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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF LOS ANGELES**

11 TOBY HARRIS, KEVIN O'CONNOR, )  
MICHAEL SANDERCOCK, ALEX LANE )  
12 and MICHAEL BEY, on behalf of )  
themselves, the general public, and all others )  
13 similarly situated, )

14 Plaintiffs, )

15 vs. )

16 INVESTOR'S BUSINESS DAILY, INC., a )  
California Corporation; DIRECT )  
17 MARKETING SPECIALISTS, INC., a )  
California corporation; DATA ANALYSIS, )  
18 INC.; WILLIAM O'NEIL & CO., )  
INCORPORATED, a California corporation )  
19 and Does 2 through 10, )

20 Defendants. )

Case No. BC269313  
R/T Case No. BC274964  
(Assigned to Elizabeth A. Grimes, Dept. 30)

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO DECERTIFY PLAINTIFFS'  
CHARGEBACK CLASS; DECLARATIONS  
OF TOBY HARRIS, ALEX LANE, KEVIN  
O'CONNOR, MICHAEL BEY, MICHAEL  
SANDERCOCK, AND ERIC EPSTEIN**

**Date: April 24, 2007**  
**Time: 8:30 a.m.**  
**Dept.: 30**

**Trial Date: July 7, 2007**

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Stripped of all of its rhetoric, and despite all of its voluminous, irrelevant “evidence,”  
4 Defendants' motion to decertify Plaintiffs’ “Chargeback Class” (the “Motion”) seeks a  
5 determination, *as a matter of law*, on a single issue: Whether, based upon the facts in this case,  
6 Plaintiffs can establish that Defendants' policy of “charging back” wages paid in the form of  
7 “commissions”<sup>1</sup> to Plaintiffs and to the members of Plaintiffs’ Class was illegal under Section 221  
8 of the California Labor Code and related sections. Defendants’ Motion must be denied for a number  
9 of related reasons.

10 First and foremost, under the California Supreme Court’s holding in *Linder v. Thrifty Oil Co.*,  
11 23 Cal.4th 429, 2 P.3d 27 (2000) and its progeny, the merits of Plaintiffs’ claims should not be  
12 determined in connection with a ruling on Plaintiffs’ Class certification, unless the “defense has no  
13 other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class  
14 . . . .” *Id.* at 443. The only case cited by Defendants to the contrary stands alone against the great  
15 weight of authority and is inapposite in any event, given the California Court of Appeal’s ruling *in*  
16 *this case* (in reversing this Court’s order summarily adjudicating Plaintiffs’ third cause of action in  
17 Defendants’ favor) that there are factual issues as to whether Defendants’ chargeback plan violates  
18 Section 221. The Court should deny Defendants’ Motion on this grounds alone.

19 Even if it would be proper for the Court to determine the merits of Plaintiffs' claims in ruling  
20 on a motion to decertify Plaintiffs’ Class, Defendants' Motion fails. The law is clear that Defendants  
21 – not Plaintiffs – have the burden of proof in connection with their Motion, and must establish that  
22 changed circumstances exist that warrant the decertification of Plaintiffs’ Class. Defendants have  
23 not met this burden. Although Defendants contend that there is “new” legal authority that now  
24 establishes, as a matter of law, that Defendants' chargeback policy was lawful, Defendants

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26  
27 <sup>1</sup> The use herein of the term “commissions” is for purposes of convenience only. Plaintiffs contend that Defendants’  
28 compensation plan was not a true “commission” plan because it was based on a point system which did not satisfy the legal  
requirements of a “commission” in that the compensation earned by plaintiffs was not based on a percentage of the price of  
the product sold. See *Harris v. Investor’s Business Daily, Inc.*, 138 Cal.App. 4<sup>th</sup> 28, 38, 41 Cal. Rptr. 3d 108 (2006 ).

1 conveniently disregard the fact that the California Court of Appeal has already expressly determined  
2 *in this case* that there is a triable issue of fact as to this very issue. *See Harris v. Investor's Business*  
3 *Daily, Inc.*, 138 Cal. App. 4th 28, 41 Cal. Rptr. 3d 108 (2006). The Court of Appeal's decision *in*  
4 *this case* is the law of the case, and Defendants have presented no "changed circumstances" or newly  
5 discovered facts that would alter the *Harris* court's holding. Accordingly, it is improper for  
6 Defendants to essentially re-argue their motion for summary adjudication of Plaintiffs' third cause  
7 of action by seeking another order from this Court that would decide, in advance of trial, and  
8 determine as a matter of law, the question of whether Defendants' chargeback policy was illegal.  
9 Such an order would be in direct contradiction of the Court of Appeal's decision in *Harris*.

10 The two cases relied upon by Defendants cannot and do not change the law of the case.  
11 *Steinhebel v. Los Angeles Times*, 126 Cal. App. 4th 696 (2005), was decided over a year *before* the  
12 Court of Appeal's decision in this case. Indeed, the *Harris* court considered and factually  
13 distinguished *Steinhebel* in reaching its decision to reverse the order summarily adjudicating  
14 Plaintiffs' claim based upon unlawful chargebacks. Likewise, when the Court of Appeal  
15 subsequently rendered its opinion in *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313, 48 Cal. Rptr. 3d  
16 749 (2006), the court found *Harris* to be "inapposite factually." *Id.* at 1333.

17 As the Court of Appeal noted in both *Harris* and *Koehl*, there are two dispositive facts that set  
18 this case apart from the circumstances in *Steinhebel* and *Koehl*: (1) In this case, the Plaintiffs did  
19 not expressly agree in writing to the chargeback policy at issue; and (2) The policy at issue in this  
20 case does not clearly state that the commissions were not earned at the time of sale. Defendants  
21 have not presented any evidence that either of these facts have changed since the *Harris* opinion was  
22 rendered in April of 2006. Indeed, they have not.

23 Despite Defendants' contention that there are "new" facts that support their request to decertify  
24 the Plaintiffs' Class,<sup>2</sup> the record establishes that there are no such facts, and that Defendants are

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26 <sup>2</sup> Defendants' Notice of Motion and Motion states that the Motion "is based on the grounds that controlling case  
27 law and authority developed in the interim since certification of the Chargeback Class establishes the absence of any  
28 actionable wrong . . . such that no predicate for this class exists . . ." (Notice of Motion at 2). The Notice makes no reference  
to any new facts or evidence as the basis for Defendants' Motion. Accordingly, the Court could reject Defendants' attempt  
to present such facts or evidence on this grounds alone. *See, e.g., People v. Hawley*, 119 Cal.App. 548, 6 P.2d 976 (1932)

1 misrepresenting the evidence that they claim is “new.” In particular, although Defendants contend  
2 that Plaintiffs signed an agreement regarding the chargeback policy at issue, there is and never has  
3 been any evidence of such an agreement because Plaintiffs never signed one. The documents  
4 entitled, "Acknowledgment" that were signed by Plaintiffs – which Defendants now claim  
5 constitutes the requisite agreement (Lancaster Decl., Ex. 9) – do not reference, identify or state the  
6 terms of Defendants' chargeback policy, and was not part of, or attached to, the Statement of  
7 General Personnel Policy (or any other document) in which the chargeback policy at issue in this  
8 case is set forth. Instead, these Acknowledgment[s] (which have been in Defendants’ possession  
9 and in Plaintiffs’ personnel files since before Plaintiffs filed this lawsuit) refer to a document that  
10 is entitled “Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook  
11 effective August 15, 1994” (the “1994 Handbook”). However, no document with that title has ever  
12 been produced or even exists. Incredibly, Defendants contend that an undated document entitled  
13 "Statement of General Personnel Policy", is the document that was referred to in each  
14 Acknowledgment, and was (for inexplicable reasons) referred to in the Acknowledgment as the  
15 1994 Handbook.<sup>3</sup> That document has been produced in discovery and has been in Defendants  
16 possession since the beginning of the case. (Epstein Decl., ¶ 2; Harris Decl., ¶¶ 3,4,5).

17 Even if Plaintiffs had signed a written agreement to be bound by the terms of Defendants'  
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19 (On motion to strike cost bill, court properly disregarded grounds for striking not appearing in notice); *De Long v. De Long*,  
20 127 Cal. App. 2d 373, 374 273 P.2d 921 (1954) (Where defendant's motion for change of venue was on grounds of  
21 convenience of witnesses and promotion of ends of justice and did not specify residence of defendant as a ground, trial court  
22 could not consider defendant's residence as ground for granting of motion). Nevertheless, because Plaintiffs do not want  
23 Defendants to waste additional resources of the Court or Plaintiffs by simply re-noticing their Motion, Plaintiffs request that  
24 the Court deny Defendants’ Motion on substantive, rather than procedural, grounds.

