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Superior Court Of California,
Sacramento
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rmacdonald
By _____, Deputy
Case Number:
34-2013-00140898

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

JOHN MULLIGAN, an individual and on
behalf of all others similarly situated,

CASE NO.

Plaintiff,

CLASS ACTION

vs.

COMPLAINT

BDS MARKETING and DOES 1
through 50 inclusive,

1. Violation of Labor Code;
2. Failure to Pay Overtime
3. Violation of B & P § 17200, et seq;
4. Failure to Indemnify Employees for Expenditures and/or Losses
5. Failure to Make Payments Within the Required Time

Defendants.

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1.

COMES NOW, Plaintiff, an individual over the age of eighteen (18), and bring this challenge to defendant's lucrative, repressive and unlawful business practices on behalf of themselves and a class of all others similarly situated and for a Cause of Action against defendants, BDS MARKETING, and DOES 1-50, inclusive, (hereinafter defendants) and each of them, alleges as follows:

THE PARTIES, JURISDICTION AND VENUE

2.

This class action is brought pursuant to §382 of the California Code of Civil Procedure. The claims of individual class members, including Plaintiff, are under the \$75,000 jurisdictional threshold for federal court. For example, a class member who was or has been employed for a relatively brief period could never reasonably be expected to receive a recovery of \$75,000 or more. The total amount in controversy does not exceed \$5,000,000.00. Further there is no federal question at issue, as all the issues related to payment wages alleged herein are based solely on California law and statutes, including the Labor Code, Civil Code, Code of Civil Procedure, and Business and Professions Code.

3.

Plaintiff John Mulligan ("Plaintiff") brings this action against BDS MARKETING, (collectively "Defendants") for engaging in a uniform policy and systematic scheme of wage abuse against their hourly paid employees in California. This scheme involved, inter alia, failing to pay hourly employees all wages earned for all hours worked. As a result of Defendant's systematic and clandestine scheme of failing to properly pay their hourly employees wages for all

1 hours worked throughout California, Defendants have violated California common and statutory
2 laws as described more particularly below.

3
4 **4.**

5 Defendants own/owned and operate/operated an industry, business and establishment in
6 within the State of California, including Sacramento County, for the purpose of assisting
7 customer store owners with sales campaign and merchandising to increase sales of products at
8 the store level under the name of BDS MARKETING. As such, and based upon all the facts and
9 circumstances incident to defendant's business in California, defendants are subject to California
10 Labor Code Sections 1194, et seq., 500, et seq., California Business and Professions Code
11 Section 17200, et seq., (Unfair Practices Act) and the applicable wage order(s) issued by the
12 Industrial Welfare Commission. At least some of the acts complained of herein occurred in
13 Sacramento County as defendants do business in Sacramento County area. Plaintiff is informed
14 and believes and thereon alleges that at all times herein mentioned defendants are and were
15 corporations licensed to do business and actually doing business in the State of California.
16

17 **5.**

18 Defendants own/owned and operate/operated an industry, business and establishment in
19 within the State of California, including Sacramento County, for the purpose of assisting
20 customer store owners with sales campaign and merchandising to increase sales of products at
21 the store level under the name of BDS MARKETING. Venue is proper in this county under
22 California Business and Professions Code §17203 and California Code of Civil Procedure
23 §§395(a) and 395.5. As such, and based upon all the facts and circumstances incident to
24 defendant's business in California, defendants are subject to California Labor Code Sections
25 1194, et seq., 500, et seq., California Business and Professions Code Section 17200, et seq.,
26 (Unfair Practices Act) and the applicable wage order(s) issued by the Industrial Welfare
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1 Commission. At least some of the acts complained of herein occurred in Sacramento County as
2 defendants do business in Sacramento County area. Plaintiff is informed and believes and
3 thereon alleges that at all times herein mentioned defendants are and were corporations licensed
4 to do business and actually doing business in the State of California.
5

