




FILED
ALAMEDA COUNTY

OCT 02 2012

CLERK OF THE SUPERIOR COURT
By  Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY, ET AL

Plaintiffs,

v.

OAKLAND PORT SERVICES CORP.
etc. , et al.,

Defendants.

No. RG08379099

NOTICE OF INTENDED
DECISION AND ORDER

The above entitled action was tried to the court over several days as reflected in the minutes of the court followed by post trial briefing. For the purposes of this Notice of Intended Decision and Order ("NOID") the court will not recount in detail the procedural history of this matter. It is sufficient for these purposes to

note that after an arduous and convoluted series of proceedings¹ and various amendments to the operative complaint the matter proceeded to a trial before the court. At trial the Second Amended Complaint filed on September 10, 2010 was the operative complaint. A class was certified by the court's order of December 3, 2012. The court certified a class consisting of "All drivers who performed work for Defendant out of its Oakland, California facility from the period of March 28, 2004 through the date of notice to the class ("Drivers")². The subject order also certified five subclasses, namely:

1. All Drivers who were not paid for all hours worked in any work week;
2. All Drivers who were misclassified as "non-employee trainees" and as a result were not paid for any hours worked;
3. All Drivers who were not paid for hours worked over eight in a day and/or forty in a week at an overtime rate of pay³;
4. All Drivers who were paid less than the Oakland Living Wage ("OLW") for any hour worked; and,

¹ Defendant makes reference to family related issues in its post-trial brief. While no doubt important to the individuals involved, none of these matters are relevant to the issues at trial except as the same may have bearing on evaluating the credibility of witnesses.

² Class notice was given on March 15, 2011 thus constituting the end of the class period.

³ Plaintiffs' overtime claims embraced by the Fourth Cause of Action in the operative complaint were dismissed by Plaintiffs at trial, thus eliminating this subclass.

5. All Drivers who were not provided rest breaks and/or meal periods as required by California Law⁴.

On the eve of trial, Defendant's new counsel filed a motion to decertify the class. The motion to decertify was denied. The court now finds and orders as follows:

The issues⁵ before the court and the court's conclusions⁶ are summarized as follows⁷:

- a. Meal Periods and Rest Breaks: The class⁸ presented substantial and persuasive evidence that class members were routinely and consistently precluded by the Defendant from taking meal periods and rest breaks. Under the authority of *Brinker*, it is clear that Defendant did not relieve class members of all duties during the periods that rest or meal breaks

⁴ The court notes that *Brinker v. Superior Court* 53 Cal. 4th 1004 ("Brinker") was decided during the post trial briefing period and is now final.

⁵ These issues are addressed in the same sequence as in the parties' post trial briefing.

⁶ As noted in the "Orders" portion of this NOID, below, the NOID will serve as a Statement of Decision unless a party requests a formal Statement of Decision. Thus the NOID does not purport to contain the level of detail that may be appropriate for a formal Statement of Decision.

⁷ The court notes that Defendants' trial counsel described this matter as an example of the truism that "no good deed goes unpunished." The comment was taken to refer to the fact that Mr. Aboudi, based on his own life experiences, had extended training and employment opportunities to many class members whose own life experiences might be obstacles to employment in the larger job market. The effort is commendable, but does not obviate the need to comply with the otherwise applicable law.

⁸ The terms "class" and "plaintiffs" are used interchangeably herein, unless otherwise specified.

could be taken. This was particularly evident from the largely⁹ uncontroverted testimony that drivers were routinely "stuck" in lines of trucks entering the Port of Oakland and within the Port. Runs to locations outside the Port likewise involved time demands of the defendant (or defendant's customers) that were not conducive to taking breaks.

- b. Failure to pay for all hours worked: Likewise as to this issue, Plaintiffs' evidence was persuasive that Defendant consistently failed to pay for all hours worked by deducting one hour per day for each employee. Both the Defendant's own records and the testimony of Ms. Aboudi confirmed this practice in violation of Wage Order 9(4)B. The evidence is in conflict as to when, if at all, this practice ceased. Defendant's failure to keep adequate and accurate records for the period in question pursuant to Wage Order 9(7) compels the court to construe the evidence against Defendant. Plaintiffs shall recover all sums claimed for the failure to pay for all hours worked¹⁰.

⁹ The court disagrees with Plaintiffs' argument in their opening post-trial brief that the testimony of non-class members on this topic is irrelevant because they are not class members. These individuals are still percipient witnesses whose testimony is admissible, subject, as is all testimony, to the trier of fact's determination of weight and credibility.

¹⁰ The rate of pay, as affected by the OLW is addressed separately below.

- c. Failure to pay employees classified as trainees¹¹: Likewise Plaintiffs will prevail on this claim. Both the evidence and Plaintiffs' legal analysis are compelling.
- d. Claims Under The Oakland Living Wage Law: The applicability of the OLW to Defendant's operations and the effect on quantification of recovery by the class presents a more difficult issue. There is no question that Defendant meets some of the criteria for a Port Assisted Business ("PAB") within the meaning of the OLW (Section 728 of the Oakland City Charter) in terms of the activities and functions of Defendant's business. What is more directly disputed is whether the number of employees met the minimum requirements of Section 728 for relevant pay periods for the OLW to be applicable to the class¹². If the requisite minimum number of employees is not met, it is unnecessary for the court to address other disputed aspects of the applicability of the OLW to the class claims. Plaintiffs seek to satisfy the "head count" requirements by grouping together both drivers and employees of Defendant who worked in other operations; i.e. the fueling and weight scale business¹³. The court concludes that the fueling and scale

¹¹ This pertains to the second sub-class.