23 <sup>3</sup> Not only does the title of this document bear no resemblance to the title of the 1994 Handbook, but there  
24 is some evidence that this undated “Statement of General Personnel Policy” was *not* even the version of the policy that was  
25 in effect in 1994. As reflected by Defendants’ own papers, there is an *entirely different document* that Defendants also  
26 contend was the 1994 version of the Statement of General Personnel Policy. See Exhibit C to the Mayeron Declaration  
27 (Exhibit 7 to the Lancaster Declaration), which Ms. Mayeron attests is “the Statement of General Personnel Policy from  
28 1994.” (Mayeron Decl., ¶ 17). Even a cursory comparison of these two documents reveals that they are not the same. For  
29 example, the Mayeron version has handwritten “1994” on the top and handwritten page numbers. The version that  
30 Defendants now contend is the 1994 Handbook is undated and has typed page numbers. The font between the two documents  
31 is different and, consequently, the pagination is different. In addition, in the Mayeron version, in the "Professional Standards"  
32 section, there are two 16s, instead of a 16 and a 17, as in the undated version.

1 chargeback policy at issue in this case (they did not), as the *Harris* court expressly found, the policy  
2 itself – as well as the other written materials that Defendants gave to Plaintiffs at the time they were  
3 hired – indicate that the commissions are earned at the time of the sale, and not at some future time.  
4 Defendants present no evidence, much less any “new” evidence, that would alter this finding.

5 In sum, contrary to Defendants' bald assertions, there are no changed circumstances (*i.e.*, new  
6 law or newly discovered facts) that would alter the *Harris* court's holding and warrant a contrary  
7 ruling by this Court that, as a matter of law, Plaintiffs have no actionable claim that Defendants'  
8 chargeback procedure violates Labor Code Section 221. Accordingly, the Court should deny  
9 Defendants' Motion for decertification of Plaintiffs' chargeback class.

## 10 **II. STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY**

### 11 **A. Plaintiffs' Class Claim That Defendants' Chargeback Policy Violates Labor Code** 12 **Section 221**

13 Defendants are in the business of publishing Investor's Business Daily, a financial newspaper.  
14 Plaintiffs and each member of Plaintiffs' Class, were telemarketing sales persons who were (or  
15 continue to be) employed Defendants by selling newspaper subscriptions over the telephone. Once  
16 Plaintiffs were successful in making a sale, they received compensation based upon a point system  
17 according to the compensation plan in effect at the time, some of which compensation consisted of  
18 “commissions”.<sup>4</sup> Pursuant to Defendants' written policies, however, Defendants later unlawfully  
19 “charged back” wages that had been paid to Plaintiffs and Plaintiffs' Class in the form of  
20 commissions.

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22  
23 <sup>4</sup> Although Defendants spend a great deal of time describing the specifics regarding how their compensation plan  
24 and point system worked (*see* Motion at pp. 3-6 and Declaration of Harlan Ratzky, attached as Exhibit 4 to the Lancaster  
25 Declaration), these specifics have no bearing on Defendants' Motion and, in any event, have been described *ad naseum* in  
26 connection with Plaintiffs' motion to certify the overtime class, Defendants' motion for summary judgment, Plaintiffs  
opposition to said motion, and on the appeal of the order granting that motion. Accordingly, although Plaintiffs do not believe  
it is necessary to repeat those specifics here, Plaintiffs strenuously deny that Defendants' description of their compensation  
plan in connection with this Motion is accurate, or that such a plan constitutes a “commission”, and reserve the right to  
challenge such description at a later time, in the appropriate proceeding.

27 In addition, Plaintiffs object to the Declaration of Andrew Safir, Ph.D. on the grounds that his testimony is  
28 irrelevant to any issue raised by Defendants' Motion, as evidenced by the fact that, despite all of the details that Defendants  
provide regarding their compensation plan, Defendants do not cite to Dr. Safir's Declaration even once in their Motion.

1 In their third cause of action, Plaintiffs allege that the commissions they received upon selling  
2 a subscription constituted wages which were earned immediately upon such sale and therefore  
3 Defendants' chargeback policy violated, *inter alia*, Section 221 of the California Labor Code.  
4 Section 221 provides: "It shall be unlawful for any employer to collect or receive from an  
5 employee any part of wages theretofore paid by said employer to said employee." Cal. Lab. Code  
6 § 221. "Wages," in turn are broadly defined by Section 200 to include "all amount for labor  
7 performed by employees of every description, whether ascertained by standard of time, task, piece,  
8 commission basis, or other method of calculation." Cal. Lab. Code § 200.

9 On September 19, 2003, this Court (the now retired Honorable Rodney E. Nelson, presiding)  
10 granted Plaintiffs' motion for class certification, and certified Plaintiffs' Class to be:

11 all sales people who Defendants "charged back" commissions paid from  
12 four years prior to the filing of this complaint to the date of judgment after  
trial herein.

13 (Epstein Decl., Ex. G at ¶ 2).

14 **B. Defendants' Chargeback Policy States That Commissions Are Earned**

15 Defendants' chargeback policy at issue in this lawsuit is set forth in Defendants' Statement of  
16 General Personnel Policy, dated January 1999:

17 Any subscription which is canceled within 16 calendar weeks from the  
18 start, or restart, date of the subscription will be charged back to the week  
19 sold. The unit amount **earned**, as well as the dollar value of the unit  
amount **earned**, will be deducted in full. . . . If the department is unable  
to prevent cancellation, the unit value will be charged back in full.

20 (Lancaster Decl., Ex. 7, [Mayeron Decl., Ex. D at p. 9; Epstein Decl., Ex. F] at p. 9) (emphasis  
21 added). According to the policy, the commission is earned at the point of the sale, and therefore  
22 constitutes "wages" under Section 200 of the Labor Code. Other provisions in the Statement of  
23 General Personnel Policy confirm that the commissions paid were "**earned**" and were therefore  
24 "wages." *See* Epstein Decl., Ex. E at p. 8; Lancaster Decl., Ex. 7, [Mayeron Decl., Ex. D] at p. 8]  
25 ("Each paycheck reflects commissions **earned** during the prior week.") (emphasis added); *Id.* at p.  
26 9 ("Associates are guaranteed to be paid the greater of . . . 1. Commissions **earned** on paid  
27 subscription sales generated . . .") (emphasis added). In addition, as explained in the 1999  
28 Statement of General Personnel Policy, "[C]ertain deductions required by law will be made from

1 each Associate's **wages**. These include federal income taxes, state income taxes . . . ." (*Id.* at p. 9)  
2 (emphasis added). As Plaintiffs have confirmed, these taxes were deducted from Plaintiffs'  
3 paychecks, which included payments for commissions. (Harris Decl., ¶ 2; O'Connor Decl., ¶ 2;  
4 Sandercock Decl., ¶ 2; Lane Decl., ¶ 2; Bey Decl., ¶ 2).<sup>5</sup> None of the language in the 1999  
5 Statement of General Personnel Policy states that commissions are not earned if a customer cancels  
6 the subscription within 16 weeks or were "advances" made but not earned at the time they were  
7 paid. (*See* Lancaster Decl., Ex. 7, [Mayeron Decl., Ex. D]; Epstein Decl., Ex. E).

8 Notably, Defendants changed their commission policy in November 2001, after Plaintiffs made  
9 their initial claim, so that it now states that commissions are advances that are not earned at the time  
10 of a sale is made. The revised policy states:

11 Commissions will be *advanced* to the Associates based on the date in  
12 which payment is authorized and posted to the account. If a customer  
13 cancels a subscription within the first 16 weeks **no commission is earned**.  
14 The unit amount **advanced** as well as the associated dollar value of the  
15 unit amount **advanced** will be deducted in full from the Associates weekly  
16 paycheck.

15 (Lancaster Decl., Ex. 7, [Mayeron Decl., Ex. E] at pp. 9-10; Epstein Decl., Ex. F at pp. 9-10  
16 (emphasis added). As Defendants' former supervisor, Candace Mayeron, testified in her deposition,  
17 "the language [of the commission policy] was cleaned up," after Defendants' counsel reviewed the  
18 policy, and after Plaintiffs made their claim. (Lancaster Decl., Ex. Ex. 8, [Mason Decl., Ex. I],  
19 Mayeron Depo. at 200:5-21; 201:11-22; 203:20-204:5).

20 In sum, under Defendants' 1999 chargeback policy at issue in this case, Plaintiffs and the  
21 members of Plaintiffs' Class employees were "charged back" the points (and commissions) earned  
22 from a sale if the customer cancelled their subscription order within 16 weeks so that these earnings  
23 were deducted from Plaintiffs' future paychecks after such cancellation.