6 **6.**

7 Plaintiff does not know the true names or capacities, whether individual, partner or
8 corporate, of the defendants sued herein as DOES 1 through 50, inclusive, and for that reason,
9 said defendants are sued under such fictitious names, and Plaintiff prays leave to amend this
10 complaint when the true names and capacities are known. Plaintiff is informed and believes and
11 thereon alleges that each of said fictitious defendants was responsible in some way for the
12 matters alleged herein and proximately caused Plaintiff and members of the class to be subject to
13 the illegal employment practices, wrongs and injuries complained of herein.
14

15 **7.**

16 At all times herein mentioned, each of said defendants participated in the doing of the
17 acts hereinafter alleged to have been done by the named defendants; and furthermore, the
18 defendants, and each of them, were the agents, servants and employees of each of the other
19 defendants, as well as the agents of all defendants, and at all times herein mentioned, were acting
20 within the course and scope of said agency and employment.
21

22 **8.**

23 Plaintiff John Mulligan ("Mr. Mulligan") was a California resident at all pertinent times
24 herein who worked for Defendants. During his employment as an hourly employee, Defendant
25 required Mr. Mulligan to work hours for which he was never paid, and work overtime for which
26 he was never paid. Plaintiff, John Mulligan ("Plaintiff") was employed in California as a Field
27
28

1 Service Representative (aka "delegate") of BDS MARKETING. Mr. Mulligan has worked for
2 defendants within four years prior to the filing of this Complaint.

3
4 **9.**

5 The true names and capacities, whether is individual, corporate, associate, representative,
6 or otherwise, of Defendants named herein as DOES 1 through 50 are unknown to Plaintiff at this
7 time, and they are therefore sued by such fictitious names pursuant to California Code of Civil
8 Procedure §474. Plaintiff will amend this Complaint to allege the true names and capacities of
9 DOES 1 through 50 when Plaintiff knows them. Each of DOES 1 through 50 is in some manner
10 legally responsible for the violations of law alleged herein.

11
12 **10.**

13 The acts charged in this Complaint as having been done by Defendant was authorized,
14 ordered, or done by their officers, agents, employees, or representatives, while actively engaged
15 in the management of the Defendant's businesses or affairs.

16 **CLASS ACTION ALLEGATIONS**

17
18 **11.**

19 Plaintiff bring this action on behalf of themselves and as a class action on behalf of all
20 persons similarly situated pursuant to California Code of Civil Procedure §382, Civil Code
21 §1781, and the procedural provisions of Rule 23 of the Federal Rules of Civil Procedure as they
22 have been adopted for use, referenced, and interpreted by this State's courts. Plaintiff seeks to
23 represent and to certify the following class:

24 All California based Field Service Representative (aka "delegates") who
25 worked at any time during the four years preceding the filing of this
26 Complaint up until the date of class certification for Defendants in the
State of California.

27 The Class excludes Defendant, its subsidiaries, affiliates, dealers, officers, directors,
28 members of Defendant's affiliates, officers, dealers' and directors' immediate families, any

1 entities in which Defendant has a controlling interest, and the officers, directors, affiliates, legal
2 representatives, heirs, successors and/or assigns of any of the individuals or entities mentioned in
3 this paragraph, and any judge assigned to hear this action.
4

5 **12.**

6 This action has been brought and may properly be maintained as a class action pursuant
7 to California Code of Civil Procedure §382, Civil Code §1781, as well as under Federal Rule of
8 Civil Procedure 23(a)(1)-(4), 23 (b)(1), (2), or (3), and case law there under, to which the
9 California trial courts have been directed by the California Supreme Court to look for guidance.
10

11 **13.**

12 Plaintiff believes there are at least several hundred presently and formerly employed
13 hourly-paid BDS MARKETING hourly employees in the Class. Given Defendant's massive size
14 and the systematic nature of Defendant's failure to comply with California employment law and
15 common law, the members of the Class are so numerous that joinder of all members is
16 impractical.
17

18 **14.**

19 Plaintiff's claims are typical of the claims of the members of the Class because they were
20 hourly employees who, like the members of the Class, were impacted by the conduct complained
21 of herein and sustained damages and other loss arising out of the Defendant's campaign to fail to
22 properly compensate them for all hours worked, and failure to properly maintain accurate records
23 of the actual hours and/or days worked by Plaintiff and the members of the Class.
24

25 **15.**

26 Plaintiff will fairly and adequately protect the interests of the Class members. Plaintiff
27 has retained counsel competent and experienced in complex, class action litigation.
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16.

Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to Plaintiff and the Class are:

a. Whether Defendant has engaged in a pattern and/or practice in California of failing to properly compensate the Plaintiff and the Class for all hours worked;

b. Whether Defendant has engaged in a pattern and/or practice in California of encouraging Plaintiff and the Class not to report all time worked;

c. Whether Defendant has engaged in a pattern and/or practice in California of threatening Plaintiff and the Class with discharge, demotion, or discrimination or otherwise intimidating them if they do not work off-the-clock;

d. Whether Defendant failed to keep true and accurate time records for all hours worked by its employees and/or improperly altered time records;

e. Whether Defendant failed to pay Plaintiff and the Class for the work Defendant required them to perform;

f. Whether Defendant violated Cal. Lab. Code §§ 1194 et seq., 1197, 1198, §510, §512, §551, §552, §§201-203, §§226, 226.7;

g. Whether Defendant violated California Industrial Welfare Commission Orders;

h. Whether Plaintiff and the Class are entitled to restitution under Cal. Bus. & Prof. Code §17200 et seq.

i. The nature and extent of class-wide injury and the measure of damages for the injury, and;

j. Whether the Class is entitled to injunctive relief.

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17.

A class action is superior to other available methods for the fair and efficient adjudication of this controversy for the following reasons:

a. A class action is the only available method for the fair and efficient adjudication of this controversy. The members of the Plaintiff Class are so numerous that joinder of all members is, at a minimum, impractical, and probably impossible.

b. The damages suffered by individual Class members are relatively small compared to the expense and burden of prosecuting this complex case against a well-financed corporation. Consequently, this class action is the only way that every Class member can redress the harm and damage caused by Defendant's conduct.

c. Should this Court require individual Class members to bring separate actions, this Court would face a multiplicity of lawsuits, which would unduly burden both the California court system and the litigants. The prosecution of separate actions will create a risk of inconsistent rulings and contradictory judgments which might dispose of other Class members' interests who are not parties to the adjudication, thereby impeding and impairing Class members' ability to protect their interests. Inconsistent results will magnify the delay and expense to all parties and to the California court system. By contrast, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single court.

18.

In the alternative, this action is certifiable under the provisions of Rule 23(b)(1)(2) and/or (b)(2) of the Federal Rule of Civil Procedure, which have been found applicable to the State of California, because:

1 a. The prosecution of separate actions by individual Class members will
2 create a risk of inconsistent or varying adjudications with respect to individual Class members
3 which would establish incompatible standards of conduct for Defendant;

4
5 b. The prosecution of separate actions by individual Class members will
6 create a risk of adjudications with respect to the Class which might, as a practical matter, be
7 dispositive of the interests of other Class members not parties to the adjudications, or
8 substantially impair other Class members' ability to protect their interests; and

9 c. Defendant has acted or refused to act on grounds generally applicable to
10 the Class thereby making appropriate final injunctive relief with respect to all Class members.
11

12 **19.**

13 A class action will cause an orderly and expeditious administration of the claims of the
14 Class. Economies of time, effort and expense will be fostered and uniformity of decisions will be
15 insured.

16 **20.**

17 Plaintiff anticipates little, if any, difficulty in the management of this litigation.

18 **SUMMARY OF ALLEGATIONS**

19 **21.**

20 Defendant offered the Plaintiff and each Class member employment as hourly paid
21 employees, which each Plaintiff and Class member accepted, thereby entering into an
22 employment relationship governed by the California Labor Code and its implementing
23 regulations and orders.
24

25 **22.**

26 At the time Plaintiff and members of the Class accepted employment with Defendant,
27 they were expressly told the rate they would earn for each hour worked.
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23.

