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

11
12 TOBY HARRIS, KEVIN O’CONNOR,) Case No.: BC 269313
13 MICHAEL SANDERCOCK, ALEX LANE) R/T Case No. BC274964
and MICHAEL BEY, on behalf of) (Assigned to Judge Rodney E. Nelson, Dept. 46)
14 themselves, the general public, and all others)
similarly situated,) CLASS AND REPRESENTATIVE ACTION
15)
Plaintiffs,) [PROPOSED] SECOND AMENDED
16) COMPLAINT FOR VIOLATION OF
vs.) CALIFORNIA LABOR CODE SECTIONS 203,
17) 221, 223, 400-410, 515, 558, 1194.5, 1197.1,
18 INVESTOR’S BUSINESS DAILY, INC,) 2699 AND CALIFORNIA BUSINESS AND
DIRECT MARKETING SPECIALISTS,) PROFESSIONS CODE SECTION 17200, ET
19 INC., DATA ANALYSIS INC., WILLIAM) SEQ.; UNJUST ENRICHMENT; WRONGFUL
O’NEIL & CO., INC., and Does 2 through) TERMINATION
20 10,)
21)
Defendants.)
22)
23)
24)
25)

26 Comes now Plaintiffs TOBY HARRIS, KEVIN O’CONNOR, MICHAEL
27 SANDERCOCK, ALEX LANE and MICHAEL BEY, on behalf of themselves, the general
28 public, and all others similarly situated and allege as follows:

PARTIES

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3 1. Plaintiffs TOBY HARRIS, KEVIN O’CONNOR, MICHAEL SANDERCOCK,
4 ALEX LANE and MICHAEL BEY (hereinafter also referred to as the “Plaintiffs” and/or
5 “Named Plaintiffs”) at all relevant times herein were employed in a telephone solicitation center
6 known as “the room” within Los Angeles County as telemarketers with the titles of inside
7 telephone sales and/or marketing agents and/or associates to sell newspaper subscriptions. The
8 amount in controversy for each plaintiff and each class member does not exceed \$70,000.
9

10 2. Defendants INVESTOR’S BUSINESS DAILY, INC, DIRECT MARKETING
11 SPECIALISTS, INC (also known as “DMSI”), DATA ANALYSIS INC. AND/OR WILLIAM
12 O’NEIL & CO., INC. (hereinafter also referred to as “Defendants”) are engaged in the business
13 of newspaper and magazine publishing and sales at its principle place of business at 12655
14 Beatrice Street, Los Angeles, California.
15

16 3. Defendants are individually, jointly and severally liable as the employer of the
17 Named Plaintiff and each Plaintiff class member because each Defendant directly or indirectly,
18 or through an agent or any other person, employed or exercised control over the wages, hours, or
19 working conditions of Plaintiffs.
20

21 4. Unless otherwise alleged in this complaint, Plaintiffs are informed and believe, and
22 on that basis allege, that at all times material, each Defendant was the agent and employee of its
23 codefendants, and in doing the things alleged in this complaint was acting within the course and
24 scope of that agency and employment.
25

26 5. The true names and capacities of defendants sued as Does are unknown to
27 Plaintiffs, but Plaintiffs will amend their complaint when and if the true names of said defendants
28 become known to them. Plaintiff is informed and believes and thereon alleges that each of the

1 defendants sued herein as a Doe is responsible in some manner for the events and happenings
2 referred to herein and any reference to “Defendant” or “Defendants” shall mean “Defendants and
3 each of them”.
4

5
6 **CLASS AND REPRESENTATIVE ACTION ALLEGATIONS**

7 6. Plaintiffs bring this action on their own behalf, on behalf of the general public and
8 on behalf of all persons similarly situated within the class of all inside telephone sales agents,
9 telemarketers, associates and/or other inside sales personnel employed by Defendants or any of
10 them, within the State of California within four years and 101 days of the filing of the original
11 complaint until the date of entry of judgment after trial.
12

13 7. The class is defined as all inside telephone sales agents, telemarketers, associates
14 and/or other inside sales personnel employed by Defendants or any of them, within the State of
15 California within four years and 101 days of the filing of the original complaint until the date of
16 entry of judgment after trial.
17

18 8. The class is further subdivided into two sub-classes consisting of: 1) all class
19 members who were “charged back” commissions earned within four years and 101 days of the
20 filing of the original complaint until the date of entry of judgment after trial, and 2) all class
21 members who were not paid overtime as required by California law within four years and 101
22 days of the filing of the original complaint until the date of entry of judgment after trial.
23 Membership in one subclass is not mutually exclusive of membership in the other subclass,
24 although most class members are members of both sub-classes.
25

26 9. Plaintiffs are informed and believe that there are over 150 people within each
27 subclass, and this class is so numerous that joinder is impractical.
28