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25 <sup>5</sup> Defendants' earlier Statement of Personnel Policy, one version of which Defendants contend is the "1994  
26 Handbook" referred to in the Acknowledgments, also states that commissions are earned at the time of sale. *See* Epstein  
27 Decl., Ex. H. *See also* Lancaster Decl., Ex. 7, [Mayeron Decl., ¶ 17, Ex. C at p. 14], a different document described as "the  
28 Statement of General Personnel Policy from 1994." *See Id.* at p. 9 ("Each paycheck reflects commissions **earned** during  
the prior week.") (emphasis added); *id.* at p. 10 ("Associates are guaranteed to be paid the greater of . . . 1. Commissions  
**earned** on paid subscription sales generated . . .") (emphasis added)

1 **C. Defendants’ 1995 Handbook Expressly States that Defendants Do Not Provide Payroll**

2 **Advances**

3 The “Investor’s Business Daily Associate Handbook,” “Effective January 1, 1995” (the “1995  
4 Handbook”) produced by Defendants in discovery (Epstein Decl., ¶ 3 and Ex. A) expressly states  
5 on page 23 thereof the following:

6 ADVANCES: The Company *does not provide payroll advances* or extend  
7 credit or loans to any of its Associates.

8 Plaintiffs understood this to be Defendants’ policy when they were hired. (Harris Decl., ¶ 7;  
9 O’Connor Decl., ¶ 5; Sandercock Decl., ¶ 5; Lane Decl., ¶ 5; Bey Decl., ¶ 5).

10 **D. Plaintiffs Never Expressly Agreed To The Chargeback Policy In Writing**

11 \_\_\_\_\_As set forth above, the chargeback policy at issue in this case was set forth in Defendants’  
12 Statement of General Personnel Policy dated January 1999. Plaintiffs never signed any document  
13 acknowledging receipt of, much less agreeing to, the terms of, this policy. (Harris Decl., ¶ 3;  
14 O’Connor Decl., ¶ 3; Sandercock Decl., ¶ 3; Lane Decl., ¶ 3; Bey Decl., ¶ 3). The  
15 “Acknowledgment” that each of Plaintiffs signed when they were hired – and which Defendants  
16 contend establishes that Plaintiffs agreed in writing to the chargeback policy – does not refer to  
17 Defendants’ chargeback policy, the 1999 General Statement of Personnel Policy, or any other  
18 document containing such chargeback policy. Each “Acknowledgment” contains the same language  
19 and states in pertinent part:

20 I acknowledge that I have received and read a copy of the Direct  
21 Marketing Specialists, Inc. Telemarketing Sales Representative Handbook  
22 effective August 15, 1994. I agree to be bound by and conform to the  
23 policies and procedures therein. I further acknowledge that there are no  
express or implied agreements or understandings between me and the  
Company concerning my employment. . . . .

24 (Lancaster Decl., Ex. 9).

25 As further set forth on each “Acknowledgment,” “This sheet becomes a permanent part of  
26 [Plaintiffs’] personnel file.” (*Id.*). Accordingly, these documents were not newly discovered and  
27 were in Defendants’ possession at the time that this lawsuit was filed.

28 Defendants never produced during discovery any document entitled “Direct Marketing

1 Specialists, Inc. Telemarketing Sales Representative Handbook effective August 15, 1994,” (i.e.,  
2 the “1994 Handbook”) referred to in the Acknowledgments Plaintiffs signed and Plaintiffs do not  
3 recall receiving any 1994 Handbook. (Epstein Decl., ¶ 2; *see also* Harris Decl., ¶¶ 3-5; O’Connor  
4 Decl., ¶ 3; Sandercock Decl., ¶ 3; Lane Decl., ¶ 3; Bey Decl., ¶ 3). Although the Defendants have  
5 produced a document that they contend was the 1994 Handbook referred to in the  
6 Acknowledgments, that document – a copy of which is attached hereto as Exhibit “H” – is  
7 **undated**, and is entitled “**Statement of General Personnel Policy**”, not “Direct Marketing  
8 Specialists, Inc., Telemarketing Sales Representative Handbook effective August 15, 1994,” the  
9 document identified in the Acknowledgments. Thus, aside from Defendants’ unsubstantiated  
10 contentions, there is no evidence that even remotely indicates that this document is in fact the  
11 document referred to in the Acknowledgments, or that this document was attached to the  
12 Acknowledgments. Indeed, it is far more likely that the document identified in the  
13 Acknowledgments is the 1995 Handbook that Defendants produced, since this document is  
14 identified as a “handbook” in its title, and its effective date is exactly one year after the 1994  
15 Handbook referenced in the Acknowledgments. Notably, the 1995 Handbook did not expressly  
16 refer to, much less contain the terms of, Defendants’ commission policy. (Epstein Decl., ¶ 3, Ex.  
17 A.)

18 Even if the undated Statement of General Personnel Policy which Defendants now contend is  
19 the 1994 Handbook referenced in the Acknowledgments, there is still no evidence that Plaintiffs  
20 ever agreed in writing to the terms of the chargeback policy at issue in this case, which terms are  
21 different than the terms of the policy set forth in the undated Statement of General Personnel Policy  
22 (purportedly from 1994). Pursuant to the undated document, Defendants’ policy was to charge back  
23 commissions on subscriptions that were “canceled within 4 calendar weeks”. In other words, a  
24 customer had to cancel within 4 weeks in order to trigger the chargeback. However, all of the  
25 Plaintiffs in this case worked under the chargeback policy set forth in the 1999 Statement of General  
26 Personnel Policy, pursuant to which Defendants’ chargedback commissions on subscriptions that  
27 were “canceled within 16 calendar weeks”. For obvious reasons, the 4 week chargeback policy  
28 which was contained in the undated Statement of General Personnel Policy (which Defendants

1 contend is the 1994 Handbook referred to in the Acknowledgments) is much more favorable to the  
2 employees than the 16 week chargeback at issue in this case: Under this policy, if a customer  
3 doesn't cancel within 4 weeks the employee keeps the entire commission, whereas under the  
4 chargeback policy at issue in this case, if a customer cancelled any time within 16 weeks, the  
5 employee lost his entire commission. Thus, even if the undated Statement of Personnel Policy was  
6 the 1994 Handbook referenced in the Acknowledgments signed by Plaintiffs, the chargeback policy  
7 contained in the undated Statement of Personnel Policy provided for a 4 week cancellation period,  
8 not a 16 week cancellation period. The fact remains that Plaintiffs never agreed in writing to a 16  
9 week chargeback period, which chargeback period is the one at issue in this case. Accordingly,  
10 Defendants' representation to the Court that by signing these "Acknowledgment[s]" Plaintiffs  
11 expressly agreed to the terms of Defendants' chargeback policy is entirely disingenuous and  
12 misstates the facts of this case.<sup>6</sup>

13 **E. The Court of Appeal Reversed The Order of This Court Granting Defendants Summary**  
14 **Adjudication of Plaintiff's Third Cause of Action That Defendants' Chargeback Policy**  
15 **Violates Labor Code Section 221**

16 On October 23, 2002, this Court (the now retired, Honorable Rodney E. Nelson, presiding)  
17 granted Defendants' motion for summary judgment and summarily adjudicated Plaintiffs' third  
18 cause of action (based upon Defendants' chargeback policy) in Defendants' favor. The Court  
19 reasoned that Defendants lawfully conditioned the Plaintiffs salespersons' right to commissions on  
20 the condition precedent that the customer maintain the subscription for 16 weeks. Thus, Defendants  
21 could advance the commission to the salesperson by paying it immediately upon the sale of the  
22 subscription but charge it back through a paycheck deduction if the customer canceled before the  
23 16 period expired, without violating Labor Code Section 221.

24 \_\_\_\_\_  
25 <sup>6</sup> In fact, on August 2, 2002, Defendants' counsel unsuccessfully attempted to get Plaintiff Alex Lane to admit in  
26 his deposition that the "Acknowledgment" that he signed was "an acknowledgment for" the Statement of General Personnel  
27 Policies containing the commission policy, and Plaintiffs' counsel informed Defendants' counsel at that time that the  
28 "Acknowledgment" "says something different" than what Defendants' counsel suggested, after which Defendants' counsel  
abruptly "moved on" to another document. (Epstein Decl., Ex. D, Lane Depo. At 35:6-36:4; Lancaster Decl., Ex. 8, [Mason  
Decl., Ex. M], Lane Depo. at 35:6-36:4).

1 On March 29, 2006 (as modified on denial of rehearing April 24, 2006), the California Court  
2 of Appeal reversed this Court's October 23, 2002 order to the extent that it granted Defendants  
3 summary adjudication of Plaintiffs' third cause of action. In doing so, the Court of Appeal found  
4 that a triable issue of fact exists as to this claim. *Harris*, 138 Cal. App. 4<sup>th</sup> at 41.