One of BDS Marketing's largest expenses is the payroll of its hourly employees. A basis for BDS Marketing's profitability is its creation and implementation of a uniform policy and system that requires hourly employees to work hours for which Defendant will not compensate them throughout its California properties.

24.

Beginning at a date unknown to Plaintiff, but at least as early as four years preceding the filing of this Complaint, Defendant committed, and continue to commit, acts of wage abuse against their hourly-paid employees by failing to properly compensate BDS Marketing's hourly employees throughout California for all hours worked.

25.

Defendant's clandestine program of failing to pay its hourly employees for all hours worked is, in part, carried out through its culture. Defendant gives employees work assignments that Defendant knows or should know its employees cannot complete within their scheduled hours. Defendant also pressures employees to complete their work assignments through intimidation, threats of discharge, and demotion, while at the same time precluding such employees from clocking in hours worked and necessary to accomplish their assignments outside their regular work schedule. Consequently, employees must work after clocking out at the end of their shifts, and before clocking in at the beginning of their shifts. When hours are recorded on time sheets, then Defendant routinely and systematically alters the time records to delete time worked.

26.

1 Defendant BDS Marketing has adopted and is using unfair business practices to hold
2 down pay to hourly employees, including the Plaintiff and the Class. Among these unfair
3 business practices are failure to pay hourly employees for all hours worked as required under
4 California law.

5
6 27.

7 Defendant BDS Marketing corporate policies also encourage its employees to not record
8 all their time actually worked, and/or refuses to pay for all hours logged. Indeed, Defendant's
9 corporate practice is to pay little or no overtime. Defendant BDS Marketing meets this cost-
10 saving goal by systematically having employees work hours for which they will not pay.

11
12 **FIRST CAUSE OF ACTION**

13 **Failure to Pay Minimum Wage**
14 **Violation of Cal. Lab. Codes §§1194, 1194.2, 1197**

15 28.

16 Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the
17 preceding paragraphs.

18 29.

19 The Class Period for this cause of action is four years from the filing of the complaint.

20 30.

21 Cal. Lab. Code §1197 provides, "the minimum wage for employees fixed by the
22 commission is the minimum wage to be paid to employees, and the payment of a less wage than
23 the minimum so fixed is unlawful."

24 31.

25 Cal. Lab. Code §1194 provides in relevant part that any employee receiving less than the
26 legal minimum wage applicable to the employee is entitled to recover in a civil action the unpaid
27
28

1 balance of the full amount of this minimum wage, including interest thereon, reasonable
2 attorneys' fees, and costs of suit.

3
4 **32.**

5 Cal. Lab. Code § 1194.2 provides in relevant part that: "In any action under ... Section
6 1194 to recover wages because of a payment of a wage less than the minimum wage fixed by an
7 order of the commission, an employee shall be entitled to recover liquidated damages in an
8 amount equal to the wages unlawfully unpaid and interest thereon. "

9
10 **33.**

11 As alleged herein, Defendant required Plaintiff and the Class members to work without
12 compensating them for all hours worked in violation of California law. By these actions,
13 Defendant violated Cal. Lab.Code § 1197 and is liable to Plaintiff and the Class.

14
15 **34.**

16 As a result of the unlawful acts of Defendant, Plaintiff and the Class members have been
17 deprived of compensation in amounts to be determined at trial, and are entitled to recovery of
18 such amounts, including interest thereon, attorneys' fees, costs, and any other damages as set
19 forth under California law, including statutory penalties under Cal. Labor Code §2699.

20 **SECOND CAUSE OF ACTION**

21 **Failure to Pay Overtime Wages**
22 **Violations of Cal. Lab. Code §§ 510, 1194 et seq., 1198**

23
24 **35.**

25 Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the
26 preceding paragraphs.

