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OAKLAND PORT SERVICES CORP. d/b/a
AB TRUCKING, a California Corporation,

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all other similarly situated,

Plaintiffs,

vs.

OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, and DOES 1-20

Defendant.

Case No.: RG 08-379099

DEFENDANT'S OPENING POST TRIAL BRIEF

Action Filed: March 28, 2008
Date: May 11, 2012
Dept.: 20
Set for Trial: February 14, 2012
Before Honorable Judge Robert Freedman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

I. INTRODUCTION

OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, a California Corporation, (collectively hereinafter referred to as "AB Trucking" or "Defendant") hereby submits that Defendant has been the unfair recipient of overly zealous litigation during the past four (4) years. As a result, Defendant's owners/management have suffered major financial losses, the end of a marriage, and witnessed their oldest child suffer a psychological breakdown while acting as prior counsel of record in this litigation. Both the law and facts that have emerged during the course of the trial have definitively shown that the aggressive manner in which this case has been litigated was not warranted.

Specifically, the uncontroverted evidence at trial established:

1. Defendant is a small business employing less than 20 employees on an ongoing basis;

2. Defendant engages in interstate commerce with employees exempt from overtime pay and regulated by the Department of Transportation;

3. Defendant implements a policy to allow employees to take duty free breaks and 30 minute meal periods[1];

4. Defendant posts employee bulletins on-site including the IWC Wage Orders (See Industrial Welfare Commission Wage Order No. 9 (Defendant's Trial Exhibit B);

5. Defendant makes manual adjustments to employee pay when employees bring any failure to receive a lunch break to the attention of management.

As the Court is aware, the California Supreme Court finally issued its long awaited opinion in *Brinker v. Superior Court*, a case that had been on its docket since 2008. In what has

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[1] State law requires employers to make meal periods and paid rest breaks available to employees. Employers must provide employees who work more than five hours in one day with at least a 30-minute, off-duty meal period and an additional 30-minute meal period when employees work more than 10 hours in one day. (Labor Code § 512(a); Wage Order 9(11).)

generally been acknowledged as a major victory for California employers, the court issued clear rules on how and when meal and rest periods must be provided. In addition, the justices provided additional important comments on the standards to be applied by trial courts in considering motions for class certification in cases generally. (*Brinker Restaurant Corp. v. The Superior Court of San Diego County* No. S166350, California Supreme Court (April 12, 2012), hereafter "*Brinker*".)

II. Procedural History:

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

Since the original filing of the complaint the following has occurred:

A. Mr. William Aboudi Was Dismissed As A Defendant.

On June 6, 2008, Defendant Mr. Aboudi was dismissed from the lawsuit with out prejudice. As a result, any potential judgment obtained in this matter can not be enforced against Mr. Aboudi in his personal capacity.

B. In 2011 Complaint Was Granted Class Certification.

In 2011, the matter was granted class certification. The class is described as: 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 [March 15, 2011] ("Drivers").

C. Multi-Million Dollar Overtime Claim Was Dismissed During Trial.

During trial in February 2012, Plaintiffs dismissed the over-time claim.[2] Plaintiffs admit AB Trucking drivers and trainees have always been required to obtain a Class A commercial driver's license and follow the Department of Transportation ("DOT") Safety regulations due to the weight and size of the commercial vehicles they drive (Class 8), weight and size of the containers transported, and because of the various federal, state and Port of Oakland operational requirements commercial truck drivers must follow. Exempted from California overtime compensation requirements are "employees whose hours of service are regulated by . . . the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13."(IWC Wage Order, 9-2001, §3.)

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

Second, this admission supports Defendant's contention that the application of the over-time exemption was readily apparent at the time this lawsuit was filed, and therefore, the aggressive manner in which this case was litigated was unwarranted.

D. Plaintiffs Eliminated 5 Years Of OLW Liability (Nonsuit).

During trial in February 2012, Plaintiffs revised their claim to limit the Oakland Living Wage Ordinance ("OLW") liability period to January 28, 2005- February 10, 2006 (this represented an elimination of approximately 5 years of purported liability [i.e., alleged liability originally extended to March 15, 2011]). At the conclusion of Plaintiffs' case, Defendant orally

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[2] 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].

moved for a "***non-suit***" on the ground that not a single Plaintiff class member that testified had been employed by AB Trucking during the relevant liability period. (e.g., Ike Cooper – hired March 2008; Gary Gilbert- started training December 2008; Steve Wellemeyer – hired October 2007; Saga LLeweylan- hired October 2007; Gina Williams- hired 2007; Lavon Godfrey – employed December 2006- May 2007.)

