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ENDORSED
FILED
SAN FRANCISCO COUNTY
SUPERIOR COURT

2009 AUG 11 AM 1:59

GORDON PARK-11, CLERK

CASE MANAGEMENT CONFERENCE SET

BY: ~~ELIAS BUKA~~

JAN - 8 2010 - 9^{AM}

Attorneys for Plaintiff

~~DEPARTMENT 212~~

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

LEONARD YAKHNICH, individually
and on behalf of all others similarly
situated,

Case No.: **CGC-09-491312**

Plaintiff,

**PLAINTIFF'S CLASS ACTION
COMPLAINT FOR:**

vs.

TIBCO SOFTWARE, INC. and
DOES 1-100, inclusive,
Defendants.

- (1) Failure to Pay Overtime Wages
- (2) Violation of Labor Code §226.7
- (3) Violation of Business & Professions Code §§17200 and 17203

THIS IS A CLASS ACTION LAWSUIT

1 Plaintiff, individually and on behalf of all others similarly situated, complains and
2 alleges as follows:

3 1. This is a class action brought on behalf of the following class:

4 All California based Sales Engineer employees 1) who worked at any time
5 during the four years preceding the filing of this Complaint up until the date
6 of class certification for Defendants in the State of California.

7 The above class of employees did not receive overtime compensation or their statutorily
8 mandated meal breaks and are similarly situated under California Code of Civil Procedure §382.
9 Plaintiff seeks to recover unpaid overtime compensation, missed meal break wages equivalent to
10 one hour's worth of pay for each missed meal period, penalties, interest, attorney's fees and costs
11 for himself and all other present and former employees similarly situated. To the extent that the
12 improper conduct alleged herein violates California Business and Professions Code §§17200 and
13 17203, this action is also brought by the Plaintiff on behalf of the public.

14
15 **I.**

16 **JURISDICTION AND VENUE**

17
18 2. This class action is brought pursuant to §382 of the California Code of Civil
19 Procedure. The monetary damages sought by Plaintiff exceed the minimal jurisdictional limits of
20 the Superior Court and will be established according to proof at trial. The monetary damages
21 sought on behalf of each and every member of the class and as aggregate class damages exceed
22 those jurisdictional limits as well.

23
24 3. Venue is proper in the San Francisco County Superior Court because Plaintiff
25 worked for Defendants at Defendants' San Francisco facilities located in San Francisco County
26 and because the Defendants own and operate numerous facilities – and employ numerous
27 putative class members – in San Francisco County. The Defendants' liability to the Plaintiff
28

1 arose in San Francisco County and many of the wrongful acts complained of occurred in that
2 county.

3 4. To the extent Plaintiff or any class member entered into any arbitration agreement
4 with any Defendants and such agreement purported to require arbitration of wage or employment
5 disputes, any such agreement is and was void and unenforceable. Any such agreement was one
6 of adhesion, was executed under duress, lacked consideration and mutuality, and failed to
7 provide that the Defendant(s) would pay the costs of any arbitration, and was otherwise void
8 under the California Supreme Court case of *Armendariz v. Foundation Health Psychcare*
9 *Services, Inc.*
10

11
12 **II.**

13 **NO FEDERAL JURISDICTION EXISTS**

14
15 5. The class representative's claims for relief are less than \$75,000 exclusive of
16 interest and costs.

17 6. Plaintiff and Defendants are citizens of the State of California. Defendants'
18 corporate headquarters are located in San Francisco County, California.

19 7. No federal jurisdiction exists in this case. This action is brought solely pursuant
20 to California law. There is no federal question at issue, as exempt status questions and remedies
21 relating thereto are based solely on California law and statutes, including the Labor Code and the
22 Business & Professions Code.
23

24 8. The Class Action Fairness Act of 2005 does not apply to this case because:

25 a. The claims asserted will be governed solely by the laws of the State of
26 California and no federal law is at issue;

27 b. Over two-thirds of the class are citizens of the State of California as of the
28 time of filing, as the class is limited to California citizens only;

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- c. Defendants are citizens of the State of California;
- d. The claims at issue arise in the State of California because the principal injuries resulting from Defendants' alleged conduct arise from the class members' employment and Defendants' failure to pay wages in the State of California.

III.
PARTIES

9. Defendants are a corporation doing business in the State of California with its corporate headquarters located in San Francisco County, California. Throughout the class period, Defendants employed hundreds of employees in California within the Sales Engineering job category.

