion Required to Obtain Attorney Fees in This Case.**

7 1. Plaintiffs Not Entitled To Attorney Fees For Overtime Claims.

8 Attorney Caren P. Sencer in her Declaration in Support of Attorney Fees ("Sencer
9 Decl.") has requested attorney fees pursuant to California Code of Civil Procedure section
10 1021.5 and Labor Code sections 226(g) and 1194. (Sencer Decl. at p. 1, lines 23-26.) It is true
11 that in actions for unpaid overtime an award of attorney fees is mandatory; but the award must be
12 reasonable. (Labor Code § 1194.) However, during the trial in this case Plaintiffs dismissed their
13 overtime claims. Plaintiffs are not entitled to receive a judgment for attorney fees as a prevailing
14 party on the overtime claims because of this dismissal during the trial.

15 2. Plaintiffs Not Entitled To Attorney Fees For OLW Claims.

16 The Court denied all of Plaintiffs claims for damages with regard to the OLW. Plaintiffs
17 are not entitled to receive a judgment for attorney fees as a prevailing party on the OLW claims
18 due to the denial of such claims.

19 3. Unclear Attorney Fees Are Costs In This Case.

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³ Several federal courts in California have now recently dismissed wage and hour putative class actions brought by
24 truck drivers, alleging claims based on violations of California's meal break laws, on the ground that those laws (as
25 applied to a motor carrier truck drivers) are preempted by the FAAA Act. (*See Esquivel et al. v. Vistar Corp. et al.*,
Case No. 2:11-cv-07284 [C.D. Cal. Feb. 8, 2012]; *Brandon Campbell v. Vitran Express*, 2012 U.S. Dist. LEXIS
85509 (C.D. Cal, 2012); and *Reinhardt v. Gemini Motor Transportation*, 2012 U.S. Dist. LEXIS 58039 (E.D. Cal,
2012).)

1 When authorized by statute reasonable attorney fees may be deemed “allowable costs” by
2 the Court. (CCP § 1033.5 et seq.; *Santisas v. Goodin* (1998) 17 Cal.4th 599, at 606.) In wage and
3 hour claim actions, the prevailing party may be entitled to reasonable attorney fees as costs if the
4 party requested such items at the commencement of the action. (Labor Code § 218.5; *On-line*
5 *Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, at 1086.) In this case, it is unclear whether
6 the Plaintiffs requested attorney fees as costs at the outset of this litigation.

7 Generally, in order to obtain a costs award, the prevailing party must serve and file a
8 memorandum of costs. (Cal. Rules of Court, Rule 3.1700(a).) Moreover, the prevailing party
9 generally should submit the “costs bill” after securing entry of order or judgment. (*Boonyarit v.*
10 *Payless Shoesource, Inc.* (2006) 145 Cal.App.4th 1188, 1192-1193 [prejudgment costs award
11 reversed because defendant failed to secure entry of order or judgment of dismissal by filing
12 proposed judgment of dismissal with memorandum of costs, and did not ensure that trial court
13 executed judgment with costs award].)

14
15 As outlined above, on October 11, 2012, Defendant filed and served a Request for
16 Statement of Decision. The Court has not entered judgment in this matter and any consideration
17 of attorney fees as costs is untimely.

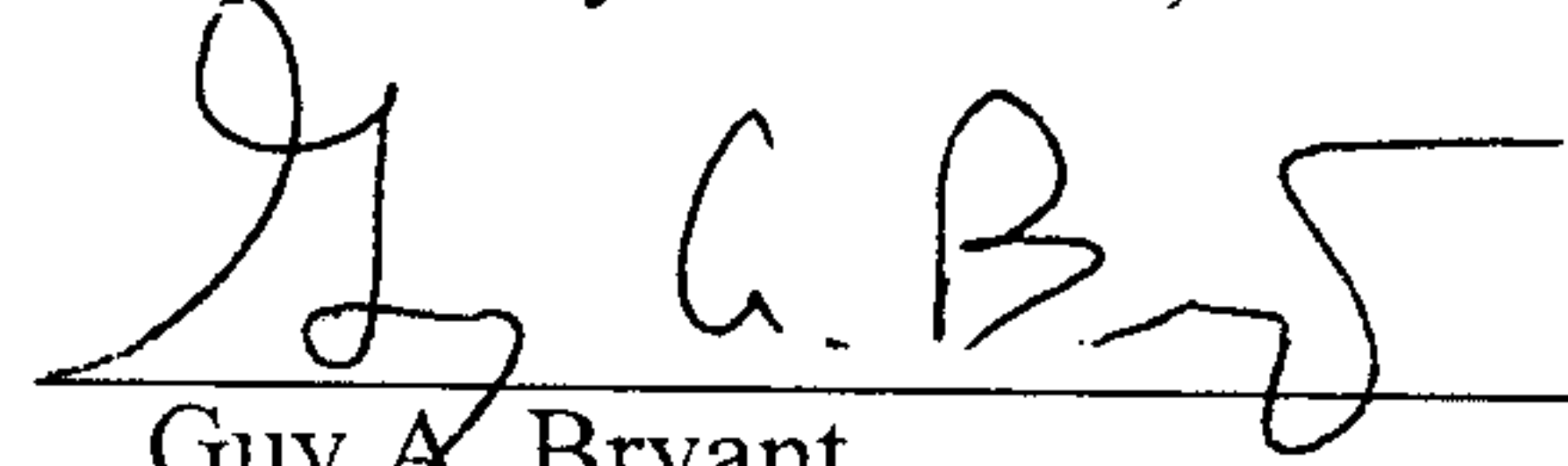
18 4. Noticed Motion Required If Attorney Fees Are Costs.

19 Despite California Code of Civil Procedure section 1033.5, statutes authorizing fee
20 awards prescribe a noticed motion procedure (e.g., CCP § 1021.5). These specific statutes prevail
21 over the generalized procedures set forth in Section 1033.5. For example, a noticed motion is
22 required whenever the court is required to determine “entitlement” to fees (e.g., prevailing party
23 determinations) or to “fix the amount of fees” (e.g., to determine a “reasonable fee”). (Cal. Rules
24 of Court, Rule 3.1702.)
25

1 In general, statutory attorney fees are determined by the court pursuant to the "lodestar"
2 method. (*Serano v. Priest* (1977) 20 Cal.3d 25, at 48.) However, in class action cases the courts
3 have developed two methods for calculating attorney fees- the lodestar method and the
4 "percentage of recovery" method. (See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th
5 224, at 254.) Regardless of the method chosen in this case, the Court will be required to
6 determine both the entitlement to fees and which fees are reasonable. As a result, Rule 3.1702
7 requires that Plaintiffs be required to submit a noticed motion in order to recover any potential
8 attorney fees.

9 Dated this 19th day of October, 2012.

10 Respectfully Submitted,

11 

12 Guy A. Bryant
13 Bryant & Brown
14 Attorney for Defendant