5 **III. DEFENDANTS' MOTION FOR DECERTIFICATION SHOULD BE DENIED**

6 **A. The Court Should Not Determine The Merits In Ruling On A Motion For**  
7 **Decertification**

8 As the California Supreme Court has explained, the "question of certification" is "a procedural  
9 one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil*  
10 *Co.*, 23 Cal.4th 429, 439-440, 2 P.3d 27 (2000). Thus, class certification generally should not be  
11 "conditioned upon a showing that class claims for relief are likely to prevail." *Linder v. Thrifty Oil*  
12 *Co.*, 23 Cal.4th at 443.<sup>7</sup> *Accord Sony Electronics Inc. v. Superior Court*, 145 Cal. App. 4th 1086,  
13 1093-1094, 52 Cal. Rptr. 3d 139 (2006) ("Whether certification of a class is appropriate is  
14 essentially a procedural question that does not depend on the legal or factual meritoriousness of the  
15 class claims."). *See also Stephens v. Montgomery Ward*, 193 Cal. App. 3d 411, 418, 238 Cal. Rptr.  
16 602 (1987) ("[A]t the certification stage the court is not to examine the merits of the case"); *Reyes*  
17 *v. Board of Supervisors*, 196 Cal. App. 3d 1263, 1271, 242 Cal. Rptr. 339 (1987) ("At the  
18 certification stage . . . the trial court is not to examine the merits of the case").

19 Under the rule espoused in *Linder*, the reviewing courts cannot "condone merit-based  
20 challenges" in the "certification process." *Linder*, 23 Cal. App. 4th at 440-441. In applying this  
21 rule, the California Court of Appeal has reversed the denial of class certification where it was based  
22 on an assessment of the lawsuit's underlying merits. *See, e.g., Lebrilla v. Farmers Group, Inc.*, 119  
23 Cal.App.4th 1070, 1084 & n.9, 16 Cal. Rptr. 3d 25 (2004) ("at this time, it is not our role, nor the  
24 trial court's job, to involve ourselves with the merits of the underlying action"; "neither we, nor the  
25 trial court, can or will consider the merits of the underlying action in determining whether the class

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26  
27 <sup>7</sup> As the *Linder* Court noted, "federal law [applying Rule 23 of the Federal Rules of Civil Procedure] generally  
28 bar[s] preliminary merit assessments for certification purposes . . ." *Id.* at 443 (citing cases).

1 should be certified.); *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 138 50 Cal. Rptr. 3d 135  
2 (2006) ("plaintiffs' deposition testimony, although perhaps an issue to be addressed at the merits  
3 stage of the litigation, is not a valid basis for denying certification.").

4 As the California Court of Appeal (Second District) recently summarized in *Aguiar*:

5 Class actions are statutorily authorized "when the question is one of  
6 common or general interest, of many persons, or when the parties are  
7 numerous, and it is impracticable to bring them all before the court ... ." (Code Civ. Proc., § 382.) "The certification question is 'essentially a  
8 procedural one that does not ask whether an action is legally or factually  
9 meritorious.' [Citation.]" [Citation.] "As the focus in a certification dispute  
10 is on what type of questions--common or individual--are likely to arise in  
11 the action, rather than on the merits of the case [citations], in determining  
12 whether there is substantial evidence to support a trial court's certification  
13 order, [the reviewing court] consider[s] whether the theory of recovery  
14 advanced by the proponents of certification is, as an analytical matter,  
15 likely to prove amenable to class treatment. [Citations.]" [Citation.] " "[T]his state has a public policy which encourages use of the class action  
16 device.' [Citation.]" [Citation.].

13 *Aguiar*, 144 Cal. App. 4<sup>th</sup> at 132 (citations omitted).

14 In *Linder*, the Court left open the possibility of only a very limited exception to the rule against  
15 refusing class certification based upon a determination on the merits:

16 [W]e do not foreclose the possibility that, in the exceptional case *where the*  
17 *defense has no other reasonable pretrial means to challenge the merits of*  
18 *a claim to be asserted by a proposed class*, the trial court may, after giving  
19 the parties notice and an opportunity to brief the merits question, refuse  
20 class certification because the claim lacks merit as a matter of law.

19 *Linder*, 23 Cal.4th at 443 (emphasis added). This, however, is not such a case. Here, the  
20 Defendants can and did have a means to challenge the merits of Plaintiffs' case prior to trial:  
21 Defendants demurred to Plaintiffs' claims and moved for summary judgment on Plaintiffs' claims.  
22 The Court of Appeal has determined that Defendants are not entitled to summary adjudication of  
23 Plaintiffs' claims because there are material issues of fact as to whether Defendants' chargeback  
24 policy violates Labor Code Section 221. Defendants' attempt to make an end run around this ruling  
25 through its Motion for decertification must be rejected.

26 Defendants' reliance upon *Bennett v. Regents of University of California*, 133 Cal. App. 4th  
27 347, 355 (2005) (the only case cited by Defendants on this point) is misplaced. To the extent that  
28 the *Bennett* court affirmed the denial of class certification based upon a finding that the plaintiffs'

1 claims in that case had no merit, as a matter of law, it stands alone against the great weight of  
2 authority set forth by *Linder* and its progeny. In *Bennett*, the court cited the exception noted in  
3 *Linder* as the basis for its ruling, but left out the crucial language from *Linder* that the defense have  
4 no other pretrial means to challenge the plaintiffs' claims, and focused exclusively on whether "the  
5 parties have had notice and an opportunity to brief the issue." *Bennett*, 133 Cal. App. 4th at 355.  
6 Thus, the *Bennett* court did not mention, much less consider, whether following discovery in that  
7 case the defense in that case had any other pre-trial means by which to challenge the merits of  
8 plaintiffs' claims.

9 Moreover, the *Bennett* court either misunderstood or ignored the *Linder* court's recognition that  
10 there may be situations in which the merits need to be considered (not ruled on) to the extent that  
11 such consideration is needed to determine whether the requisite commonality of claims exists.  
12 *Linder*, 23 Cal. 4th at 443 ("issues affecting the merits of a case may be enmeshed with class action  
13 requirements, such as whether substantially similar questions are common to the class and  
14 predominate over individual questions or whether the claims or defenses of the representative  
15 plaintiffs are typical of class claims or defenses"). Instead, the *Bennett* court cited to pre-*Linder*  
16 case law for the proposition that the merits could be considered "when the merits of the claim are  
17 enmeshed with class action requirements." *Bennett*, 133 Cal. App. 4th at 357. Since the  
18 commonality of plaintiffs' claims is always a factor considered in ruling on the propriety of class  
19 certification, under the reasoning in *Bennett*, it could be argued that it would be proper to consider  
20 the merits in connection with every certification or decertification motion. In *Linder*, the California  
21 Supreme Court expressly rejected this result.

22 Finally, even if *Bennett* was based upon an accurate application of the rule espoused by *Linder*,  
23 it is factually inapposite. In *Bennett*, the court expressly found that there was no evidence to support  
24 the plaintiffs' claims:

25 [W]e conclude that the factual basis for plaintiffs' class claim – multiple,  
26 simultaneous incineration of human remains – is not an actionable wrong  
27 in the context of a university's willed body program. Moreover, despite  
28 nine years of litigation, the plaintiffs failed to present any admissible  
evidence of their common "core fact" that the decedents' remains were  
improperly disposed of at a landfill.

1 *Bennett*, 133 Cal. App. 4<sup>th</sup> at 355.

2 For all of these reasons, Plaintiffs urge this Court to follow the great weight of authority on this  
3 issue, and deny Defendants' Motion on the grounds that it is based exclusively upon a substantive  
4 attack on the merits of Plaintiffs' claims

5 **B. Under The Law of The Case, There Is A Triable Issue of Material Fact As To**  
6 **Whether Defendants' Chargeback Policy Violates Labor Code Section 221**

7 Even if it would be appropriate for the Court to determine the merits of this case in ruling on  
8 Defendants' Motion, it is clear that under the law of the case as recognized by California courts, the  
9 predicate for Plaintiffs' Class, *i.e.*, that Defendants' chargeback policy violates Labor Code Section  
10 221, is not only actionable, but triable issues of fact exist regarding the merits of this predicate  
11 claim. The law of the case and, in particular, the *Harris* court's holding that there is a material issue  
12 of fact as to whether Defendants' chargeback policy was lawful, preclude a finding by this Court  
13 that, as a matter of law, Plaintiffs' Class cannot prevail upon their claim against Defendants.