10. At all times relevant to this Complaint, the wage and hour and all related employee compensation policies of Defendants' locations in California are and were dictated by, controlled by, and ratified by Defendants.

11. The true names and capacities of Defendants named herein as DOES 1 through 100 inclusive, whether individual, corporate, associate, or otherwise, are unknown to plaintiff who therefore sues such Defendants under fictitious names pursuant to California Code of Civil Procedure §474. Plaintiff is informed and believes, and thereon alleges, that these Defendants, DOES 1 through 100, are in some manner or capacity, and to some degree, legally responsible and liable for the wrongs of which Plaintiff complains. Plaintiff will amend their Complaint to allege the true names and capacities of these DOE Defendants once they are ascertained. On information and belief, Plaintiff makes all allegations contained in this complaint against all Defendants, including DOES 1 through 100, inclusive.

12. At all times herein mentioned, each Defendant was an agent, servant, employee

1 and/or joint venturer of each of the remaining Defendants, and was at all times acting within the
2 course and scope of such agency, service, employment, and/or joint venture, and each Defendant
3 has ratified, approved, and authorized the acts of each of the remaining Defendants with full
4 knowledge of said acts.

5 13. Plaintiff Leonard Yakhnich is a former employee of Defendants. Mr. Yakhnich
6 worked as an employee for Defendants (within the Sales Engineering job category) within the
7 past three years.

8 14. The named Plaintiff and every employee classified within the Sales Engineering
9 job category and employed by Defendants in California are/ were routinely required to work in
10 excess of eight (8) hours a day and/or forty (40) hours per week without receiving overtime
11 compensation.

12 15. Plaintiff brings this action on his own behalf and on behalf of all other such current
13 and former employees similarly situated, as defined in paragraph 1, as well as on behalf of the
14 California public.

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18 IV.

19 FACTUAL ALLEGATIONS

20 16. Pursuant to Defendants' uniform employment policies, employees categorized
21 within Defendants' Sales Engineering Job Category are and were classified as "exempt" and
22 paid a set wage (either salary or hourly) for hours worked. During the class period, such
23 employees typically worked well over forty hours per week.

24 17. Throughout the class period, Defendants have refused to pay overtime wages to
25 the putative class. Throughout the class period, putative class members were not provided
26 meal periods pursuant to the requirements of California law.

27
28 18. The duties of the putative class members are set forth by uniform written company-

1 wide policies and procedures. The wage order applicable to Defendants' industry, states that an
2 employee must be paid overtime, equal to 1.5 times the employee's regular rate of pay, for all
3 hours worked in excess of 40 per week or 8 per day. Members of the alleged class are not
4 exempt because, *inter alia*, they are production workers, they do not spend a majority of their
5 time on exempt tasks, they do not supervise two or more subordinates, they do not customarily
6 and regularly exercise discretion and independent judgment in matters of consequence to
7 Defendants business, and they earn less than the minimum amount per hour worked set by Labor
8 Code 515.5(a)(4). Defendants cannot meet their burden of showing the applicability of any
9 exemption, including, but not limited to, any exemptions under federal or state law for
10 administrative, professional, executive, commissioned sales person, or outside sales person
11 employees.
12

13
14 19. Labor Code §1174(d) and the IWC Orders (Section 5) provide that every employer
15 shall keep accurate information with respect to *each employee* including time records showing
16 when the employee begins and ends each work period. In addition to the imposition of penalties
17 as herein alleged, when an employer fails to keep such time records, employees may establish the
18 hours worked solely by their testimony and the burden of overcoming such testimony shifts to
19 the employer. *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 245 Cal.Rptr. 36.
20

21 20. Some evidence generally reflecting the number of overtime hours worked by each
22 employee and the compensation rates for the relevant work periods are in the possession of
23 Defendants. While Plaintiff is unable to state at this time the exact amount owing to the class,
24 Plaintiff proposes to obtain such information by appropriate and focused discovery proceedings
25 to be taken promptly in this action, and requests that damages or restitution be awarded
26 accordingly to proof thus obtained and presented to the Court.
27
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V.

CLASS ACTION ALLEGATIONS

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3 21. Plaintiff brings this action individually and as a class action on behalf of the class
4 set forth in paragraph 1 herein.

