



ps

1 DAVID A. ROSENFELD, Bar No. 058163  
 2 CAREN P. SENCER, Bar No. 233488  
 3 LISL R. DUNCAN, Bar No. 261875  
 4 WEINBERG, ROGER & ROSENFELD  
 5 A Professional Corporation  
 1001 Marina Village Parkway, Suite 200  
 Alameda, California 94501  
 Telephone (510) 337-1001  
 Fax (510) 337-1023

**FILED**  
**ALAMEDA COUNTY**

FEB 08 2012

CLERK OF THE SUPERIOR COURT  
*[Signature]*  
 Deputy

6 Attorneys for Plaintiffs  
 7 LAVON GODFREY and GARY GILBERT

**ORIGINAL**

8 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,

Case No. RG08379099

**PLAINTIFFS' MOTION IN LIMINE  
 FOR AN ORDER EXCLUDING  
 WITNESSES AND EVIDENCE**

12 Plaintiffs,

13 v.

Date: February 9, 2012, Pretrial Conf.  
 Time: 3:00 p.m.  
 Dept.: 20  
 Judge: Hon. Robert B. Freedman

14 OAKLAND PORT SERVICES CORP. d/b/a  
 15 AB TRUCKING, and DOES 1 through 20,  
 inclusive,

Trial Date: February 14, 2012

16 Defendants.

**FAXED**

18 TO DEFENDANT AND ALL ATTORNEYS OF RECORD:

19 Plaintiffs Lavon Godfrey and Gary Gilbert ("Plaintiffs") hereby move the Court for an  
 20 Order excluding any witnesses or exhibits offered by Defendant AB Trucking at trial and  
 21 preventing any mention of the excluded witnesses and exhibits.  
 22

23 **I. INTRODUCTION**

24 Plaintiffs Lavon Godfrey and Gary Gilbert ("Plaintiffs") hereby move the Court for an  
 25 Order excluding any witnesses or exhibits offered by Defendant at trial and preventing any  
 26 mention of the excluded witnesses and exhibits, as any witness list, index of exhibits, or copies of  
 27 exhibits would be untimely in violation of Local Rules of the Superior Court of the State of  
 28 California, Alameda County ("Local Rules"), Rule 3.35(b) and (f).

1 Plaintiffs would be unduly prejudiced if Defendant were permitted to disregard the Court's  
2 rules. Defendant made no request to be exempted from meeting the requirements set forth in  
3 Local Rule 3.35. Defendant has not been excused from meeting the requirements set forth in  
4 Local Rule 3.35. Defendant would be at an unfair advantage should it be permitted to present  
5 witnesses and exhibits at trial that it was obligated to disclose prior to the pretrial conference  
6 because it will have used Plaintiffs' properly disclosed witness list and exhibits to formulate its  
7 trial strategy.<sup>1</sup>

8 In addition, Plaintiffs move the Court for an Order specifically excluding Defendant's  
9 proposed Exhibit 1, the Declaration of Bill Aboudi, on the grounds of hearsay; Exhibits 2 and 3  
10 on the grounds that they were not produced in response to Plaintiffs' discovery or supplemental  
11 discovery requests and are prejudicial; and Exhibits 4, 5, 6 and 7, excerpts from the deposition  
12 testimony of Bill Aboudi, David Blyth, Jose Luis Navarro and Jovi Aboudi, on the grounds that  
13 Defendant has made no showing that these individuals are (1) "unavailable" at the time of trial,  
14 (2) reside more than 150 miles from the courthouse, or (3) subject to other "exceptional  
15 circumstances." (See California Code of Civil Procedure ("CCP") §2025.620.)