A motion for nonsuit is like "demurrer" to a plaintiff's evidence. A nonsuit is proper only where interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of plaintiff a judgment for the defendant is required as a matter of law. The motion lies only if there is no substantial conflict in the evidence.

Here, it is undisputed that none of the testimony presented at trial was from a witness that worked during the stipulated OLW liability period. Thus, Representative Plaintiffs standing to bring an action was never established by the evidence presented at trial. As a result, Plaintiffs have not met their burden of proof to establish that they were directly impacted by any purported OLW violation or that Representative Plaintiffs are representative of the purported class with regard to the injury claimed. Defendant respectfully requests that its non-suit motion be granted in accordance with California Code of Civil Procedure 581(c)(a).[3]

III. ARGUMENT

1. Brinker Decision Supports AB Trucking's Meal And Rest Period Policy.

a) The Brinker Decision Holding.

In a nutshell, the California Supreme Court ruled that:

The first meal period for an employee must only be "provided" and must begin before the end of the fifth hour of work. The second meal period must be "provided" before the end of 10 hours of

[3] 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.)

work. Meal periods are not required every five hours as the Plaintiffs contend in this case. (*Brinker* at pp. 20-23.)

Similarly, employee rest periods must be "permitted" for every four hours of work or major fraction of four hours, which the court determined to be more than two hours. This means that for any employee working longer than 3½ hours in a workday, the following number of 10-minute rest breaks must be provided:

Two hours of work or less = No ten minute break required

Over two hours of work to six hours = One ten minute break required

Over six hours to 10 hours = Two ten minute breaks required

Over 10 hours to 14 hours = Three ten minute breaks required

The Brinker Court also ruled that there is no requirement that a ten minute rest period be provided before the first meal period as had been claimed by the Plaintiffs in this case. (*Brinker* at pp. 20-23.)

b) Employer Not Required to Ensure No Work Performed During Breaks.

The Brinker Court explained what it means to "provide" a meal period under California law. In applying the clearly stated requirement of the law, and common sense, the court concluded that "an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." (*Brinker* at p. 36.)

c) Employees Are Responsible For Documenting Breaks Taken.

The Brinker Court concluded that employees must accurately record the time they begin and end each meal period each day. If an employee finds that, due to work requirements, he or she has not been able to take one or more required daily meal periods, then the employee must

report such on his or her time record. The employee will be paid for the time worked and one hour of premium pay for that day.

Employees who work over 3½ hours in any workday are authorized and permitted to take net 10-minute paid rest breaks as set forth above. If an employee finds that, due to work requirements, he or she has not been able to take one or more required rest breaks, then the employee must report such on his or her time record. The employee will be paid one hour of premium pay for that day. (*Id.*)

d) Trial Testimony Regarding Rest And Meal Breaks.

The *Brinker* decision in very relevant terms to the case at bar articulated the following:

"Proof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay; employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability. On the other hand, an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963; see also *Jaimez v. Daiohs USA, Inc.*, *supra*, 181 Cal.App.4th at pp. 1304-1305 [proof of common scheduling policy that made taking breaks extremely difficult would show violation]; *Dilts v. Penske Logistics, LLC* (S.D.Cal. 2010) 267 F.R.D. 625, 638 [indicating informal anti-meal-break policy "enforced through „ridicule" or „reprimand" " would be illegal].) The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks. To summarize: An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (Emphasis added; *Brinker* at p. 36; See also Wage Order No. 9 (11) [Transportation Industry].)[4]

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[4] Wage Order No. 9(11)(c) provides in part that "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved from duty. (See also *Brinker* at pp. 28-30 for a brief discussion of "on duty" meal periods.) A compelling argument can be made that the trucking industry and AB Trucking specifically, at times can not relieve a driver from all responsibility from the commercial vehicle due to safety or Port of Oakland and DOT requirements that are integral to the nature of the work and beyond AB Trucking's control. However, testimony admitted at trial established that drivers were permitted to leave trucks unattended, and if they desired, drivers could use their trucks to drive to restaurants or other places during breaks and meal periods with out penalty.

The testimony at trial established that AB Trucking has always had a policy to encourage its employees to take all of their breaks and meal periods. This policy was communicated to all employees and employees were not pressured to forego breaks or meal periods. (See Defendant's Trial Exhibit B [2006 IWC Wage Order 9 notice] admitted into evidence.)