5
6 22. Plaintiff's claims are typical of the claims of the proposed class because Plaintiff
7 and all the class members were harmed by Defendants' failure to pay overtime and failure to
8 provide meal breaks as required by California law. Defendants' policies with respect to overtime
9 entitlement for overtime hours worked are and were uniform throughout California.

10
11 23. Plaintiff is a representative party who will fully and adequately protect the interests
12 of the class members. He has retained counsel who are competent in both class action and
13 employment litigation. Plaintiff has no interests that are contrary to or in conflict with those of
14 the class he seeks to represent.

15
16 24. The number of class members is believed to exceed one hundred (100) individuals,
17 which makes it impractical to bring all members of the class individually before the Court, and
18 the identities of the members of the class are readily ascertainable from the records of the
19 Defendants, as are the days worked and the regular rate of pay for each class member.

20
21 25. A class action is superior to other available means for the fair and efficient
22 adjudication of this lawsuit. Individual employees such as Plaintiff have a difficult time
23 prosecuting an individual action against a large corporate employer such as Defendants. Even if
24 any class member could afford individual litigation against a large business like Defendants, it
25 would be unduly burdensome to the court system. Individual litigation of hundreds of similar
26 claims in scores of counties magnifies the delay and expense to all parties. By contrast, a class
27 action presents far fewer management difficulties and affords the benefits of unitary adjudication,
28 economies of scale, and comprehensive supervision by a single court. Concentrating this

1 litigation in one forum will promote judicial economy and parity among the claims of individual
2 class members and judicial consistency in rulings. Notice of the pendency and any resolution of
3 this action can be efficiently provided to class members by mail, print, broadcast, internet, and/or
4 multimedia publication.

5
6 26. This type of case is uniquely well-suited for class treatment since the employer's
7 practices were uniform and the burden is on the employer to prove any exemption.

8 27. Many issues of law or fact are common and they predominate over any individual
9 questions. These common issues include:

- 10 a. Whether those in the alleged class were uniformly classified as exempt,
11 in violation of California Labor Code and applicable IWC wage orders;
- 12 b. Whether Defendants failed to pay Plaintiff and class members all overtime
13 compensation due to them by virtue of their uniform designation of
14 employees as exempt in violation of California Labor Code and applicable
15 IWC wage orders;
- 16 c. Whether Plaintiff and/or class members were expected to and/or mandated
17 to regularly work overtime;
- 18 d. Whether the purportedly exempt category of Sales Engineer involved
19 production work and whether such employees customarily and regularly
20 exercise discretion and independent judgment in matters of consequence to
21 Defendants business;
- 22 e. Whether Plaintiff and/or class members spend a majority of their time on
23 exempt tasks and whether they supervise two or more other employees;
- 24 f. Whether class members earn less than the minimum amount per hour
25 worked set by Labor Code 515.5(a)(4);
- 26 g. Whether the Defendants failed to either provide meal periods or pay
27 Plaintiff and class members meal break wages per California Labor Code
28 §226.7;
- h. The correct statute of limitations for Plaintiff's and class members' claims;
- i. The correct method of calculating back overtime pay;
- j. Whether Defendants' conduct constitutes unfair competition within the
meaning of California Business & Professions Codes §§17200 and 17203;
- k. Whether Defendants' conduct constitutes unfair business practices within
the meaning of California Business & Professions Codes §§17200 and
17203;

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- l. Whether plaintiff and class members are entitled to injunctive relief prohibiting Defendants from requiring class members who do not meet the statutory and regulatory guidelines for exemption from working more than eight (8) hours per day or forty (40) hours a week in any work week without pay for overtime wages;
- m. Whether Plaintiff and/or class members are entitled to restitution;
- n. Whether Defendants are liable for pre-judgment interest;
- o. Whether Defendants are liable for attorney's fees and costs; and
- p. Whether Plaintiff and/or class members are entitled to waiting time and other penalties under California law.

VI.
GENERAL ALLEGATIONS
AS TO CLASS REPRESENTATIVE

28. During the class period, Plaintiff was employed by Defendants as a salaried employee designated by Defendants within Defendants' Sales Engineering job category in California and classified "exempt." Plaintiff regularly worked more than 8 hours per day and in excess of 40 hours a week without payment of overtime wages.