27
28 **36.**

The Class Period for this cause of action is four years from the filing of the complaint.

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37.

Cal. Lab. Code §510, "Day's work" provides in relevant part:

Eight hours of labor constitutes a day's work

* * * *

Any work in excess of eight hours in one workday and any work in excess of 40 hours in anyone workweek and the first eight hours worked on the seventh day of work in anyone workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.

38.

Cal. Lab. Code § 1194 provides in relevant part that: "any employee receiving less than the minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

39.

Cal. Lab. Code § 1198 provides in relevant part, "the employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful."

40.

Industrial Welfare Commission Order No. 7-2001(3)(A)(I) provides in relevant part:

1 [E]mployees shall not be employed more than eight (8) hours in any
2 workday or more than 40 hours in any workweek unless the
3 employee receives one and one-half (1 1/2) times such employee's
4 regular rate of pay for all hours worked over 40 hours in the
5 workweek. Eight (8) hours of labor constitutes a day's work.
6 Employment beyond eight (8) hours in any workday or more than six
7 (6) days in any workweek is permissible provided the employee is
8 compensated for such overtime at not less than:

9 (a) One and one-half (1 1/2) times the employees' regular
10 rate of pay for all hours worked in excess of eight (8) hours up to and
11 including 12 hours in any workday, and for the first eight (8) hours
12 worked on the seventh (7th) consecutive day of work in a workweek;
13 and

14 (b) Double the employee's regular rate of pay for all hours
15 worked in excess of 12 hours in any workday and for all hours
16 worked in excess of eight (8) hours on the seventh (7th) consecutive
17 day of work in a workweek.

18 **41.**

19 As alleged herein, Defendant required Plaintiff and Class members to work overtime
20 without receiving overtime compensation for any hours worked over eight per day or forty per
21 week.

22 **42.**

23 By their actions alleged above, Defendant violated the provisions of §§ 510, 1194 and
24 1198 of the California Labor Code and is liable to Plaintiff and the Class.

25 **43.**

26 As a result of the unlawful acts of Defendant, Plaintiff and the Class have been deprived
27 of overtime compensation in amounts to be determined at trial, injunctive relief and are entitled
28 to recovery of such amounts, including interest thereon, attorneys' fees, costs, and penalties.

THIRD CAUSE OF ACTION

**Unfair Competition
Violations of Cal. Bus. & Prof. Code §17200 et seq.**

44.

1 Plaintiff re-alleges and incorporate by reference each and every allegation set forth in the
2 preceding paragraphs.

3
4 **45.**

5 The Class period for this cause of action is four years from the filing of the complaint.

6 **46.**

7 Section 17200 of the California Business & Professions Code prohibits any unlawful,
8 unfair, or fraudulent business acts or practice.

9 **47.**

10 As used in this Complaint and in §17200, "unfair competition" means an unlawful, unfair
11 or fraudulent business act or practice. This conduct is actionable pursuant to Business and
12 Professions Code §§ 17200, 17203.

13
14 **48.**

15 Through the actions alleged herein, Defendant has engaged in unfair competition within
16 the meaning of Cal. Bus. & Prof. Code § 17200, because Defendant's conduct has violated state
17 wage and hour laws and the California common law as herein described. Indeed, Defendant's
18 conduct as herein alleged has damaged Plaintiff and the Class by wrongfully denying them
19 earned wages and therefore was substantially injurious to Plaintiff and the Class.

20
21 **49.**

22 Beginning at a date unknown to Plaintiff, but at least as early as four years preceding the
23 filing of this lawsuit, Defendant committed, and continues to commit, acts of unfair competition,
24 as defined by § 17200 et seq. of the California Business and Professions Code, by, among other
25 things, engaging in the acts and practices described above.