David Blyth

Mr. Blyth testified that AB Trucking made log books available to truck drivers so drivers could log their hours behind the wheel pursuant to DOT regulations and document meal and rest breaks in accordance with the law. (See June 10, 2011 deposition of former AB Trucking truck driver David Blyth admitted as Defendant's Trial Exhibit N.)[5] Mr. Blyth testified at length that he was not prevented from taking rest breaks and meal breaks. Specifically, Mr. Blyth testified to the following among other issues relevant to meal periods and breaks: 1) he was employed with AB Trucking from 2008- 2009 and was aware of AB Trucking's policy to encourage employees to take meal breaks and rest periods; 2) dispatchers would contact him on occasion and remind him to take a break, 3) he took breaks "when ever he felt like it," 4) he could take breaks "with the engine turned off" and away from his vehicle, and 5) there were "at least 10" meal trucks available along the side of the road near the Port to obtain hot food. (See Defendant's Trial Exhibit N at pp. 23-32.) Mr. Blyth's testimony is very credible as he testified at his deposition that the reason he left AB Trucking was because Mr. Aboudi fired him. (*Id.* at p. 12.)

Jose Luis Navarro

Specifically, Mr. Navarro, with the use of an interpreter, testified to the following issues relevant to meal periods and breaks: 1) he had been employed with AB Trucking since 2004 and

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[5] The June 10, 2011 deposition of former AB Trucking truck driver David Blyth was admitted as Defendant's Trial Exhibit N. The portions of Exhibit N designated into the trial record are pp. 12, 23-32.

was aware of the AB Trucking policy encouraging employees to take meal breaks and rest periods from communications he received from the dispatcher and Mr. Aboudi; 2) the dispatcher would contact him on occasion and remind him to take a break, 3) during meal periods he was free "to do what ever he wanted" and he was never interrupted during his breaks by the office, 4) he could take breaks "with the engine turned off" and away from his vehicle, and 5) That he was able to eat meals even when he was stuck at the Port for 8 hours.[6]

Erik Gaines

Mr. Gaines testified that he had been employed with AB Trucking since 2004 and has acted as a trainer and driver. Mr. Gaines testified that he trained several of the Plaintiffs that testified at trial and that he was disappointed that the lawsuit had been brought. Mr. Gaines confirmed that the Wage Orders were posted on-site and that employees were shown how to take their breaks and meal periods. Mr. Gaines testified that employees were not discouraged or penalized for taking breaks.

Mr. Gaines testified that employees are not required to make a minimum number of truck runs a day and that dispatch goes out of the way to schedule delivery and pick-up runs in a manner that gives drivers plenty of time make appointments and stop if necessary for restroom or other breaks. Mr. Gaines testified that the reason all of the Plaintiffs that testified had a criminal record was because he was the one that convinced Mr. Aboudi to establish a training protocol to help ex-cons down on their luck to learn a new trade. Mr. Gaines testified that Plaintiffs Ike Cooper, Gary Gilbert, Steve Wellemeyer, Saga LLeweylan, Gina Williams, and Lavon Godfrey all had criminal records and were referred to AB Trucking as a result through different processes.

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[6] The June 13, 2011 deposition of AB Trucking truck driver Jose Luis Navarro was admitted as Defendant's Trial Exhibit O. The portions of Exhibit O designated into the trial record are pp. 20-28, 35.

Mr. Gaines specifically testified that AB Trucking made an accommodation with regard to Plaintiff Lavon Godfrey to no longer have her take on any long distant trips after she complained about her one and only long distant trip. Mr. Gaines also testified that the IWC wage orders were posted in the AB Trucking office over the years either near the dispatch or on the door of the kitchen. Mr. Gaines also testified that drivers could leave their trucks unattended during breaks if they chose (when not subject to Port of Oakland rules) or use their trucks to drive to a restaurant or other places if they were on the road travelling without fear of reprisal. Lastly, Mr. Gaines explained that it was the Port of Oakland that would impose penalties on drivers for a violation of its rules.

James Francis

Mr. Francis testified at trial that he had been employed with AB Trucking for well over ten years. He too trained several of the Plaintiffs that testified at the trial. Mr. Francis (similar to Mr. Gaines) confirmed that the term "trainee" was developed as a result of the Port of Oakland. He testified that the Port would not let anyone on the premises unless they were designated a trainee. Mr. Francis testified that he had taken City Councilwoman Libby Schaaf to the Port as a "trainee" as well as reporters, T.V. personalities, etc. under the designation of trainee. Mr. Francis agreed with Mr. Gaines that the Port would impose penalties on drivers for any violation of its rules.

Mr. Francis testified that he had trained new drivers on how to take breaks and how to obtain meals. He testified that he always takes his meal break early before noon and has never been discouraged from doing so. He testified that there was no minimum number of trips a driver had to make and that appointments were made for drivers with the understanding they would need a cushion for traffic and other contingencies. Lastly, Mr. Francis explained that drivers

were not ridiculed or penalized for taking their breaks as the right to take breaks were posted in the AB Trucking office.