14 Under the law of the case doctrine, "the decision of an appellate court, stating a rule of law  
15 necessary to the decision of the case, conclusively establishes that rule and makes it determinative  
16 of the rights of the same parties in any subsequent retrial or appeal in the same case." *Nally v.*  
17 *Grace Community Church*, 47 Cal.3d 278, 301, 253 Cal. Rptr. 97, 763 P.2d 948 (1988) (quoting (9  
18 Witkin, Cal. Procedure 302 (3d ed. 1985) Appeal, § 737, pp. 705-707). *Accord Yu v. Signet*  
19 *Bank/Virginia*, 103 Cal.App.4th 298, 309, 126 Cal. Rptr. 2d 516 (2002). Moreover, "[i]n analyzing  
20 a motion to decertify a class action, [the court] may consider a previous decision concerning the  
21 merits of the case." *Clarke v. Ford Motor Co.*, 228 F.R.D. 631, 633 (E.D. Wis. 2005).

22 In this case, the California Court of Appeal has determined that "[a] triable issue of facts exists  
23 as to whether the chargeback plan in effect during [Plaintiffs'] employment violates Labor Code  
24 Section 221." *Harris*, 138 Cal. App. 4<sup>th</sup> at 41. This ruling is the law of the case and Defendants'  
25 request that this Court make a contrary determination should be rejected.

26 Contrary to Defendants' contentions, as the California Court of Appeal has expressly  
27 acknowledged, the facts in this case do not "correspond[] emphatically in all essentials to the facts  
28 in" *Steinhebel v. Los Angeles Times* 126 Cal. App. 4th 696 (2005), and *Koehl v. Verio, Inc.*, 142 Cal.

1 App. 4th 1313, 48 Cal. Rptr. 3d 749 (2006). (See Motion at p. 1).

2 In particular, as the *Harris* Court of Appeal explained in reversing the order granting  
3 Defendant's motion for summary judgment, the facts in this case are distinguishable from those in  
4 *Steinhebel v. Los Angeles Times* 126 Cal. App. 4th 696 (2005),<sup>8</sup> because here, unlike the plaintiffs  
5 in *Steinhebel*, the Plaintiffs in this case "did not expressly agree to the chargeback policy in writing."  
6 *Harris*, 138 Cal. App. 4th at 41. Moreover, unlike the written employment agreement in *Steinhebel*  
7 which made clear that the commissions paid to plaintiffs were advances that had not yet been  
8 earned, the Statement of General Personnel Policy describing Defendants' chargeback policy as well  
9 as Defendants' other "materials suggested that the [commissions] were earned at the time of the sale,  
10 not some designated time in the future." *Id.* Thus, even if the Plaintiffs had signed the policy as a  
11 binding agreement (they did not), the policy still indicated that the commissions were "wages."

12 As the *Harris* Court of Appeal explained, these factual differences are dispositive and create  
13 a factual issue as to whether Defendants' chargeback policy violates Section 221 of the California  
14 Labor Code. *Id.* Accordingly, *Steinhebel*, decided before, and distinguished by, *Harris*, does not  
15 and cannot change the law of the case.

16 Like the facts in *Steinhebel*, the facts in *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313, 48 Cal.  
17 Rptr. 3d 749 (2006), decided shortly after *Harris*, are also dispositively different from the facts in  
18 this case. Unlike the policy at issue here, the policy at issue in *Koehl* expressly explained that the  
19 commissions were not earned unless certain conditions precedent had occurred:

20 "Verio is paying Commission in prior to when the commission is actually  
21 earned, which does not occur until the service or product has been  
22 delivered, accepted and payment has been received by Verio for three (3)  
months."

23 *Koehl*, 142 Cal. App. 4th at 1321 (quoting the 2001 Sales Associate Compensation Plans). *See also*  
24 *id.* at 1321 (quoting nearly identical language in the 2000 Direct Sales Compensation Plan).

25 In addition, unlike the Plaintiffs in this case, the plaintiffs in *Koehl* "all admitted that [the

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26  
27 <sup>8</sup> In *Steinhebel*, the California Court of Appeal affirmed summary judgment in the defendant newspaper's favor  
28 on the grounds that the defendant's chargeback of *advanced* commissions (to which the plaintiffs salespersons had expressly  
agreed in writing) did not violate Labor Code Section 221. *Steinhebel*, 126 Cal. App. 4th at 710-712.

1 Defendant employer] paid them in advance of when the commissions were earned . . .” *Id.* at 1323.

2 Moreover, as the *Koehl* court explained, like the plaintiffs in *Steinhebel*, the plaintiffs in *Koehl*:

3 did expressly agree to the policy in writing[] [a]nd here the policy  
4 expressly, and clearly, stated that the commissions were not earned at the  
time of sale – as [Plaintiffs] expressly admitted.

5 *Id.* at 1334. Based upon these facts, the *Koehl* court found *Harris* to be “inapposite factually.” *Id.*  
6 at 1333. Consequently, although *Koehl* was decided after *Harris*, nothing in *Koehl* can or does  
7 change the law of the case.

8 As set forth below, Defendants have not presented any new (or old) evidence that would or  
9 could change the dispositive facts in this case – facts which, under the law of the case, create a  
10 triable issue as to whether Defendants’ chargeback policy violates Labor Code Section 221, the  
11 predicate claim for Plaintiffs’ Class. Accordingly, the Court should deny Defendants’ request that  
12 the Court issue an order contradicting *Harris* and finding that, as a matter of law, Plaintiffs’ Class’  
13 claim that Defendants’ chargeback policy violates Section 221 is not actionable. (*See* Motion at p.  
14 1).

15 **C. Defendants Have Not Met Their Burden of Proof In Connection With Their**  
16 **Motion**

17 **1. Defendants Have The Burden Of Proving That There Is A Change In**  
18 **Circumstances Warranting Decertification**

19 Defendants contend that "even at the decertification stage, plaintiffs bear the continuing burden  
20 of satisfying class action requirements." (Motion at p. 7). The law is to the contrary. A party who  
21 seeks decertification of a class has the burden of showing that the case can no longer satisfy class  
22 action requirements. *McGhee v. Bank of America*, 60 Cal. App. 3d 442, 450, 131 Cal. Rptr. 482  
23 (1976). *See also Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 651 (D.D. Cal. 2000) ("The party seeking  
24 decertification should bear the burden of demonstrating the elements of Rule 23 have not been  
25 established.").

26 Defendants’ authorities are not to the contrary. Two of the cases cited by Defendants did not  
27 involve a motion to decertify a class of plaintiffs. *Hamwi v. Citinational-Buckeye Investment Co.*,  
28 72 Cal. App. 3d 462, 140 Cal. Rptr. 215 (1977), involved a motion for certification and the *Hamwi*

1 court stated, "*On a motion to certify class status* of an action, it is the plaintiff's burden to establish  
2 that in fact the requisites for continuation of the litigation in that format are present." *Id.* at 471-72  
3 (Emphasis added). *Almtan v. Manhattan Savings Bank*, 83 Cal. App. 3d 761, 764, 148 Cal. Rptr.  
4 100 (1978), involved an order dismissing unnamed class members. The third case, *Grogan-Beall*  
5 *v. Ferdinand Roten Galleries, Inc.*, 133 Cal. App. 3d 969, 975-96, 184 Cal. Rptr. 411 (1982), did  
6 involve a decertification order, but did not address the issue of which party had the burden of proof  
7 in connection with a motion for decertification.

8 Moreover, while the Court is vested with the discretion to decertify a class, it may do so "only  
9 where it is clear there exist changed circumstances making continued class action treatment  
10 improper." *Green v. Obledo*, 29 Cal. 3d 126, 148, 624 P.2d 256 (1981) (quoting *Sley v. Jamaica*  
11 *Water & Util., Inc.*, 77 F.R.D. 391, 394 (E.D. Pa. 1977)).<sup>9</sup> See also *Grogan-Beall v. Ferdinand*  
12 *Roten Galleries, Inc.*, 133 Cal. App. 3d 969, 977, 184 Cal. Rptr. 411 (1982) ("The trial court does  
13 retain jurisdiction to decertify a class . . . providing there has been a showing of changed  
14 circumstances or newly available evidence making continued class action treatment improper . . .  
15 ."); *Sley v. Jamaica Water & Utilities, Inc.*, 77 F.R.D. 391, 394 (D.C. Pa. 1977) ("Applying a 'law  
16 of the case' rationale, a class once certified on the basis of the requirements of rule 23(a) and 23(b)  
17 should be decertified only where it is clear there exist changed circumstances making continued  
18 class action treatment improper."); *Robin v. Doctors Officenters Corp.*, 686 F. Supp. 199, 203 (N.D.  
19 Ill 1988) ("Decertification should only occur where it is clear that changed circumstances make  
20 continuation of the class action improper."). Accordingly, where, as here, a defendant fails to  
21 establish the existence of changed circumstances or new evidence warranting decertification, a  
22 motion to decertify should be denied. *Green*, 29 Cal. 3d at 149.