1 15. Plaintiffs and Plaintiff class members do not qualify for the exemption for inside
2 commissioned sales persons contained in section 3 of the applicable Wage Orders of the
3 Industrial Wage Commission of the State of California.
4

5 16. Plaintiffs pay state and federal wage type taxes on all money earned as
6 commission.
7

8 17. Defendants make deductions (called “charge backs”) from pay earned of 100% of
9 commissions from prior sales for cancelled subscriptions, even though Defendants receive pro
10 rata payment for these cancelled subscriptions, as well as additional advertising revenue
11 generated by the additional number of subscribers even if the subscriber ultimately cancelled.
12 For example, Defendants’ Special 40-80 Policy and Procedures states “CHARGEBACKS:
13 Chargebacks will be decided on a case by case basis. In general, deals that cancel with in he first
14 five weeks are subject to chargebacks. In the case of a chargeback, the commission earned will
15 be deducted from the next available paycheck. You will always be informed of chargebacks on
16 your commission run.”
17

18 18. Defendants subtract wages previously earned and paid from wages due to recover
19 these chargebacks.
20

21 19. On or shortly before May 21, 2001, Plaintiffs TOBY HARRIS and MICHAEL
22 SANDERCOCK complained to Defendants about the unlawful chargeback policy and illegal
23 recording of telephone conversations.
24

25 20. On or about June 11, 2001 Defendant terminated the employment of Plaintiff
26 TOBY HARRIS, and stated that the reason for the termination was Plaintiff’s moonlighting for
27 another employer on his off-hours.
28

1 21. On or about August 28, 2001, Plaintiffs sent Defendants a letter demanding, inter
2 alia, that Defendants cease desist its unlawful practices and to demand reinstatement for Mr.
3 Harris. A copy of that letter is hereto marked as Exhibit A and incorporated by reference herein.
4

5 22. On June 12, 2001, Defendants told Plaintiffs that it chargeback policy was lawful
6 and it would continue its chargeback policy of recouping wage payments from cancelled
7 subscriptions from future commissions.
8

9 23. Shortly after Plaintiffs complained to Defendants that the aforesaid chargeback
10 policy violated California law, and showed Defendants news media reports of the tentative
11 decisions in the case of *Baker v. Ikon Office Solutions Inc.*, Defendants published a new
12 employment manual dated November 1, 2001, which contains a “Chargeback Policy” stating:
13

14 “Any subscription which is cancelled within 16 calendar weeks from the
15 start, or restart, date of the subscription will be charged back to the week
16 sold. Commission will be advanced to Associates based on the date in
17 which the payment is authorized and posted to this account. If a customer
18 cancels a subscription within with in the first 16 weeks no commission is
19 earned. The unit amount advanced will be deducted in full from the
20 Associates weekly paycheck. Commissions are fully earned in the 17th
21 weeks and no longer subject to deductions for cancellation. If a customer
22 cancels a subscription after 16 weeks, the Associate keeps the entire
23 commission.
24

25 Any cancellation request made during the 16 weeks will be forwarded to
26 specially trained quality assurance (“Stop-Save”) agents. These agents will
27 attempt to save the customer in any way possible. If the subscriber is
28 saved, reps will be charged back 60% of the original unit/dollar value
earned. If the department is unable to prevent cancellation, the unit value
will be charged back in full. Sales associates may not attempt to intercept
their own cancellations.”

 Any cancellation request involving misrepresentation will be charged back
the unit/dollar value originally earned plus the cost of issues delivered plus
the retail cost of premiums sent. There is not time limitation on
cancellations involving misrepresentation.

 Misrepresentation is a serious offense. Besides chargebacks of
commission, misrepresentation may also be subject to further disciplinary
action, up to and including suspensions or termination.

1
2 Prior to the aforesaid employee manual of November 1, 2001, the chargeback policy specifically
3 stated that all commissions were earned on the date that the order was taken and the credit card
4 payment was authorized, or in rare instances, when a check sent in for payment was received and
5 posted, but said commissions were subject to being “charged back” against future commissions if
6 the customer cancelled within the first 16 weeks.

7
8 **FIRST CAUSE OF ACTION**

9 **Overtime Pay**

10 (CAL. LAB. CODE § 510 *eq seq.* and 1194)

11 24. Plaintiffs incorporate by reference all paragraphs set forth above in this Second
12 Amended Complaint, as if fully set forth herein.