Mr. William Aboudi

Mr. Aboudi testified that the Port and most of AB Trucking's vendors follow a standard meal and break time schedule: 10 minute breaks at 10:00 a.m. and 3:00 p.m., 1 hour lunch at 12:00 noon. During these break times the Port completely shuts down and no loading or unloading of trucks can occur. Mr. Aboudi explained that AB Trucking drivers generally coordinate their breaks with the break periods referenced above and they take advantage of the various restroom stations and meal trucks that are often located around company warehouses and similar areas surrounding the Port. For example, Mr. Aboudi testified that on Maritime Street in Oakland, there are always a minimum of three meal trucks strategically stationed along the road to be conveniently accessible to truck drivers waiting in line to enter or exit Port entrances. In addition, some truck drivers choose to bring their lunches and snacks from home.

In his role as president of AB Trucking, Mr. Aboudi testified that he personally reviews time sheets and dispatch assignments of all truck drivers and trainees. He also signs off on all payments to employees. He testified that he would instruct Ms. Aboudi on occasion to adjust payroll to not deduct payment for meal or rest breaks when appropriate. He testified he would make sure that appropriate adjustments were made to an employee's pay and that the employee received the adjusted payment.

Mr. Aboudi further testified that AB Trucking always had a policy with regard to meal periods that was communicated to all truck drivers and posted. He explained that "we expected all drivers to take their meal break, one hour, every shift." This policy was explained at the "time

of hire" and during the course of employment on as needed basis.[7] He testified that on occasion some new drivers are given their schedules for the day but most of the time drivers have full control over when and how to take their breaks because they are on the road and other locations away from the AB Trucking office. He testified that this is the process that has been followed through out the history of AB Trucking and that AB Trucking does not discourage drivers from taking break.

Ms. Jovi Aboudi

Jovi Aboudi (Payroll Officer for AB Trucking) testified that "TimeCalc" a payroll software program used by AB Trucking had an "automatic setting" for showing a 1 hour break deduction with regard to an employee's pay.[8] However, Ms. Aboudi testified that she would write notes manually on the payroll sheets she received if she "received instructions from Bill" about not deducting an employee's pay with regard to the hour lunch period. Ms. Aboudi specifically testified that if she received instructions from Bill (or other managers in the Oakland office) then she would not "deduct an hour break." Even under cross-examination Ms. Aboudi maintained that AB Trucking did not have an automatic policy of deducting an hour's pay for lunch. Ms. Aboudi testified that the time sheets were filled out by employees directly and that she would merely input manually the time noted on the time sheets and make changes that were noted on them. Ms. Aboudi testified that it has always been AB Trucking's policy to make adjustments to employee payroll and never deduct from an employee's pay check their meal breaks if that employee was entitled to be paid.

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[7] Mr. Aboudi testified and Ms. Aboudi confirmed that after 2008 AB Trucking just went ahead and paid all employees for the one hour meal period no matter what. Any meal break liability should end as of 2008.

[8] In very emotional testimony (often unable to hold back tears) Ms. Aboudi testified with conviction that JayGav was a separate entity and that she and one other JayGav employee performed less than 20% of Port related work.

Admissions of Plaintiffs Ike Cooper, Gary Gilbert, Steve Wellemeyer, Saga LLeweylan, Gina Williams, and Lavon Godfrey ("Plaintiffs")

a) All Plaintiffs admitted at trial that they had a conviction record.

b) All Plaintiffs admitted at trial that they benefitted from the training they received.

c) All Plaintiffs (except Ike Cooper) admitted at trial that they are currently no longer working as a truck driver.

d) All Plaintiffs admitted at trial that only Mr. Cooper and Mr. Wellemeyer are currently employed.

e) All Plaintiffs admitted at trial that none of them worked for AB Trucking during the OLW liability time-frame.

f) Plaintiffs Saga LLeweylan and Steve Wellemeyer admitted at trial that Mr. Francis and Mr. Gaines always took their breaks "when they wanted them."

g) Mr. Wellemeyer admitted that he "always gets his meals" and Mr. LLeweylan admitted that he would take his breaks but he "did not count" them as breaks.[9]

h) All Plaintiffs admitted at trial that the Port of Oakland closes down at 10 a.m., noon, and 3 p.m.

i) All Plaintiffs admitted at trial that they were not required to make a minimum number of trips in a given day.

j) All Plaintiffs admitted that many truck drivers brought their lunch.

k) Mr. Wellemeyer admitted that he liked to eat in his truck because it was "air conditioned, had comfortable seats, and a radio."