23 As set forth above in Section III. B., Defendants in this case have not established any change  
24 in circumstances by way of "new" law that would render Plaintiffs' chargeback claim deficient as  
25 a matter of law and thereby warrant the decertification of Plaintiffs' Class. Nor, as set forth below,

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27 <sup>9</sup> As the court explained in *Green*, "It is well established that in the absence of relevant state precedents our  
28 trial courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil Procedure for conducting  
class actions. [Citations.] The California class action statute (Code Civ. Proc. § 382) is silent on the question of when a court  
may order a class to be certified or decertified." *Green*, 29 Cal. 3d at 145-46 (citations omitted).

1 have Defendants established that there is any newly acquired evidence that would warrant such a  
2 ruling. Having failed to meet their burden of proof, Defendants' Motion must be denied.

3           **2. There Are No "Changed Circumstances" Warranting A Finding That, As**  
4           **A Matter of Law, Plaintiffs Have No Actionable Claim That Defendants'**  
5           **Chargeback Policy Violates Labor Code Section 221**

6           Although Defendants contend that Plaintiffs signed an agreement regarding the chargeback  
7 policy at issue, and that this agreement was not considered by the *Harris* court because it was not  
8 part of the record on Defendants' motion for summary judgment (see Motion at footnotes 7 and 29),  
9 the document the Defendants contend is the agreement regarding the chargeback policy (i.e., the  
10 Acknowledgment signed by the Plaintiffs referring to the 1994 Handbook) has always been in their  
11 possession, as has been the undated Statement of General Personnel Policy which Defendants claim  
12 is the 1994 Handbook.

13           The documents entitled, "Acknowledgment", that were signed by each of the named Plaintiffs  
14 – which Defendants now claim constitutes the requisite agreement – do not reference, identify or  
15 state the terms of Defendants' chargeback policy, were not part of, or attached to, any 1994  
16 Handbook in which the chargeback policy is set forth. Instead, these Acknowledgment[s] refer  
17 globally to "the Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook,  
18 effective August 15, 1994," a document that Plaintiffs now contend is an undated Statement of  
19 General Personnel Policy. (Lancaster Decl., Ex. 9; Epstein Decl., ¶ 2). Far from "new," the  
20 Acknowledgments that Defendants now claim are evidence of this purported "agreement" were part  
21 of Defendants' own personnel files for Plaintiffs. (*See* Lancaster Decl., Ex. 9).

22           As each of the Plaintiffs have attested to, they never signed an Acknowledgment agreeing to  
23 Defendants' chargeback policy at issue in this case, nor did they ever sign a written agreement  
24 expressly agreeing to such policy. (Harris Decl., ¶ 3; O'Connor Decl., ¶ 3; Sandercock Decl., ¶ 3;  
25 Lane Decl., ¶ 4; Bey Decl., ¶ 3). This fact has not changed since the holding in *Harris*.

26           Even if Plaintiffs had signed a written agreement to be bound by the terms of Defendants'  
27 chargeback policy at issue in this case (they did not), as the *Harris* court expressly found, the policy  
28 itself as well as Defendants other materials indicate that the commissions are "earned" at the time

1 of the sale, and not at some future time (*See* Epstein Decl., Ex. E at pp. 8, 9), and none of  
2 Defendants’ operative materials from 1999 state that commissions are “advances” or are not  
3 “earned” if a customer cancels the subscription within 16 weeks. *See* Lancaster Decl., Ex. 7,  
4 [Mayeron Decl., Ex. D]; Epstein Decl., Ex. E). To the contrary, as Defendants’ 1995 Handbook  
5 unambiguously states: “The Company does not provide payroll advances . . . to any of its  
6 Associates.” (Epstein Decl., Ex. A; Harris Decl., Ex. A; O’Connor Decl., Ex. A; Sandercock Decl.,  
7 Ex. A; Lane Decl., Ex. A; Bey Decl., Ex. A). Moreover, in a “Welcome” letter sent to each  
8 employee, Defendants clearly state that the money they receive each week is either “minimum  
9 wage” or “**earned commissions**” (Bey Decl., Ex. I). Even the chargeback policy set forth in the  
10 undated Statement of General Personnel Policy (which Defendants contend was agreed to in writing  
11 by Plaintiffs when they signed the Acknowledgments) states, under the heading of “Chargeback  
12 Policy”, the following:

13           “Any subscription which is cancelled within 4 calendar weeks from the  
14           start, or restart, date of the subscription will be charged back to the week  
15           sold. The unit **earned**, as well as the associated dollar value of the unit  
16           amount **earned**, will be deducted in full.” (Emphasis added)

17           Thus, Defendants never used the word “advanced” or “loaned” but always referred to the  
18 commissions that were to be charged back as “**earned**”.

19           Defendants present no "new" evidence that would alter the *Harris* court’s finding. The fact  
20 that Defendants attempted to cure the defects in their chargeback policy after Plaintiffs made their  
21 initial claim (so that it now explicitly states that commissions are “advances” that are not "earned"  
22 unless a sale is not cancelled 16 weeks after the sale is made), serves as Defendants' own admission  
23 that their prior policy was defective and needed to be “cleaned up.” (Lancaster Decl., Ex. 7,  
24 [Mayeron Decl., Ex. E] at pp. 9-10; Epstein Decl., Ex. E at pp. 9-10; Lancaster Decl., Ex. Ex. 8,  
25 [Mason Decl., Ex. I], Mayeron Depo. at 200:5-21; 201:11-22; 203:20-204:5).

26           Moreover, because of the ambiguity in the operative 1999 chargeback policy and Defendants’  
27 other materials, as the *Harris* court found, a material issue of fact exists as to whether the policy  
28 violates Labor Code Section 221 “[e]ven if [Plaintiffs’] knew about the policy.” *Harris*, 138 Cal.

1 App. 4<sup>th</sup> at 41 (emphasis added). There is no basis for a contrary ruling by this Court.

2 **IV. CONCLUSION**

3 For all of the reasons stated herein, Plaintiffs respectfully request that the Court deny  
4 Defendants' Motion to decertify Plaintiffs' Class.

5 Dated: April \_\_\_\_, 2007

**ERIC M. EPSTEIN**, A Professional Corporation

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By: \_\_\_\_\_  
Eric M. Epstein  
Attorney for Plaintiffs

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1 **DECLARATION OF TOBY HARRIS**

2 I, Toby Harris, declare:

3 1. I am one of the named Plaintiffs in the within action and have personal knowledge  
4 of the facts set forth herein below. If called upon as a witness I could and would competently testify  
5 thereto.

6 2. I was employed as a telemarketing sales associate for Defendants from approximately  
7 May 1995 to June 11, 2001. During that period of time I was paid compensation which was termed  
8 “commissions” based upon the number of points I earned in the preceding week. Federal, State and  
9 Social Security taxes were always deducted from my paycheck. I know it was the practice of  
10 Defendants to withhold taxes from all checks paid to the telemarketing sales representatives. When  
11 I was charged back commissions that I previously earned because a customer canceled within 16  
12 weeks, the deductions that had been taken from my paycheck for taxes were not reimbursed.

13 3. I never signed any Acknowledgment agreeing to Defendants’ chargeback policy at  
14 issue in this case, nor did I ever sign any written agreement in which I expressly agreed to the terms  
15 of such policy. The Acknowledgment that I signed that is attached as Exhibit 9 to the Declaration  
16 of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’ Class refers  
17 to “the Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook effective  
18 August 15, 1994” (hereinafter, the “1994 Handbook”). However, I have no recollection of receiving  
19 a copy of the 1994 Handbook from Defendants when I was hired, or at any other time. To the best  
20 of my knowledge, I never had a copy of such handbook in my possession.

21 4. In or about November of 2000, I met with Defendants’ then Vice President of Human  
22 Resources, Dennis Miller, to confirm whether Defendants’ managers had made a note in my  
23 personnel file of the error that they had made when they wrongly accused me of committing acts  
24 requiring disciplinary action, after they learned that these acts had been actually committed by a  
25 different employee, named Jeff Harris, and had not been committed by me. During this meeting,  
26 I asked Mr. Miller to allow me to review my personnel file, which he did. Upon such review, I saw  
27 the document entitled “Acknowledgment” that is attached as Exhibit 9 to the Declaration of William  
28 H. Lancaster. Based upon the reference in the Acknowledgment to the 1994 Handbook, and the fact

1 that I knew that I did not have a copy of such handbook, I asked Mr. Miller to provide me with a  
2 copy of this document. Mr. Miller informed me at that time that he had never seen the 1994  
3 Handbook and was not sure whether such handbook was still in the possession of Defendants. Mr.  
4 Miller told me that he would check with one of my supervisors, Candace Mayeron, to see if she  
5 could locate the 1994 Handbook, and that he would get back to me. Mr. Miller was never able to  
6 locate the 1994 Handbook, and never gave me a copy of that handbook.