## 16 II. STATEMENT OF CASE

17 This is a wage and hour class action suit brought by two former drivers of Defendant AB  
18 Trucking. The operative class action complaint in the instant action (Second Amended  
19 Complaint, filed September 20, 2010, hereafter "Complaint") contains causes of action for 1)  
20 Unfair Business Practices (Business & Professions Code §§17200, et seq., "UCL"), 2) Failure to  
21 Pay for All Hours Worked (Labor Code §§510, 1182.12, and 1194; IWC Wage Order No. 9, §4),  
22 3) Failure to Pay for Any Hours Worked Due to Misclassification of Employment Status (Labor  
23 Code §§510, 1182.12 and 1194; IWC Wage Order No. 9, §40, 4) Failure to Pay Overtime (Labor  
24 Code §§510 and 1194; IWC Wage Order No. 9, §3), 5) Failure to Pay Living Wage (Oakland  
25 City Charter §728) ("OLW"), 6) Failure to Provide Meal and/or Rest Periods (Labor Code

26  
27 <sup>1</sup> The pretrial conference on November 10, 2011 was held with both parties appearing. All deadlines triggered by  
28 Local Rule 3.35 consequently came and went. *Subsequently*, the trial date, previously set for November 29, 2011  
was continued. (See the Court's Order of November 16, 2011 and its Order Granting Trial Continuance of December  
2, 2011; Duncan Decl. at ¶¶ 2, 5.)

1 §§226.7 and 512; IWC Wage Order No. 9), 7) Failure to Pay Wages Owing at Discharge or  
2 Quitting (Labor Code §§201, 202 and 203), and 8) Failure to Provide Accurate Itemized Wage  
3 Statements (Labor Code §226). Plaintiffs are truck drivers certified as class representatives of the  
4 Class and Subclasses. Plaintiffs seek to recover any and all wages due and applicable penalties  
5 on behalf of themselves and the Class. Plaintiffs also seek the difference between the Living  
6 Wage, and/or the overtime rate, and the lower wage rate paid for the four (4) years prior to the  
7 filing of the Complaint, for themselves and the Class. Plaintiffs request treble damages pursuant  
8 to the OLW, costs of litigation and attorneys' fees.

9 **III. STATEMENT OF FACTS**

10 The trial in this matter was scheduled to begin November 29, 2011. As a result, the  
11 pretrial conference in this matter was scheduled for November 10, 2011. (See Declaration of Lisl  
12 R. Duncan in support of motion in limine for an order excluding witnesses and evidence  
13 ("Duncan Dec.") at ¶ 2.) The Court set the above trial date on February 4, 2011 at a Case  
14 Management Conference ordering that "a Trial Management Conference is scheduled for  
15 11/10/11 at 3:00 p.m. by which date all documents pursuant to Local Rule 3.35 shall be filed and  
16 served with a hard courtesy copy sent to Dept. 20."

17 Class counsel did not receive a witness list from Defendant by November 7, 2011.<sup>2</sup> For  
18 the first time, a "witness list" was personally served upon class counsel on February 6, 2012.  
19 (See Local Rule 3.35(f); Duncan Dec. at ¶¶ 3, 6.)

20 Class counsel did not receive an index of exhibits and/or copies of exhibits from  
21 Defendant by November 7, 2011. (See Local Rule 3.35(b); Duncan Decl. ¶ 4.) Plaintiffs  
22 received for the first time an "index of exhibits" from Defendant on February 6, 2012.

23 To date, Defendant has not produced Plaintiffs a copy of its proposed exhibits in one set  
24 with the index of exhibits. (Duncan Dec. ¶¶ 7, 8.)

25 Defendant has not complied with the rules of this Court. By contrast, class counsel has  
26 gone to great lengths to comply with the rules and provide notice to Defendant.

27 //

28 <sup>2</sup> Three court days before the pretrial conference was November 7, 2011. (See Local Rule 3.35(b) and (f).)

1 On Monday, November 7, 2011 at approximately 4:00 p.m. attorney for the Class, Lisl  
2 Duncan, exchanged Plaintiffs' index of exhibits and copies of exhibits (hundreds of pages) with  
3 Mr. Aboudi<sup>3</sup> via email. (Duncan Decl. at ¶ 9 and Exhibit A.) Ms. Duncan received an auto-  
4 response to the email, which stated Mr. Aboudi was out of the office. On November 7 at  
5 approximately 5:00 p.m., Ms. Duncan left a voicemail for Mr. Aboudi asking him to call to meet  
6 and confer regarding exhibits and the statement of the case. Ms. Duncan left her cell phone  
7 number, advised Mr. Aboudi he could reach Ms. Sencer or Mr. Rosenfeld on the office telephone  
8 number, and suggested he send an email with a time he was available to have a conversation.  
9 (*Id.*)