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[9] In an amazing display, Mr. LLeweylan lectured defense counsel during his cross-examination about his understanding of the legal requirements of an employee's "duty-free" break that sounded as coherent as Mr. Rosenfeld's MCLE labor law seminars.

l) All Plaintiffs admitted that they filled out their own time sheets.

m) All Plaintiffs admitted that there were postings above Trina's (the dispatcher) desk and on the door of the kitchen even though they did not pay much attention to them.

n) Lastly, all Plaintiffs admitted that the Port of Oakland "TWIC" program required AB Trucking to designate anyone other than a driver as a "trainee."[10]

e) Trial Evidence Presented Would Satisfy The Ciciaros Case.

In *Ciciaros* (a non-class action case), the Court of Appeal held that the employer's obligation to provide employees with an adequate meal period was not satisfied by assuming that the meal periods were taken, because employers have "an affirmative obligation to ensure workers are actually relieved of all duty." (*Cicairos v. Summit Logistics, Inc., supra.,* 133 Cal.App.4th 949.) The California Supreme Court specifically rejected *Cicairos'* "ensure" standard and held contrary to *Cicairos* that California law only requires an employer to make rest periods available; California law does not require an employer to ensure that employees take rest periods. (See *Brinker, supra.*, p. 36.)

In this case, the admissible evidence offered at trial would satisfy other aspects of *Cicairos*. Here, the testimony of Mr. Blyth, Mr. Navarro, Mr. Francis, Mr. Gaines, Saga LLeweylan, Steve Wellemeyer and Mr. Aboudi demonstrate that AB Trucking did not pressure its drivers to make a "certain number of trips during a work day" and did not create a work environment that effectively deprived drivers of an opportunity to take breaks. (*Cicairos, supra,* 133 Cal.App.4th at pp. 962-963.)

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[10] To document all of the admissions and relevant statements of Plaintiffs would cause this brief to exceed 50 pages.

f) Federal Exemption From State Meals And Rest Break Laws.

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* 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 is consistent with the following statement: "What will suffice may vary from industry to industry, and we cannot in the context of this class certification

proceedings delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker* at p. 36.)[11]

2. <u>AB Trucking Is Exempt From Oakland Living Wage Ordinance Rules.</u>

On March 5, 2002, Oakland voters passed Measure I ("§728). This measure amended the City of Oakland Charter effective April 25, 2002, by adding Section 728 entitled "Living Wage and Labor Standards at Port Assisted Businesses." Section 728 of the Oakland City Charter applies to businesses involved in Port of Oakland aviation or maritime business (i.e., those located at Oakland International Airport or in the seaport area or those providing aviation or maritime related services) that also:

- pay the Port $50,000 or more by means of a contract, lease or license (for leases under one year, this applies if $50,000 or more is paid over 5 years),
- hold service contracts with the Port, where the Port pays $50,000 or more over the term of the contract,
- hold a subcontract, sublease, sublicense, management agreement, etc. with any of the above companies, or
- receive $50,000 or more in financial assistance from the Port.
- have <u>more</u> than 20 employees spending more than 25% of their work time working on Port-related work.

Specifically, Section 728 [Scope and Definitions] provides in relevant part:

(A) "Port" means the Port of Oakland.

(B) "Port-Assisted Business" or "PAB") means (1) any person involved in a Port Aviation or Port Maritime Business receiving in excess of $50,000 worth of financial assistance from the Port, or (2) any Port Contractor involved in a Port Aviation or Port Maritime Business if the person employs more than 20 persons per pay period, unless in the <u>prior 12 pay periods</u> the

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[11] Another federal court in California recently dismissed with prejudice a wage and hour putative class action brought by truck drivers, alleging claims based on violations of California's meal break laws, on the ground that those laws (as applied to a motor carrier's 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].) In making that ruling, the *Esquivel* court became the second court in recent months to hold that California's break laws are preempted by the FAAA Act, which expressly preempts state laws that have a significant impact on the routes, service or prices of motor carriers. Clearly, the *Brinker* Court was aware of this decision and chose not to disapprove of it as well!

person has not had more than 20 such employees and will not have more than 20 persons in the next 12 pay periods. A PAB shall be deemed to employ more than 20 persons if it is part of an 'enterprise' as defined under the Fair Labor Standards Act employing more than 20 persons. "Port Contractor" means any person party to a Port Contract as herein defined.[12]

a) Plaintiffs Admits OLW Does Not Apply.