¹² The overall time period in dispute for applicability of the OLW is January 28, 2005 to February 10, 2006.

¹³ For the purposes of the NOID, the court does not address the conflicting evidence on this issue in detail. However, the fact that there were co-owners of the

employees may not be aggregated with the driver employees and that the OLW is not applicable to quantifying the recovery to which the class is otherwise entitled and other forms of relief under the OLW.

- e. Plaintiffs' UCL and Labor Code Claims: Given the court's conclusions regarding the foregoing issues, Plaintiffs are also entitled to recovery under Business & Professions Code Section 17200, et seq. and Labor Code Sections 201, 202, 203 and 226 for underpayment of wages due at termination, and erroneous wage statements.
- f. Damages and Restitution Computation: The court overrules Defendant's objections to Plaintiff's "Damage Model" to the extent that the same is based on the assertion that the witness who assembled the model was not qualified. As Plaintiffs correctly argue, Ms. Don's testimony was authorized by Evidence Code Section 1523 (d). However, due to the court's indicated conclusion that the OLW is not applicable, the recovery to be afforded Plaintiffs and the class will require revision as discussed below.
- g. Defendant's Preemption Defense: The court has considered and rejects the Defendant's preemption claim under the Federal Aviation Administration Authorization Act.

scale operations who did not have an ownership interest in the Defendant's trucking operations by whom class members were employed is a material factor in

Orders:

1. This Notice of Intended Decision will serve as a Statement of Decision unless any party timely submits a request for a Statement of Decision pursuant to Code of Civil Procedure Section 632 and California Rule of Court, Rule 3.1590.
2. With or without a request for a Statement of Decision, Plaintiff shall submit a supplemental memorandum setting forth the proposed recovery for the class with computations based on the court's conclusions in this NOID. The memorandum shall also include proposals for a claims administration process for the class and subclasses and a proposed form of judgment. The supplemental memorandum shall be filed and served within 10 days of the date of mailing of this NOID. Defendant shall have 10 days thereafter to file and serve any opposition memorandum. Any reply may be presented orally at the time of the hearing¹⁴. The parties are at liberty to bring any other procedural matters to the attention of the court that might usefully be addressed at the hearing set below.

the court's conclusion. Conversely, the court does not exclude those employees who worked, at least in part, at Defendant's Vallejo location.

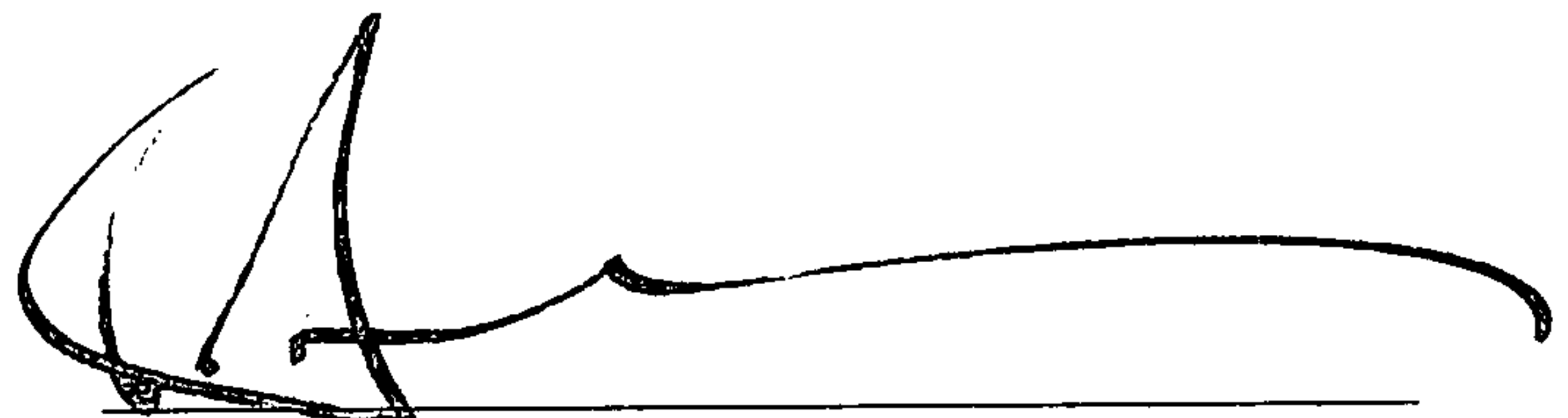
¹⁴ The court notes, anecdotally, that very few employment class actions proceed to trial, particularly those in which a class has been certified. The parties are encouraged to meet and confer regarding the possibility of a post trial resolution of this matter in light of these determinations, including the possibility of invoking the assistance of a mediator.

3. The above entitled action is placed on the court's calendar for a hearing as to the computation of the proposed class recovery and form of the proposed judgment and class claims process on November 09, 2012 at 2:00 p.m. This date may be modified by subsequent order if a Statement of Decision is requested.
4. The Clerk of Court shall serve an endorsed filed copy of this Notice of Intended Decision and Order on all parties of record with proof of service.

IT IS SO ORDERED.

Date

Oct 2, 2012



ROBERT B. FREEDMAN
Judge of the Superior Court

Superior Court of California, County of Alameda
Department 20, Administrative Building

Case Number RG08 379099

RE: NOTICE OF INTENDED DECISION AND ORDER

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

Executed on October 2, 2012

Executive Officer/Clerk of the Superior Court

By Reshma Mishra

Deputy Clerk



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