29. During his employment by Defendants, Plaintiff and the members of the alleged class were not exempt because, *inter alia*, they are production workers, they do not spend a majority of their time on exempt tasks, they do not supervise two or more subordinates, they do not customarily and regularly exercise discretion and independent judgment in matters of consequence to Defendants' business, and they earn less than the minimum amount per hour worked set by Labor Code 515.5(a)(4). Defendants cannot meet their burden of showing the applicability of any exemption, including, but not limited to, any exemption under state law for administrative, computer software, professional, executive, commissioned sales person, or outside sales person employees.

30. Due to scheduling and work demands, Defendants did not provide Plaintiff or the class with thirty (30) minute meal periods, as required by law, when working shifts in excess of

1 five (5) hours in duration.

2 VII.

3 FIRST CAUSE OF ACTION

4 FAILURE TO PAY OVERTIME WAGES

5 Violation of California Labor Code §§ 203, 218, 510, 1194 and 1198

6 (As Against All Defendants)

7
8 31. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
9 though fully set forth in detail herein.

10 32. California Labor Code §510 defines a day's work as 8 hours and states that any
11 work in excess of 8 hours in one workday and any work in excess of 40 hours in any one
12 workweek must be compensated at the rate of no less than one and one-half times the regular rate
13 of pay.

14
15 33. Pursuant to California Labor Code §§218 and 1194(a), a Plaintiff may bring a civil
16 action for overtime wages directly against the employer without first filing a claim with the
17 Division of Labor Standards Enforcement (hereinafter "DLSE") and may recover such wages,
18 together with interest thereon, penalties, attorney's fees and costs.

19
20 34. Pursuant to California Labor Code §1198, it is unlawful to employ persons for
21 longer than the hours set by the IWC or under conditions prohibited by the applicable IWC Wage
22 Orders. The wage order applicable to Defendants' industry provides for payment of overtime
23 wages equal to one and one-half times an employee's regular rate of pay for all hours worked in
24 excess of 8 hours in a day or 40 hours in a work week or, in certain circumstances, two times an
25 employee's regular rate of pay.

26
27 35. At all times relevant hereto, Defendants treated Plaintiff and other similarly situated
28 employees as exempt from the protections of the California Labor Code and applicable wage

1 order.

2 36. In California, all employees are presumed to be non-exempt and all exemptions are
3 *narrowly* construed against the employer. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20
4 Cal.4th 785; *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555.

5 37. Defendants improperly misclassified Plaintiff and members of the alleged class as
6 exempt from California's overtime laws. Defendants did so despite the fact that these employees
7 did not meet the exemption criteria under any of the exemptions set forth by California law.

8 38. Plaintiff and members of the Class regularly worked more than forty (40) hours per
9 week to meet Defendants' job expectations.

10 39. As a uniform practice, Defendants failed to keep the records of hours worked by its
11 employees as required by California's wage orders and the Labor Code. However, records of the
12 rates of pay for Plaintiff and the class members are in the possession or within the custody and
13 control of Defendants.

14 40. Defendants owe Plaintiff and the class overtime wages according to proof at the
15 time of trial. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
16 should have known that Plaintiff and the class did not qualify as exempt employees and
17 purposely elected not to pay them for their overtime labor. Plaintiff, individually and on behalf
18 of all employees similarly situated, requests recovery of overtime compensation according to
19 proof, penalty wages, interest, attorney's fees and costs pursuant to Labor Codes §§203 and
20 1194(a), as well as the assessment of any other statutory penalties, including waiting time
21 penalties, against Defendants in a sum as provided by the Labor Code and/or other statutes.

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VIII.

SECOND CAUSE OF ACTION

FAILURE TO PROVIDE MEAL BREAKS

Violation of California Labor Code §226.7

41. Plaintiff hereby re-alleges and incorporates by reference the allegations contained in the preceding paragraphs of the Complaint.

42. California Labor Code §226.7 requires an employer to pay an additional hour's worth of pay for each period in which an off-duty meal period is not provided. Pursuant to the wage order applicable to Defendants' industry, employees are entitled to an off-duty meal period of at least thirty (30) minutes in duration during each shift in excess of five (5) hours in duration.

43. During the class period, Defendants failed to provide Plaintiff and the class members with off-duty thirty (30) minute meal periods as required under the wage order and Labor Code §226.7. Defendants also failed to maintain records of meal periods provided as required by California law.

44. Pursuant to Labor Code §226.7, Plaintiff and the class members are entitled to one (1) hour of wages for every missed meal period, including interest, in an amount to be proved at trial.