During trial in February 2012, Plaintiffs revised their claim to limit the Oakland Living Wage Ordinance ("OLW") liability period to January 28, 2005- February 10, 2006. At trial, Plaintiffs failed to provide clear evidence that AB Trucking employed more than 20 employees 'in the prior 12 pay periods" and that AB Trucking planned to have more than 20 employees "in the next 12 pay periods" (i.e., 25 pay periods in a row or almost 1 year).[13]

Ms. Don testified in summary to the following at trial:

"There are 4 alternative versions of the Damages Model based on different combinations of two different variables: wage rate used for unpaid time worked (the employee's regular rate of pay or the minimum wage), and the number of employees for purposes of Oakland Living Wage applicability (5 Oakland Port Scale Workers in addition to the number of employees reported on AB Trucking's payroll). The different Oakland Living Wage alternatives result in a different number of periods of applicability of the Oakland Living Wage." (See Exhibit D at p.1, para. 1 attached to the April 13, 2012 Declaration of Lisl Duncan in support of Plaintiffs Opening Post-Trial Brief.)[14]

Specifically, Ms. Don concludes:

"If a driver was making less than the Oakland Living Wage during the Oakland Living Wage period, the amount due to the driver for being underpaid for the hours worked is calculated. The difference between the rate paid and the Oakland Living Wage Rate is multiplied by 8 hours and multiplied by the number of days worked in that pay period.

a. 5 Scale workers- Oakland Living Wage Rate applies to all pay periods in the stipulated time period except one, 2/7/2005- 2/18/2005 (during which time the number of

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[12] Plaintiffs admitted at trial that there was no other basis to apply the OLW against Defendant other than the allegation that Defendant employed more than 20 employees under the "enterprise" theory.

[13] Testimony at trial established that AB Trucking followed a pay period of every two weeks.

[14] Defendant contests the applicability of the "enterprise' theory with regard to Oakland Port Scale.

paychecks issued by AB Trucking, combined with 5 Oakland Port Scale workers, is less than 20).

b. 1 Trainee-Oakland Living Wage Rate applies to six pay periods in which the number of paychecks issued by AB Trucking, combined with one trainee, is at least 20. . .” (See Exhibit D at p.3, para. 6 attached to the April 13, 2012 Declaration of Lisl Duncan in support of Plaintiffs Opening Post-Trial Brief.)

Ms. Don’s testimony is an admission that the OLW does not apply to AB Trucking in this case if the Court chooses to follow Option (b) set forth above. The OLW requires evidence that the Port Contractor employed more than 20 employees for a minimum of 25 pay periods (12 pay periods before + 1 pay period in question + 12 pay periods thereafter =25). Here, it is admitted under Option (b) only six [6] pay periods showed AB Trucking had employed more than 20 employees during the relevant liability time period. Liability can not attach under Option (b).

At trial, Defendant’s Trial Exhibits K (March 30, 2005, EDD form for Oakland Port Scale **listing only 1 employee**) and L (March 2, 2005, Oakland Port Scale Weigh-Master License) were admitted into evidence. For the purposes of calculating when the 5 purported employees for Oakland Port Scale started working, the overwhelming evidence at trial supports the conclusion that four of these individuals could not have been employees working before April 1, 2005.[15] As a result, April 1, 2005, should be deemed the first date of calculation.

If the first pay period under Option (a) begins April 1, 2005, then the date after which 12 pay periods would have past would be on or around September 16, 2005. Accordingly, the 12th pay period following the pay period in question would not occur until sometime in March 2006 well beyond Plaintiffs claimed time frame of liability (February 10, 2006). Thus, again it appears

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[15] Plaintiffs Trial Exhibits 18 and 19 [Oakland Port Scale list of employees for 2005 -2006] were recent recreations of old employee records that Mr. Aboudi provided in response to a Court order to clarify Oakland Port Scale’s listed employees. Mr. Aboudi testified at trial that he normally did not keep such records that were more than 5 years old and he explained that he did his best to comply with the Court’s direction when compiling the information. He noted that he could not fully vouch for the accuracy of when each employee was hired/employed.

that Plaintiffs have admitted that OLW liability does not attach to AB Trucking if the Court chooses to follow Option (a) and the "enterprise" theory they advance.

b) Plaintiffs "Enterprise" Theory Should Not Apply.

As a preliminary matter, Plaintiffs are engaging in legal gymnastics worthy of an Olympic gold medalist in an effort to find some way to attach OLW liability to AB Trucking. These tactics support Defendant's ongoing contention that this aggressive litigation was never warranted. (See Defendant's Trial Exhibit M [Teamsters flier] admitted into evidence.)