7 5. I have been advised that Defendants contend that the undated Statement of General  
8 Personnel Policy attached hereto as Exhibit "H" was the 1994 Handbook referred to in the  
9 Acknowledgment. That was never my understanding. Mr. Miller never said that the undated  
10 Statement of General Personnel Policy was the 1994 Handbook. I have no recollection of any such  
11 document being attached to the Acknowledgment.

12 6. Perhaps the Associate Handbook entitled "Investor's Business Daily Associate  
13 Handbook," "Effective January 1, 1995," (the "1995 Handbook") a true and correct copy of which  
14 is attached hereto as Exhibit A, is the handbook that the Acknowledgment attached as Exhibit 9 to  
15 the Declaration of William H. Lancaster intended to reference, since I do not believe I ever received  
16 a copy of any 1994 Handbook.

17 7. As set forth in the 1995 Handbook:

18 ADVANCES: The Company *does not provide payroll advances or*  
19 *extend credit or loans to any of its Associates.*

20 (*See Ex. A at p. 23*) (emphasis added). I understood this to be Defendants' policy when I was hired.

21 I hereby declare under penalty of perjury that the foregoing is true and correct. Executed on  
22 April \_\_, 2007 at Los Angeles, California.

23  
24 \_\_\_\_\_  
25 Toby Harris  
26  
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**DECLARATION OF ALEX LANE**

I, Alex Lane, declare:

1. I am one of the named Plaintiffs in the within action and have personal knowledge of the facts set forth herein below. If called upon as a witness I could and would competently testify thereto.

2. I was employed as a telemarketing sales associate for Defendants from approximately April of 1998 to September of 2001. During that period of time I was paid compensation which was termed “commissions” based upon the number of points I earned in the preceding week. Federal, State and Social Security taxes were always deducted from my paycheck. I know it was the practice of Defendants to withhold taxes from all checks paid to the telemarketing sales representatives. When I was charged back commissions that I previously earned because a customer canceled within 16 weeks, the deductions that had been taken from my paycheck for taxes were not reimbursed.

3. I never signed any Acknowledgment agreeing to Defendants’ chargeback policy at issue in this case, nor did I ever sign any written agreement in which I expressly agreed to the terms of such policy. The Acknowledgment that I signed that is attached as Exhibit 9 to the Declaration of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’ Class refers to “the Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook effective August 15, 1994” (hereinafter, the “1994 Handbook”). However, I have no recollection of receiving a copy of the 1994 Handbook from Defendants when I was hired, or at any other time.

4. I have been advised that Defendants contend that the undated Statement of General Personnel Policy attached hereto as Exhibit “H” was the 1994 Handbook referred to in the Acknowledgment. I have no recollection of that document being attached to the Acknowledgment. To the best of my recollection, it was never my understanding that the undated Statement of General Personnel Policy was the 1994 Handbook referred to in the Acknowledgment. Moreover, the undated Statement of General Personnel Policy sets forth a cancellation period of only 4 weeks. Even if it was the document that IBD contends was the 1994

1 Handbook, referred to in the Acknowledgment that I signed, I never agreed in writing to a  
2 chargeback policy which had a 16 week cancellation period. During my entire employment with  
3 Defendants, the cancellation period for chargebacks was always 16 weeks, not 4 weeks as set  
4 forth in the undated Statement of General Personnel Policy which Defendants contend is the 1994  
5 Handbook.

6 5. There is a handbook entitled, "Investor's Business Daily Associate Handbook,"  
7 "Effective January 1, 1995" (the "1995 Handbook"), a true and correct copy of which is attached  
8 hereto as Exhibit A.

9 As set forth in the 1995 Handbook:

10 ADVANCES: The Company *does not provide payroll advances or*  
11 *extend credit or loans to any of its Associates.*

12 (*See Ex. A at p. 23*) (emphasis added). I understood this to be Defendants' policy when I was  
13 hired.

14 I hereby declare under penalty of perjury that the foregoing is true and correct. Executed  
15 on April \_\_\_, 2007 at Los Angeles, California.

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Alex Lane

**DECLARATION OF KEVIN O'CONNOR**

I, Kevin O'Connor, declare:

1. I am one of the named Plaintiffs in the within action and have personal knowledge of the facts set forth herein below. If called upon as a witness I could and would competently testify thereto.

2. I was employed as a telemarketing sales associate for Defendants from approximately August of 1998 to December of 2003. During that period of time I was paid compensation which was termed "commissions" based upon the number of points I earned in the preceding week. Federal, State and Social Security taxes were always deducted from my paycheck. I know it was the practice of Defendants to withhold taxes from all checks paid to the telemarketing sales representatives. When I was charged back commissions that I previously earned because a customer canceled within 16 weeks, the deductions that had been taken from my paycheck for taxes were not reimbursed.

3. I never signed any Acknowledgment agreeing to Defendants' chargeback policy at issue in this case, nor did I ever sign any written agreement in which I expressly agreed to the terms of such policy. The Acknowledgment that I signed that is attached as Exhibit 9 to the Declaration of William H. Lancaster filed in support of Defendants' motion to decertify Plaintiffs' Class refers to "the Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook effective August 15, 1994" (hereinafter, the "1994 Handbook"). However, I have no recollection of receiving a copy of the 1994 Handbook from Defendants when I was hired, or at any other time.

4. I have been advised that Defendants contend that the undated Statement of General Personnel Policy attached hereto as Exhibit "H" was the 1994 Handbook referred to in the Acknowledgment. I have no recollection of that document, nor do I believe it was attached to the Acknowledgment that I signed. It was never my understanding that the undated Statement of General Personnel Policy was the 1994 Handbook referred to in the Acknowledgment. Moreover, the undated Statement of General Personnel Policy sets forth a cancellation period of only 4 weeks. Even if it was the document that IBD contends was the 1994 Handbook referred

1 to in the Acknowledgment that I signed. I never agreed in writing to a chargeback policy which  
2 had a 16 week cancellation period. During my entire employment with Defendants, the  
3 cancellation period for chargebacks was always 16 weeks, not 4 weeks as set forth in the undated  
4 Statement of General Personnel Policy which Defendants contend is the 1994 Handbook.

5 5. There is a handbook entitled , “Investor’s Business Daily Associate Handbook,”  
6 “Effective January 1, 1995” (the “1995 Handbook”), a true and correct copy of which is attached  
7 hereto as Exhibit A.

8 As set forth in the 1995 Handbook:

9 ADVANCES: The Company *does not provide payroll advances or*  
10 *extend credit or loans to any of its Associates.*

11 (*See Ex. A at p. 23*) (emphasis added). I understood this to be Defendants’ policy when I was  
12 hired.

13 I hereby declare under penalty of perjury that the foregoing is true and correct. Executed  
14 on April \_\_\_\_, 2007 at Los Angeles, California.

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Kevin O’Connor  
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**DECLARATION OF MICHAEL BEY**

I, Michael Bey, declare:

1. I am one of the named Plaintiffs in the within action and have personal knowledge of the facts set forth herein below. If called upon as a witness I could and would competently testify thereto.

2. I was employed as a telemarketing sales associate for Defendants from approximately August of 1998 to December of 2003. During that period of time I was paid compensation which was termed “commissions” based upon the number of points I earned in the preceding week. Federal, State and Social Security taxes were always deducted from my paycheck. I know it was the practice of Defendants to withhold taxes from all checks paid to the telemarketing sales representatives. When I was charged back commissions that I previously earned because a customer canceled within 16 weeks, the deductions that had been taken from my paycheck for taxes were not reimbursed.

3. I never signed any Acknowledgment agreeing to Defendants’ chargeback policy at issue in this case, nor did I ever sign any written agreement in which I expressly agreed to the terms of such policy. The Acknowledgment that I signed that is attached as Exhibit 9 to the Declaration of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’ Class refers to “the Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook effective August 15, 1994” (hereinafter, the “1994 Handbook”). However, I have no recollection of ever receiving a copy of any document entitled “Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook effective August 15, 1994.”