13 25. CAL. LAB. CODE § 510(a) states that: Eight hours of labor constitutes a day's work.
14 Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one
15 workweek and the first eight hours worked on the seventh day of work in any one workweek
16 shall be compensated at the rate of no less than one and one-half times the regular rate of pay for
17 an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no
18 less than twice the regular rate of pay for an employee. In addition, any work in excess of eight
19 hours on any seventh day of a workweek shall be compensated at the rate of no less than twice
20 the regular rate of pay of an employee.
21

22 26. Plaintiffs were not employed in an executive, administrative or professional
23 capacity, nor were they employed pursuant to a validly enacted alternative work week instituted
24 at this location.
25

26 27. Unless otherwise exempt by law, Section 3(A)(1)(a) and (b) of the Wage Order of
27 the Industrial Wage Commission of the State of California requires the payment of overtime to
28

1 all workers as follows: One and one-half (1 ½) times the employee’s regular rate of pay for all
2 hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for
3 the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and
4
5 (b) Double the employee’s regular rate of pay for all hours worked in excess of 12 hours in any
6 workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive
7 day of work in a workweek.

8
9 28. CAL. LAB. CODE § 510 has no express exemption for sales personal paid on a
10 commission basis although the Wage Orders of the Industrial Wage Commission state that the
11 overtime provisions of the Wage Orders “shall not apply to any employee whose earnings exceed
12 one and one-half (1 ½) times the minimum wage if more than half of that employee’s
13 compensation represents commissions.”

14
15 29. CAL. LAB. CODE § 204.1 states as follows: “Commission wages are compensation
16 paid to any person for services rendered in the sale of such employer's property or services and
17 based proportionately upon the amount or value thereof.”

18
19 30. Plaintiffs and Plaintiff class members were not paid on a commission basis
20 because their wages were not a percent of the price or value of the product or service.

21
22 31. By the conduct describe above, Defendants, and each of them, have failed to pay
23 Plaintiffs and Plaintiff class members overtime compensation as required by California law.

24
25 32. CAL. LAB. CODE § 1194(a) states: “Notwithstanding any agreement to work for a
26 lesser wage, any employee receiving less than the legal minimum wage or the legal overtime
27 compensation applicable to the employee is entitled to recover in a civil action the unpaid
28 balance of the full amount of this minimum wage or overtime compensation, including interest
thereon, reasonable attorney's fees, and costs of suit.”

1 39. Defendant derives an economic benefit from the sale, even if it is cancelled before
2 the expiration of the subscriptions period, because the Defendant keeps the amount of money
3 earned for the time the customer accepts the product and derives advertising revenues from the
4 additional subscribers during the period of time that they receive the newspaper.
5

6 40. The length of the “subscription” itself is a rather arbitrary and/or marketing
7 determined period, rather than rationally related to the costs of the product. In other words, it
8 does not cost significantly less per week to deliver the product to the customer after the week
9 before the subscription period expires than the week after the subscription week expires, except
10 perhaps for the costs of “commission” to the class members which is not paid if the customer
11 allows the subscription to continue automatically after the chargeback period has expired.
12

13 41. In addition, defendants derive an economic benefit from the sale, even if it is
14 cancelled before the expiration of the subscriptions period, because Defendants charge
15 advertisers for ads based upon “circulation numbers” which include every sale, even if a
16 chargeback occurs later.
17

18 42. If a customer cancels a subscription, Defendant pro-rates the customer the
19 subscription price, but charges back its employees the full amount of the chargeback.
20

21 43. If a customer cancels a subscription, Defendant keeps the revenue from advertising
22 that went into that subscription and does not return a pro rata amount to the advertiser, even
23 though Defendant charges back its employees the full amount of the chargeback.

24 44. By deducting the entire amount of wages earned from the sale of a subscription in
25 the event of a cancellation, while keeping a pro rata amount of the subscription price paid by the
26 customer, Plaintiffs were working for nothing.
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45. CAL. CIV. CODE § 1670.5 states that “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

46. Plaintiffs are non-union employees and Defendants are a wealthy, multi million dollar commercial enterprise with the power and resources to hire counsel and demands a single policy of compensation for all sales employees, a take it or leave it contract, and thus have unequal bargaining power to negotiate terms and conditions of employment with its employees.

47. The contract that permits an employee to work without pay is unconscionable and void as against public policy, both procedurally because of the lack of true negotiation and substantively because it produces an overly harsh allocation of risks or costs which is not justified by the circumstances under which the contract was made.

48. The “charge back” provisions of the corporate policy so grossly shift the business risk on to the employee without any ownership interest that the contract is unconscionable.

49. Plaintiffs were working for wages without payment of any wages thereby unjustly enriching Defendants.

50. Wages were earned at the time of the sale, and once earned, unpaid wages became property to which the plaintiff was entitled. The sale occurred, and wages were earned by the salesperson, when the order was accepted by an authorized credit card payment or on rare occasions, when a check was received and posted. The defendant paid these wages in the next paycheck.

1 years and 101 days of the filing of the original complaint until the date of entry of judgment after
2 trial as provided by CAL. LAB. CODE § 203.

3
4 **FIFTH CAUSE OF ACTION**

5 Unfair Competition Law

6 (CAL. BUS. & PROF. CODE § 17200 et seq.)