There is a three prong test that must be met in order to prove that AB Trucking is part of an "enterprise" with Oakland Port Scale, LLC ("OPS LLC"). (*Chao v. A-One Med. Serv., Inc.*, 346 F.3d 908 (9th Cir 2003).) The term "enterprise" under the FLSA means businesses engaged in related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." (29 U.S.C. section 203(r)(1). If these three elements- 1) related activities, 2) unified operation or common control, and 3) common business purpose- are present, different separate corporations or businesses are grouped together for the purpose of determining FLSA coverage. (*Brennan v. Arnheim & Neely, Inc.*, (1973, U.S. Supreme Court) 410 U.S. 512, 518; *Chao v. A-One Med. Serv., Inc., supra.,* 346 F.3d 908, 914-915.) The activities of two companies are "related" if they are "the same or similar." (*Arnheim & Neely,* 410 U.S. at 518, (quoting S.Rep. No. 145, at 41 (1961)).

At trial, the evidence and testimony established that OPS LLC does not satisfy the "enterprise" three prong test. First, there is not sufficient common ownership to justify the inclusion of OPS LLC as part of AB Trucking's business. Defendant's Trial Exhibit K shows that Mr. Aboudi shares ownership of OPS LLC with three other partners. Mr. Aboudi testified that he owns only 25% of OPS LLC, and thus, he is not a majority shareholder in that business.

Similarly, Mr. Aboudi testified that the proceeds and income from OPS LLC are separate and apart from the AB Trucking enterprise. While Mr. Aboudi acknowledged that Jovi Aboudi had originally helped to set up the books for OPS LLC when it was initially starting operations, he testified that all billings and payroll since have been managed by a separate company other than what is used by AB Trucking. Second, Mr. Aboudi testified that the employees at OPS LLC are totally separate from AB Trucking and do not perform similar duties for a common business purpose. At OPS LLC, employees work at a Mini-Mart convenience store and assist with the truck weigh scale. (See Defendant's Trial Exhibit I [OPS LLC Web printout] admitted into evidence.) These are substantially different duties from working as a truck driver for AB Trucking regulated by the DOT.[16] Mr. Aboudi acknowledged during his testimony that OPS LLC was complimentary to the trucking industry. By having a weigh scale and mini-mart near by was of benefit. However, Mr. Aboudi further testified that there were 3 other weigh scale operations in the area and that drivers would have to pay out of pocket (then subsequently reimbursed) if they chose to use other weigh scale operators. Convenience of the operation and the fact that AB Trucking had an account with OPS LLC is not a proper basis to satisfy the "enterprise" theory under the FLSA.

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[16] Plaintiffs appear to be improperly using the "enterprise" theory as a false "alter ego" theory recognized under California law. The general requirements for alter ego liability are succinctly set forth in *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 777, as follows:
"There are two general requirements for disregarding the corporate entity. First, there must be 'such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist.' (*Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 796, 306 P.2d 1.) Second, it must be demonstrated that 'if the acts are treated as those of the corporation alone, an inequitable result will follow.' (*Id.* at p. 796, 306 P.2d 1.) 'When considering the application of the alter ego doctrine to a particular situation, it must be remembered that it is an equitable doctrine and, though courts have justified its application through consideration of many factors, their basic motivation is to assure a just and equitable result.' (*Alexander v. Abbey of the chimes* (1980) 104 Cal.App.3d 39, 48, 163 Cal. Rptr. 377.)"

Lastly, Mr. Aboudi testified that he did not have sole control over the operations of OPS LLC. (See Defendant's Trial Exhibit K.) Mr. Aboudi further testified that he shared managerial responsibilities with Joseph Zadik the person who taught him the weigh-master business. Mr. Aboudi testified about several legitimate business reasons for why he encouraged AB Trucking employees to use OPS LLC. Similarly, truck drivers Erik Gaines and James Francis agreed with Mr. Aboudi's legitimate business reasons and testified that all drivers in the area new that OPS LLC had one of the best, convenient and cheapest truck weigh scales in the area. Based on the foregoing, it would be improper to disregard the status of a separate limited liability company with different owners and shared management to conclude the "enterprise" theory is applicable.