4. I have been advised that Defendants contend that the undated Statement of General Personnel Policy attached hereto as Exhibit “H” was the 1994 Handbook referred to in the Acknowledgment. However, that document sets forth a cancellation period of only 4 weeks. Even if it was the document that IBD contends was the 1994 Handbook referred to in the Acknowledgment that I signed, I never agreed in writing to a chargeback policy which had a 16 week cancellation period. During my entire employment with Defendants, the cancellation period for chargebacks was always 16 weeks, not 4 weeks as set forth in the undated Statement of

1 General Personnel Policy which Defendants contend is the 1994 Handbook.

2 5. There is a handbook entitled, "Investor's Business Daily Associate Handbook,"  
3 "Effective January 1, 1995" (the "1995 Handbook"), a true and correct copy of which is attached  
4 hereto as Exhibit A.

5 As set forth in the 1995 Handbook:

6 ADVANCES: The Company *does not provide payroll advances or*  
7 *extend credit or loans to any of its Associates.*

8 (*See Ex. A at p. 23*) (emphasis added). I understood this to be Defendants' policy when I was  
9 hired.

10 6. Attached hereto as Exhibit "I" is a true and correct copy of a "Welcome" letter that  
11 I received from Defendants when I was hired (except for the portions that are somewhat "blacked  
12 out" because I highlighted them). It states on page 1, as follows:

13 "Each week you will be paid the higher of minimum wage or  
14 commissions **actually earned.**" (Emphasis added)

15 I hereby declare under penalty of perjury that the foregoing is true and correct. Executed  
16 on April \_\_, 2007 at Los Angeles, California.

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19 Michael Bey  
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1 **DECLARATION OF MICHAEL SANDERCOCK**

2 I, Michael Sandercock, declare:

3 1. I am one of the named Plaintiffs in the within action and have personal knowledge  
4 of the facts set forth herein below. If called upon as a witness I could and would competently  
5 testify thereto.

6 2. I was employed as a telemarketing sales associate for Defendants from  
7 approximately August of 1996 to September of 2001. During that period of time I was paid  
8 compensation which was termed “commissions” based upon the number of points I earned in the  
9 preceding week. Federal, State and Social Security taxes were always deducted from my  
10 paycheck. I know it was the practice of Defendants to withhold taxes from all checks paid to the  
11 telemarketing sales representatives. When I was charged back commissions that I previously  
12 earned because a customer canceled within 16 weeks, the deductions that had been taken from my  
13 paycheck for taxes were not reimbursed.

14 3. I never signed any Acknowledgment agreeing to Defendants’ chargeback policy  
15 at issue in this case, nor did I ever sign any written agreement in which I expressly agreed to the  
16 terms of such policy. The Acknowledgment that I signed that is attached as Exhibit 9 to the  
17 Declaration of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’  
18 Class refers to “the Direct Marketing Specialists, Inc. Telemarketing Sales Representative  
19 Handbook effective August 15, 1994” (hereinafter, the “1994 Handbook”). However, although  
20 I have a vague recollection of receiving a “handbook” at the time I was hired, there was no  
21 document attached to the Acknowledgment, and any handbook that I did receive did not contain  
22 the chargeback policy at issue in this case.

23 4. I have been advised that Defendants contend that the undated Statement of General  
24 Personnel Policy attached hereto as Exhibit “H” was the 1994 Handbook referred to in the  
25 Acknowledgment. Although I do have a recollection of that document, it was not attached to the  
26 Acknowledgment that I signed, nor do I remember receiving it at the time I was hired. It was  
27 never my understanding that the undated Statement of General Personnel Policy was the 1994  
28 Handbook referred to in the Acknowledgment. Moreover, that document sets forth a cancellation

1 period of only 4 weeks. Even if it was the document that IBD contends was the 1994 Handbook,  
2 I never agreed to a chargeback policy which had a 16 week cancellation period.

3 5. There is a handbook entitled, "Investor's Business Daily Associate Handbook,"  
4 "Effective January 1, 1995" (the "1995 Handbook"), a true and correct copy of which is attached  
5 hereto as Exhibit A.

6 As set forth in the 1995 Handbook:

7 ADVANCES: The Company *does not provide payroll advances or*  
8 *extend credit or loans to any of its Associates.*

9 (*See Ex. A at p. 23*) (emphasis added). I understood this to be Defendants' policy when I was  
10 hired.

11 I hereby declare under penalty of perjury that the foregoing is true and correct. Executed  
12 on April \_\_\_\_, 2007 at Los Angeles, California.

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Michael Sandercock

**DECLARATION OF ERIC M. EPSTEIN**

I, Eric M. Epstein, hereby declare:

1. I am an attorney at law duly licensed to practice in the State of California and am one of the attorneys for Plaintiffs herein. I have personal knowledge of the facts set forth herein below and if called upon as a witness I could and would competently testify thereto.

2. The Acknowledgments that are collectively attached as Exhibit 9 to the Declaration of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’ Class refer to “the Direct Marketing Specialists, Inc. Telemarketing Sales Representative Handbook effective August 15, 1994” (hereinafter, the “1994 Handbook”). I do not have a copy of the 1994 Handbook in my possession and, Defendants never produced this document during discovery in this action. However, in response to a Request for Production specifically requesting the 1994 Handbook, the Defendants did produce an undated document entitled “Statement of General Personnel Policy” which Defendants contend is the 1994 Handbook referenced in the Acknowledgments. A copy of said undated Statement of General Personnel Policy is attached hereto as Exhibit “H”.

3. During discovery in this action, Defendants produced a document entitled, “Investor’s Business Daily Associate Handbook,” “Effective January 1, 1995” (the “1995 Handbook”), a true and correct copy of which is attached hereto as Exhibit A.

4. None of the handbooks that Defendants produced in this action, including the 1995 Handbook expressly referred to, much less contained the terms of, Defendants’ chargeback policy. True and correct copies of the other handbooks produced by Defendants in this action, which are “Room Procedures Handbooks, dated April 10, 2000 and June 1, 2001, respectively, are attached to the Declaration of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’ class, in Exhibit 7 thereto, as Exhibits A and B to the subsumed Declaration of Candace Mayeron. For ease of reference, true and correct copies of the Room Procedures Handbooks dated April 10, 2000 and June 1, 2001, are attached hereto as Exhibits B and C, respectively.

5. I attended the deposition of plaintiff Alex Lane on August 2, 2002. During that deposition, Defendants’ counsel, Belle C. Mason of Silverman & Freedman, unsuccessfully

1 attempted to get Mr. Lane to admit that the “Acknowledgment” that he signed was “an  
2 acknowledgment for” the Statement of General Personnel Policies (which contains Defendants’  
3 chargeback policy). At that time, I informed Ms. Belle that the “Acknowledgment” “says  
4 something different” than what she suggested, and Ms. Belle abruptly “moved on” to another  
5 document.. True and correct copies of the relevant portions of the transcript of Mr. Lane’s  
6 deposition are attached to the Declaration of William H. Lancaster filed in support of Defendants’  
7 motion to decertify Plaintiffs’ class, in Exhibit 8 thereto, as Exhibit M to the subsumed  
8 Declaration of Belle C. Mason, Lane Depo. at 35:6-36:4). For ease of reference, these same  
9 pages are collectively attached hereto as Exhibit D.

10 6. A true and correct copy of Defendants’ Statement of General Personnel Policy,  
11 dated January 1999, produced by Defendant during discovery in this action, is attached to the  
12 Declaration of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’  
13 class, in Exhibit 7 thereto, as Exhibit D to the subsumed Declaration of Candace Mayeron. For  
14 ease of reference, a true and correct copy of Defendants’ Statement of General Personnel Policy,  
15 dated January 1999, produced by Defendants during discovery, is attached hereto as Exhibit E.

16 7. A true and correct copy of Defendants’ Statement of General Personnel Policy,  
17 dated November 2001, produced by Defendants during discovery in this action, is attached to the  
18 Declaration of William H. Lancaster filed in support of Defendants’ motion to decertify Plaintiffs’  
19 class, in Exhibit 7 thereto, as Exhibit E to the subsumed Declaration of Candace Mayeron. For  
20 ease of reference, a true and correct copy of Defendants’ Statement of General Personnel Policy,  
21 dated November 2001, produced by Defendants during discovery, is attached hereto as Exhibit  
22 F.

23 8. On September 19, 2003, this Court, the Honorable Rodney E. Nelson, presiding,  
24 granted Plaintiffs’ motion for class certification, and certified Plaintiffs Class to be:

25 all sales people who Defendants “charged back” commissions paid  
26 from four years prior to the filing of this complaint to the date of  
27 judgment after trial herein.

28 A true and correct copy of the Court’s order dated September 19, 2003 is attached hereto as

1 Exhibit G.

2 I hereby declare under penalty of perjury that the foregoing is true and correct. Executed  
3 on April \_\_, 2007 at Los Angeles, California.

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Eric M. Epstein

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