10 Class counsel also caused to be personally served on defense counsel, Mr. Aboudi,  
11 Plaintiffs' witness list at approximately 4:20 p.m. on November 7. This witness list was also  
12 delivered to defense counsel by facsimile at 2:38 p.m. (Duncan Decl. at ¶ 10 and Exhibit B.) Ms.  
13 Duncan additionally copied Mr. Aboudi on an email to the Court sent at approximately 4:00 p.m.  
14 on November 7 regarding motions in limine deadlines. (Duncan Decl. at ¶ 11.)

15 Class counsel received no response to the above-referenced communications, no other  
16 correspondence from Mr. Aboudi, and nothing from any other counsel for Defendant, until  
17 approximately 1:00 p.m. on November 9, 2011 when Mr. Aboudi left Ms. Duncan a voicemail at  
18 her office. (Duncan Decl. at ¶ 12.) Mr. Rosenfeld and Ms. Sencer called Mr. Aboudi at 3:00p.m.  
19 on November 9 and left a voicemail, but received no call in response from Mr. Aboudi. (*Id.*)

20 Defendant also failed to meet and confer regarding the brief, non-argumentative statement  
21 of the case required by Local Rule 3.35(h), though class counsel mentioned a wish to discuss this  
22 statement on the voicemail left for Mr. Aboudi on November 7. (Duncan Decl. at ¶ 13.)

23 The only information provided by Defendant to class counsel leading up to the pretrial  
24 conference on November 10, 2011, was a Notice to Attend and Produce Documents at Trial,  
25 which, according to the proof of service, Defendant served via mail and facsimile on November  
26 9, 2011. (Duncan Decl. at ¶ 14.) Pursuant to California Code of Civil Procedure sections 1987(c)

27  
28 <sup>3</sup> The Court is familiar with the fact that Mr. Jay Aboudi was counsel for Defendant until Mr. Bryant substituted in on  
November 23, 2011, but Plaintiffs note this for the record.

1 and 1013(a), any notice to attend if documents are requested was required to be served November  
2 4, 2011 if sent by mail, or by November 9, 2011 if served by hand. Defendant's untimely Notice  
3 to Attend and Produce Documents at Trial requested that originals and copies of depositions in  
4 the matter, originals and copies of discovery in the matter, and the original and copies of the  
5 deposition of William Aboudi be produced. (Duncan Decl. at ¶ 14 at Exhibit C.)

6 Current defense counsel did send a Trial Management Plan listing witnesses and exhibits  
7 it intends to produce at trial on January 31, 2012, though the exhibits listed are not identical to  
8 those on the "Exhibit List." Defendant also personally served on Plaintiffs Defendant's Witness  
9 List and Defendant's Exhibit List on February 6, 2012. However, Defendant did not produce any  
10 copies of proposed exhibits, nor did it identify the documents it intends to use with any  
11 particularity.<sup>4</sup> (Duncan Decl. at ¶ 15.) Defendant's Exhibit List sets out Exhibits 1-7, to which  
12 Plaintiffs object by this motion in limine as set forth below.

#### 13 IV. ARGUMENT

##### 14 A. **DEFENDANT FAILED TO COMPLY WITH LOCAL RULE 3.35, STANDING 15 PRETRIAL ORDERS**

16 The crux of Plaintiffs' argument is simple. Defendant failed to comply with Local Rule  
17 3.35. Local Rule 3.35(b), Exhibits, provides: "Failure to disclose or exchange a copy of any  
18 exhibit may result in exclusion at trial." The rule further provides in Subsection (n): "In the  
19 discretion of the trial judge, the consequences of noncompliance with an order made under this  
20 rule may include imposition of any sanction or order authorized by law including, without  
21 limitation, restricting evidence ... excluding an exhibit, precluding the testimony of a witness ..."  
22 This Court would be well-within its authority to preclude Defendant from producing evidence and  
23 witnesses at trial.