26
27 **50.**

1 Defendant engaged in unfair competition in violation of Cal. Bus. & Prof. Code § 17200
2 et seq. by violating, inter alia, each of the following, each of which constitutes an independent
3 and separate violation of Cal. Bus. & Prof. Code § 17200 et seq.:

- 4
- 5 a. Failure to pay wages for all hours worked;
 - 6 b. Cal. Lab. Code §§201,202, 204 et seq.;
 - 7 c. Cal. Lab. Code §§226, 226.7;
 - 8 d. Cal. Lab. Code §510;
 - 9 e. Cal. Lab. Code Section 512;
 - 10 f. Cal. Lab. Code §551, which provides that "[e]very person employed in any
11 occupation of labor is entitled to one day's rest there from in seven."
 - 12 g. Cal. Lab. Code §552, which provides that "No employer of labor shall
13 cause his employees to work more than six days in seven."
 - 14 h. Cal. Lab. Code § 1182. 11, which provides the minimum wage for all
15 industries;
 - 16 i. Cal. Lab. Code § 1194 et seq.;
 - 17 j. Cal. Lab. Code § 1197, 1198;
 - 18 j. Cal. Lab. Code § 2802;
 - 19 k. California Industrial Welfare Commission Order

20
21
22 **51.**

23 Defendants' course of conduct, acts, and practices in violation of the California laws
24 mentioned in each paragraph above constitute a separate and independent violation of §17200, et
25 seq., of the California Business and Professions Code.

26 **52.**

1 The harm to Plaintiff and the Class in being wrongfully denied lawfully earned wages
2 outweighs the utility, if any, of Defendant's policy/practices and, therefore, Defendant's actions
3 described herein constitute an unfair business practice or act within the meaning of California
4 Business and Professions Code §17200.
5

6 **53.**

7 Further, Defendants failed to provide Plaintiffs and Class Members with their legally
8 required meal break, and Plaintiff and Class Members seek to recover by way of restitution the
9 wages owed to them for Defendants' violations of Labor Code § 226.7 and Wage Order
10 provisions for meal periods, which constituted unfair business practices.
11

12 Defendant's conduct described herein constitutes an incipient violation of state wage and
13 hour laws and the California and/or violates the policy or spirit of such laws or otherwise
14 significantly threatens or harms competition.

15 **54.**

16 Defendant's course of conduct also violates Cal. Bus. & Prof. Code § 17200 in that it is
17 fraudulent and improper.
18

19 **55.**

20 The unlawful, unfair, and fraudulent business practices and acts of Defendants, and each
21 of them, as described above, have injured Plaintiff and members of the Class in that they were
22 wrongfully denied the payment of all wages owed as required under California law.
23

24 **56.**

25 Pursuant to Business and Professions Code § 17203, the Court may impose injunctive
26 relief against any conduct found to constitute unfair competition pursuant to Business and
27 Professions Code § 17200. The court may also make such orders or judgments, including the
28 appointment of a receiver, as may be necessary to prevent the use or employment by any person

1 of any practice which constitutes unfair competition, or as may be necessary to restore to any
2 person in interest any money or property, real or personal, which may have been acquired by
3 means of such unfair competition.
4

5 Plaintiffs are informed and believe that for the last four years, Defendants have
6 intentionally and improperly violated the Labor Laws and Regulations for Plaintiffs and Class
7 Members as alleged herein, and have induced and directed its officers, managers, supervisors
8 and/or other employees or agents to engage in violations including (1) failing and refusing to pay
9 all wages owed for hours worked; and (2) failing to pay compensation due in a timely manner
10 upon termination, and (3) failing to provide thirty-minute, uninterrupted, off-duty time for meal
11 periods, which constitute unfair business practices in violation of California Business &
12 Professions Code Sections 17200, *et seq*
13

14 **FOURTH CAUSE OF ACTION**

15 **Failure to Make Payment Within the Required Time**
16 **Violations of Cal. Lab. Code §§201-203, 226**

17 **57.**

18 Plaintiff re-allege and incorporate by reference each and every allegation set forth in the
19 preceding paragraphs.
20