3. <u>Dependent Claims Should Not Be Basis To Preserve Class Claims.</u>

a) *Unfair Business Practices*

In California, for example, a claim under California's Unfair Competition Law (UCL) is usually pled in conjunction with wage-and-hour claims. The UCL allows recovery of restitution, as well as injunctive relief, for "any unlawful, unfair or fraudulent business act or practice. . . ." Bus. & Prof. Code §17200. An action based on the UCL "borrows" violations of other laws when committed pursuant to business activity. (*Farmers Ins. Exchange v. Superior Court,* (1992) 2 Cal.4th 377, 383.) Claims under the UCL are derivative of other claims and should fail if the other claims fail. (*Cortez v. Purolator Air Filtration Products Co.*, (2000) 23 Cal.4th 163.)

b) *Failure to Provide Accurate Itemized Wage Statements*

Plaintiffs have alleged that AB Trucking failed to furnish class members with accurate wage statements showing all the information required by California Labor Code §226: (a) by, for example, failing to include compensation for allegedly missed meal or rest periods; (b) the failure was knowing and intentional; and (c) the class members suffered injury as a result.

This claim is almost always dependent upon the viability of plaintiffs' wage and meal-period claims asserted and thus will usually fail if these other claims fail. (*See, e.g., Barnick v. Wyeth,* (C.D. Cal. 2007) 346 F.Supp. 1102 [district court granted summary judgment on Labor Code §226 claim after finding that plaintiff was an exempt outside salesperson].) There is no evidence of "knowing and intentional" failure to comply with the requirements of §226 by AB Trucking. Moreover, there is no evidence that the company willfully or intentionally gave drivers pay statements that did not accurately reflect the hours they actually worked. Jovi Aboudi and Mr. Aboudi specifically testified that they did their best to provide accurate statements.

c) *Misclassification of Employment/Failure to Pay for All Hours Worked*

AB Trucking employed different levels of Trainees during the years relevant for this lawsuit. Mr. Aboudi testified that most Trainees were paid, including named representative Lavon Godfrey, if they already had a Class A license and other industry related experience. Depending on the level of experience/background of the new driver, that would determine what amount of training or pay such driver would receive. Mr. Aboudi testified that this was done on a case by case basis as AB Trucking was working with non-profit organizations and Oakland law enforcement authorities to assist individuals that had criminal records (e.g., Plaintiff Lavon Godfrey) return to the workforce. Under California law, employers may pay new inexperienced employees less than the minimum wage for the first 160 hours of employment. (See Cal. Code of Regs. §§ 11010-11150.) An employer can pay "learners" 85% of the minimum wage under such circumstances. (*Id.*) Given the facts in this case, there is no "community of interest" between the members of the purported class of Trainees. Thus, Trainees arguably should not qualify as an ascertainable class due to each trainee's unique background.

d) *Failure to Pay Wages Owing at Discharge or Quitting*

Waiting-time penalty claims usually are dependent upon plaintiffs' wage and meal-period payment claims, and therefore should fail if the other claims fail. (*Barnick v. Wyeth, supra*, 346 F.Supp. 1102.) Moreover, a company arguably should not be found to have "willfully" failed to pay wages if it can show that there was a good faith dispute, in law or fact, that the claimed wages were due at the time of termination. (*See* 8 Cal. Code of Regs. §13520; *see, e.g., Barnhill v. Robert Saunders & Co.*, (1981) 125 Cal.App.3d 1 [denying former employee's waiting time penalties because, although the defendant employer had improperly asserted the equitable defense of setoff, the state of the law regarding the application of that defense was not settled at the time the employer asserted it, and the employer demonstrated that it had a good faith belief that the defense applied at that time].) No competent evidence was presented at trial that AB Trucking willfully failed to pay wages owed at the time of discharge or quitting.

IV. CONCLUSION

Based on the foregoing, AB Trucking respectfully requests that this court dismiss the class action complaint in its entirety.

Dated this 11th day of May, 2012.

Respectfully Submitted,

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AB TRUCKING, a California Corporation,

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all other similarly situated,

Plaintiffs,

vs.

OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, and DOES 1-20

Defendant.

Case No.: RG 08-379099

PROOF OF SERVICE

Action Filed: March 28, 2008
Date: May 11, 2012
Dept.: 20et for Trial: February 14, 2012
Before Honorable Judge Robert B. Freedman

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is 476 Third Street, Oakland, California, 94607.

On May 11, 2012, I served the foregoing documents described as:

DEFENDANT'S OPENING POST TRIAL BRIEF

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE MAILING LIST INCLUDED HEREIN

☐ (BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Oakland, California in the ordinary course of business.

☐ (BY FACSIMILE) by faxing a true and correct copy thereof to the person(s) at the fax number set forth above.

☐ (BY FEDERAL EXPRESS) by using express mail service and causing to be delivered overnight next day delivery a true copy thereof to the person(s) at the address set forth above.

☒ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

GUY A. BRYANT

Signature

SERVICE LIST

VIA PERSONAL ON ALL PARTIES LISTED HEREIN:

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