##### 24 B. **DEFENDANT'S NONCOMPLIANCE IS PREJUDICIAL TO THE CLASS**

25 Plaintiffs have already suffered prejudice because Defendant has had Plaintiffs' witness  
26 list and proposed exhibits for months. Plaintiffs will suffer prejudice should Defendant be

27 <sup>4</sup> Defendant cross-references to documents filed in support of its motion to decertify the class, but it does not give  
28 Plaintiffs separate copies, nor does it identify by bates stamp numbers, for example, the "payroll records" described  
in its Trial Management Plan that it apparently intends to use as exhibits.

1 permitted to call witnesses that it was required to disclose under Local Rule 3.35, yet failed to  
2 disclose. Defendant will essentially be free, because it already has had well-over *90 days* to  
3 review and consider Plaintiffs' witness list, to address what it anticipates Plaintiffs' witnesses will  
4 testify about in its initial presentation at trial. This will result in an undue advantage for  
5 Defendant, one improperly gained through its failure to comply with the Local Rules. Again,  
6 Plaintiffs were bound to follow the Court's rules and produce a witness list, an index of exhibits,  
7 and copies of exhibits because the trial date was not continued until *after* November 7, 2011, the  
8 date by which Plaintiffs were obligated to make the exchange.

9 Defendant should not be permitted to produce exhibits that it would not have otherwise  
10 produced but for its ability to view Plaintiffs' exhibits first. For instance, Plaintiffs submitted  
11 photographs obtained years after responding to Defendant's discovery requests. Because  
12 Defendant did not submit a supplemental request for production of documents, Defendant would  
13 not have seen these photographs until after it had already disclosed its own exhibits. As  
14 Defendant has failed to comply with Local Rules, put in place to foster fairness in the process  
15 leading up to trial, it has had the opportunity to review Plaintiffs' exhibits prior to producing its  
16 own. Defendant realizes that Plaintiffs are limited to the exhibits produced, as nothing in the  
17 Local Rules provides that if the trial date is continued (after the deadlines originally imposed by  
18 Local 3.35 have passed) so too do all deadlines start anew.<sup>5</sup> Defendant may even have noticed  
19 something that Plaintiffs "missed" and so can take documents out of its own exhibits that it would  
20 have otherwise included in order to be safe.

21 The harm is already done and difficult to fix. As a result, Defendant should be barred  
22 from presenting evidence and witnesses it failed to properly and timely disclose.

23 //

24 //

25 //

26

27 <sup>5</sup> While Plaintiffs' recognize the Court's ultimate authority to exclude exhibits and preclude the testimony of  
28 witnesses under Local Rule 3.35, there is no doubt that there is no provision providing a party gets a "second bite" at  
meeting the requirements of Local Rule 3.35 if a trial date is later continued, because such a provision would have  
the precise unfair and prejudicial result Defendant seeks here.

1 **C. DEFENDANT FAILED TO REQUEST RELIEF FROM THE COURT PRIOR TO,**  
2 **OR AT THE TIME OF, ITS NONCOMPLIANCE AND HAS PROVIDED THE**  
3 **COURT WITH NO NEW CIRCUMSTANCES THAT WOULD WARRANT**  
4 **RELIEF NOW**

5 On top of its disregard for the Court's rules as described above, Defendant has never  
6 requested relief from the Court. Defendant did not request relief prior to the passage of the  
7 deadlines set by Local Rule 3.35(b) and (f); Defendant did not request relief at the pretrial  
8 conference on November 10, 2011; nor did Defendant make such a request at the case  
9 management conference on December 2, 2011.