21 **58.**

22 The Class Period for this cause of action is four year from the filing of the complaint.

23 **59.**

24 Cal. Lab. Code §201 provides in relevant part, "[i]f an employer discharges an employee,
25 the wages earned and unpaid at the time of discharge are due and payable immediately."
26

27 **60.**
28

1 Cal. Lab. Code §202 provides in relevant part, " [i]f an employee not having a written
2 contract for a definite period quits his or his employment, his or his wages shall become due and
3 payable not later that 72 hours thereafter, unless the employee has given 72 hours previous notice
4 of his or his intention to quit, in which case the employee is entitled to his or his wages at the
5 time of quitting."
6

7 **61.**

8 As alleged herein, Defendant failed to pay earned wages to Plaintiff and the Class who
9 are former employees of BDS Marketing at the time they became due and payable. Thus,
10 Defendant violated Cal. Lab. Code §§201 and 202.
11

12 **62.**

13 As a result of Defendant's unlawful acts, Plaintiff and the Class who are former
14 employees of BDS Marketing are entitled to recover, pursuant to Cal. Lab. Code §203,
15 continuing wages as a penalty from the due date thereof at the same rate until paid or until this
16 action was commenced; but for no more than 30 days.
17

18 **63.**

19 In addition, Cal. Lab. Code §226(a) provides in relevant part that" Every employer shall
20 furnish each of his or his employees ... an itemized statement in writing showing ... total hours
21 worked by the employee ... and all applicable hourly rates in effect during the pay period and the
22 corresponding number of hours worked at each hourly rate by the employee." Cal. Lab. Code
23 §226(b) then provides in relevant part: "Any employee suffering injury as a result of a knowing
24 and intentional failure by an employer to comply with subdivision (a) shall be entitled to recover
25 the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a
26 violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent
27 pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000) and shall be
28

1 entitled to an award of costs and reasonable attorney's fees." Plaintiff and the Class are entitled to
2 recover accordingly.

3
4 **FIFTH CAUSE OF ACTION**
5 **(Failure to Indemnify Employees for Expenditures:**
6 **California Labor Code Sections 2802)**

7 **64.**

8 Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the
9 preceding paragraphs.

10 **65.**

11 California Labor Code Section 2802 provides in relevant part, "An employer shall
12 indemnify his or her employee for all necessary expenditures or losses incurred by the employee
13 in direct consequence of the discharge of his or her duties, or of his or her obedience to the
14 directions of the employer, even though unlawful, unless the employee, at the time of obeying the
15 directions, believed them to be unlawful."

16 **66.**

17 As alleged herein, Defendants failed to indemnify Plaintiff and the class members for all
18 business expenses and/or losses as required under Labor Code Section 2802 and *Gattuso v.*
19 *Harte-Hanke Shoppers, Inc.* incurred while working under the direction of Defendants.

20 **67.**

21 As a result of the unlawful acts of Defendants, Plaintiff and the Class members have been
22 deprived of compensation in amounts to be determined at trial, and are entitled to recovery of
23 such amounts, including interest thereon, attorneys' fees, costs, and any other damages as set
24 forth under California Law.

25
26 **PRAYER FOR RELIEF**

1 WHEREFORE, Plaintiff, on behalf of themselves and the members of the Class, pray for
2 judgment against the Defendant as follows:

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- 4 1. Determining that this action may proceed and be maintained as a class action;
- 5 2. On the First Cause of Action:
- 6 a. A declaratory judgment that Defendant has violated Cal. Lab. Code
7 §§1194, 1194.2 and 1197;
- 8 b. An award to Plaintiff and the Class of damages for the balance of unpaid
9 overtime compensation, including interest thereon, and penalties subject to
10 proof;
- 11 c. An award to Plaintiff and the Class of reasonable attorneys' fees and costs
12 pursuant to Cal. Lab. Code § 1194 and/or other applicable state laws;
- 13 d. An award to Plaintiff and the Class of liquidated damages, pursuant to Cal.
14 Lab. Code § 1194.2;
- 15 e. Awarding the Named Plaintiff and the Class pre-judgment interest at the
16 highest legal rate, on all unpaid wages from the date such wages were
17 earned and due;
- 18 3. For the Second Cause of Action:
- 19 a. A declaratory judgment that Defendant has violated Cal. Lab. Code
- 20 b. An award to Plaintiff and the Class of damages for the amount of unpaid
21 overtime compensation, including interest thereon, and penalties subject to
22 proof;
- 23 c. An award to Plaintiff and the Class of reasonable attorneys' fees and costs
24 pursuant to Cal. Lab. Code § 1194 and/or other applicable state laws;
- 25 4. For the Third Cause of Action:
- 26 a. Ordering Defendant, its agents, servants, and employees, and all
27 persons acting, directly or indirectly, in concert with it, to restore and
28 disgorge all funds to each member of the Class acquired by means of any
 act or practice declared by this Court to be unlawful, unfair or fraudulent
 and therefore constitute unfair competition under § 17200 et seq. of the
 California Business and Professions Code;
- b. For injunctive relief pursuant to California Business & Professions Code §
 17203, consisting of, inter alia: (1) a declaration that Defendant has
 engaged in unlawful and unfair business acts and practices in violation of

1 California Business & Professions Code § 17200 et seq.; (2) a preliminary
2 and/or permanent injunction enjoining Defendant and its respective
3 successors, agents, servants, officers, directors, employees and all persons
4 acting in concert with them from pursuing the policies, acts and practices
5 complained of herein and prohibiting Defendant from continuing such acts
6 of unfair and illegal business acts and practices;

5 5. For the Fourth Cause of Action:

- 6 a. A declaratory judgment that Defendants have violated Labor Code Section
7 2802;
- 8 b. An award to Plaintiff and the Class of compensatory damages to be paid
9 by Defendant for failure to indemnify Plaintiff and the Class for all
10 necessary expenditures or losses incurred by the employee in direct
11 consequence of the discharge of his or her duties, or of his or her
12 obedience to the directions of the employer, even though unlawful, unless
13 the employee, at the time of obeying the directions, believed them to be
14 unlawful;
- 15 c. An award to Plaintiff and the Class of reasonable attorneys' fees and costs
16 pursuant to Labor Code Section 2802;
- 17 d. An award of all accrued interest from the date that the compensation was
18 due and payable at the interest rate specified in subdivision (b) or Section
19 3289 of the Civil Code; and

16 7. For the Fifth Cause of Action:

- 17 a. A declaratory judgment that Defendant has violated Cal. Lab. Code §§201,
18 202 and 226;
- 19 b. An award to Plaintiff and the Class who are former employees of
20 continuing wages as a penalty from the due date thereof at the same rate
21 until paid or until this action was commenced; but for no more than 30
22 days;
- 23 c. An award to Plaintiff and the Class of interest, which shall accrue from the
24 date that the wages were due and payable, pursuant to Cal. Lab. Code
25 §218.6.
- 26 d. An award to Plaintiff and the Class of reasonable attorneys' fees and costs
27 pursuant to Cal. Lab. Code §1194 and/or other applicable state laws;
- 28 e. An award to Plaintiff and the Class of actual damages as well as an award
of costs and reasonable attorneys' fees, pursuant to Cal. Lab. Code §226;

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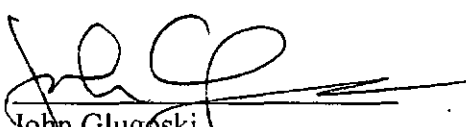
8. Awarding Plaintiff and the Class their attorneys' fees and costs of suit to the extent permitted by law;

9. All other relief as this Court may deem proper.

Dated: March 1, 2013

Respectfully submitted,

RIGHETTI GLUGOSKI, P.C.



John Glugoski
Attorneys for Plaintiff