IX.

THIRD CAUSE OF ACTION

VIOLATION OF BUSINESS & PROFESSIONS CODE §§17200 and 17203

(As Against All Defendants)

45. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as though fully set forth in detail herein.

1 46. Within the four years preceding the filing of this action, Defendants have engaged
2 and continue to engage in unfair and/or unlawful business acts and practices in violation of
3 California Business & Professions Code §§17200 and 17203. These acts and practices constitute
4 a continuing and ongoing unfair and/or unlawful business activity defined by Business &
5 Professions Code §17200, and justify the issuance of an injunction, restitution, and other
6 equitable relief pursuant to Business & Professions Code §17203.
7

8 47. Defendants have unlawfully designated Plaintiff and the proposed class as "exempt"
9 employees to avoid the payment of overtime wages and other benefits in violation of Labor Code
10 §200 et seq., Labor Code §500 et seq., Labor Code §1100 et seq., the California Code of
11 Regulations, and the guidelines set forth by the IWC and DLSE.
12

13 48. The conduct of Defendants is inimical to the public welfare since it transgresses
14 civil statutes of this state designed to protect workers from exploitation.
15

16 49. Defendants' conduct in misclassifying Plaintiff and other members of the class and
17 failing to pay overtime was unfair within the meaning of §17200 because it was against
18 established public policy and has been pursued to attain an unjustified monetary advantage for
19 Defendant by creating personal disadvantage and hardship to its employees. As such,
20 Defendant's business practices and acts have been immoral, unethical, oppressive and
21 unscrupulous.
22

23 50. By and through its unfair and/or unlawful business practices and acts described
24 herein, Defendants have obtained valuable services from Plaintiff and all persons similarly
25 situated and have deprived Plaintiff and all persons similarly situated of valuable rights and
26 benefits guaranteed by law, all to their detriment.
27

28 51. Plaintiff, and all persons similarly situated, and all persons in interest, are entitled
to and do seek such relief as may be necessary to restore to them the money and property which

1 Defendants have acquired, or of which Plaintiff and class members have been deprived by means
2 of the herein described unfair and/or unlawful business practices.

3 52. Plaintiff, and all persons similarly situated, and all persons in interest, are further
4 entitled to and do seek a declaration that the above described business practices are unfair and
5 unlawful, and injunctive relief restraining Defendants from engaging in any of the herein
6 described unfair and/or unlawful business practices at all times in the future.
7

8 WHEREFORE, Plaintiff, on his own behalf and on behalf of the members of the class,
9 prays for judgment as follows:

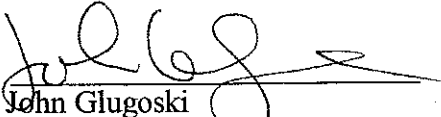
- 10 1. For an order certifying the proposed class;
- 11 2. Upon the First Cause of Action, for consequential damages according to proof as set
12 forth in California Labor Code §1194, *et seq.* (and the applicable wage order) related to unpaid
13 wages due and owing;
- 14 3. Upon the First Cause of Action, for waiting time penalties according to proof
15 pursuant to California Labor Code §203;
- 16 4. Upon the First Cause of Action, for civil penalties pursuant to California Labor
17 Code §§226, 226.3, 558, 1174.5 and 1197.1 ;
- 18 5. Upon the Second Cause of Action, for a recovery pursuant to Labor Code §226.7
19 and the wage order;
- 20 6. Upon the First, Second and Third Causes of Action, that Defendants be ordered to
21 show cause why they should not be enjoined and ordered to comply California law related to
22 payment of overtime compensation and record keeping for the proposed class who are non-
23 exempt, work more than 40 hours per week or 8 hours per day, are not paid overtime or provided
24 meal periods; and for an order enjoining and restraining Defendants and their agents, servants
25 and employees related thereto;
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- 7. Upon the Third Cause of Action, for all restitutionary sums owed to Plaintiff and the proposed class with interest thereon
- 8. For pre-judgment interest as allowed by California law;
- 9. For reasonable attorneys fees, expenses and costs as provided by California Labor Code §§226, 1194, and,
- 10. For such other and further relief the Court may deem just and proper.

Dated: August 4, 2009

RIGHETTI LAW FIRM, P.C.

By: 
John Glugoski
Attorneys for Plaintiff Yakhnich