10 To date, Defendant has offered no legitimate reason that it should be immune from  
11 meeting the requirements of Local Rules. Defendant addresses these issues tangentially in its  
12 Opposition to Plaintiffs' Motion to Quash Defendant's Notice to Attend Trial and Produce  
13 Documents, which Plaintiffs received via personal service on February 6, 2012, however,  
14 Defendant does not provide any reason that would make it just for Defendant to be permitted to  
15 ignore Local Rule 3.35. Primarily, defense counsel appears to argue that it has been  
16 inconvenienced by prior defense counsel, Mr. Aboudi's, medical condition. But what current  
17 defense counsel fails to address beyond mere acknowledgment in its presentation of "B. Unique  
18 Circumstances Require Denial of Motion," is the fact that its office was well-aware of Mr.  
19 Aboudi's condition, and any potential obstacles that might consequently arise from that condition,  
20 at the time it chose to substitute in as defense counsel. Current defense counsel chose to take this  
21 case despite these well-known circumstances.<sup>6</sup> Current defense counsel was also well-aware  
22 from its first meeting with the Court on December 2, 2011, that no further continuances would be  
23 granted in this case.<sup>7</sup> Defendant recognizes as much in a footnote on page 3 of its Opposition to  
24 Plaintiffs' Motion to Quash: "the Court's calendar and prior rulings must take precedent." Yet,

25 <sup>6</sup> Current defense counsel took on this case despite his knowledge of another trial he would be handling in January  
26 2012. This is not a new or excusable reason for non-compliance.

27 <sup>7</sup> When the Court made this decision, no doubt in light of *all* circumstances of this case including its filing date in  
28 early 2008 or the setting of the November 2011 trial date nearly a year earlier in February 2011, it was already aware  
of Mr. Aboudi's condition - the same factor current defense counsel now attempts to use as a new justification for  
producing witnesses and exhibits, despite Defendant's non-compliance with Local Rule 3.35. Plaintiffs also note for  
the record that Defendant is correct that it offered to make documents already produced in discovery available for  
copying, however, Plaintiffs did not offer to split the cost, but rather offered that Defendant could pay to have copies  
made if it wished.

1 Defendant has produced no new information to the Court that would warrant a granting of relief  
2 from deadlines under Local Rule 3.35 with which Defendant failed to comply.

3 **D. DEFENDANT’S UNTIMELY PROPOSED EXHIBITS ARE NOT ADMISSIBLE**

4 In addition, the proposed exhibits on Defendant’s Exhibit List are independently  
5 inadmissible. First, Defendant’s Exhibit 1, the Declaration of William (“Bill”) I. Aboudi dated  
6 January 12, 2012, should be excluded from trial on the grounds that it is hearsay. (Evid. Code §  
7 1200.) Defendant has presented no showing of an exception to the hearsay rule that would permit  
8 the admission of this declaration.

9 Second, Defendant’s Exhibits 2 and 3 should be excluded because these documents were  
10 not produced in response to Plaintiffs’ supplemental discovery requests served on Defendant on  
11 September 16, 2011. (See Duncan Decl. ¶ 16 and Exhibits D1 and D2.) Allowing Defendant to  
12 disregard discovery rules causes prejudice to the Class because it has denied them of their right to  
13 review and consider these documents and take any action accordingly.

14 Third, Defendant’s Exhibits 4-7 should be excluded from trial on the grounds that these  
15 depositions are hearsay (Evid. Code § 1200) and inadmissible under CCP section 2025.620.  
16 Deposition testimony is admissible *against* any party present at the deposition to the same extent  
17 the deponent’s live testimony would be admissible under the rules of evidence if it is the  
18 deposition of an *adverse party or agent, another witness* who is “unavailable” at the time of trial  
19 – or meets several other criteria warranting an exception set by statute, or *a physician or expert’s*  
20 video deposition. (See CCP §2025.620(a),(b),(c) and (d).) It is improper for Defendant to rely  
21 on its proposed Exhibits 4-7. Exhibit 4 (deposition of Bill Aboudi) and Exhibit 7 (deposition of  
22 Jovi Aboudi) are depositions of agents of the Defendant corporation as Bill Aboudi is an officer  
23 and co-owner of the company and Jovi Aboudi is also a co-owner. In any event, neither Bill  
24 Aboudi or Jovi Aboudi are “adverse parties or agents.” Likewise, Exhibit 5 (deposition of opt-out  
25 David Blyth) and Exhibit 6 (deposition of opt-out Jose Luis Navarro), are not depositions of  
26 parties or agents “adverse” to Defendant.

27 Finally, to the extent Defendant intends to offer “employee payroll records that have been  
28 produced during discovery,” as referenced in the “Exhibit List” section of Defendant’s Trial



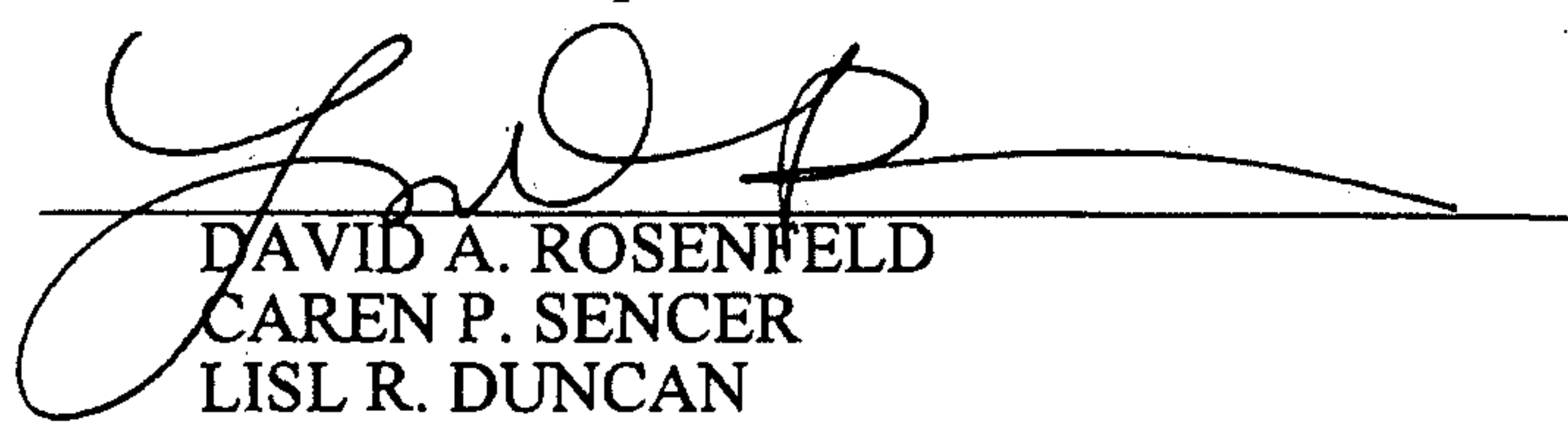
1 Management Plan at page 9, it should be precluded. Defendant has not referenced these payroll  
2 records with any particularity. There were hundreds of pages exchanged in discovery, the  
3 majority of which were payroll records. Local Rule 3.35 requires that the index of exhibits "must  
4 identify as separate exhibits each discrete document or item to be offered at trial and the index  
5 must include a brief description of each exhibit sufficient to distinguish it from the other  
6 exhibits." (LR 3.35(b).) The Class would be prejudiced by permitting Defendant to rely on  
7 documents not identified prior to the trial management conference.

8 **V. CONCLUSION**

9 For the reasons set forth above, Plaintiffs request that the Court grant their motion and  
10 preclude Defendant from presenting witnesses and exhibits, including its proposed Exhibits 1-7  
11 and "payroll records," at trial, which it was obligated to disclose on November 7, 2011 prior to  
12 the pretrial conference pursuant to Local Rule 3.35.

13 Dated: February 8, 2012

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

14  
15  
16 By:   
DAVID A. ROSENFELD  
CAREN P. SENCER  
LISL R. DUNCAN

Attorneys for Plaintiffs  
LAVON GODFREY and GARY GILBERT

17  
18  
19 118212/654754

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

**PROOF OF SERVICE  
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 8, 2012, I served the following documents in the manner described below:


**PLAINTIFFS' MOTION IN LIMINE FOR AN ORDER EXCLUDING WITNESSES AND EVIDENCE**

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.
- (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.
- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jkoffler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Guy A. Bryant  
Bryant & Brown  
476 3rd Street  
Oakland, CA 94607  
(510) 836-7564 (fax)  
guybryant@bryantbrownlaw.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 8, 2012, at Alameda, California.

  
Jennifer Koffler

118212/651241