7 64. Plaintiffs incorporate by reference all paragraphs set forth above in this Complaint,
8 as if fully set forth herein.

9 65. CAL. BUS. & PROF. CODE § 17200, entitled “Definition,” provides: “As used in this
10 chapter, unfair competition shall mean and include any unlawful or fraudulent business act or
11 practice and unfair, deceptive, untrue or misleading advertising an any act prohibited by Chapter
12 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions
13 Code.”

14 66. Defendants and each of them have violated the provisions of the CAL. LAB. CODE.

15 67. By the conduct described above, Defendants have also violated the provisions of
16 the Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 et seq. for which this Court
17 should issue equitable and injunctive relief pursuant to CAL. BUS. & PROF. CODE § 17203,
18 including restitution of wages wrongfully withheld or labor taken without proper compensation.

19 68. Unless enjoined, Defendants, and each of them, will continue to fail to pay
20 overtime to inside sales employees employed as telemarketers as required by law. Furthermore,
21 unless enjoined, Defendants and each of them, will continue to deduct commissions earned for
22 canceled subscriptions in the form of “ chargebacks” against future commissions, even when the
23 Defendants collect some portion of the subscriptions sold

24 69. Plaintiffs demand an order of Court pursuant to CAL. BUS. & PROF. CODE § 17200,
25 et seq. enjoining Defendants, and each of them, from engaging in these, or similar, unlawful
26 business practices
27
28

1 76. Defendants stated reason for the termination of TOBY is a violation of CAL. BUS.
2 & PROF. CODE § 16600.
3

4 77. TOBY had been employed by Defendants since May, 1995. Within 6 months
5 prior to his termination, he had received an award certificate signed by William J. O’Neil,
6 Founder and Chairman of the Board of IBD, attesting to his excellent sales performance, and
7 within three (3) months of his termination he was commended by Candace Mayeron, Head of
8 Sales Recruiting and Training, for bringing in more than \$1,000,000.00 in sales. A copy of the
9 Award Certificate is attached hereto, marked Exhibit “B” and by reference thereto incorporated
10 herein.
11

12 78. The reason stated by Defendant for terminating TOBY was a pretext for
13 terminating TOBY for insisting on his rights not to have commissions charged back against
14 wages and for complaining about other illegal activity, including the illegal recording of
15 telephone conversations.
16

17 79. The payment of wages without deduction or rebate is an important public policy
18 of the State of California, based upon statutes and regulations. California also has a strong public
19 policy against the tape recording of a confidential communication without the consent of the
20 parties being recorded.
21

22 80. CAL. LAB. CODE § 1102.5 provides that an employer may not retaliate against an
23 employee for disclosing a violation of state or federal regulation to a governmental or law
24 enforcement agency. An employer may not terminate an employee for bringing these same
25 violations of statute and public policy to the attention of the employer or attempting to persuade
26 an employer from continuing to violate the law or a fundamental social policy.
27
28

1 81. As a direct and proximate result of Defendants' wrongfully terminating TOBY as
2 set forth hereinabove, TOBY has suffered lost wages and emotional distress, all to his damage in
3 a sum which has not yet been ascertained, but which will be shown according to proof at time of
4 trial.
5

6 82. The conduct of defendants in wrongfully terminating TOBY as hereinabove
7 alleged was oppressive and despicable and by reason thereof TOBY is entitled to punitive
8 damages in the sum of at least \$10,000,000.00.
9

10 **SEVENTH CAUSE OF ACTION**
11 (Labor Code Private Attorneys General Act of 2004)

12 83. Plaintiffs herein repeat and reallege each and every paragraph above as though fully
13 set forth herein.

14 84. CAL. LAB. CODE § 2699 (a), also known as the Labor Code Private Attorneys
15 General Act of 2004, states:

16 Notwithstanding any other provision of law, any provision of this code that
17 provides for a civil penalty to be assessed and collected by the Labor and
18 Workforce Development Agency or any of its departments, divisions,
19 commissions, boards, agencies, or employees, for a violation of this code,
20 may, as an alternative, be recovered through a civil action brought by an
aggrieved employee on behalf of himself or herself and other current or
former employees.

21 85. Plaintiffs are an "aggrieved employee" as that term is defined in the Labor Code
22 Private Attorneys General Act of 2004 because they are persons who were employed by the
23 alleged violator and against whom one or more of the alleged violations was committed
24

25 86. Plaintiffs therefore bring this action on behalf of themselves and other current
26 and former inside sales personnel, associates and telemarketers employed by defendants.

27 87. CAL. LAB. CODE § 558 provides that:
28

1 Any employer or other person acting on behalf of an employer who
2 violates, or causes to be violated, a section of this chapter or any provision
3 regulating hours and days of work in any order of the Industrial Welfare
4 Commission shall be subject to a civil penalty as follows: (1) For any
5 initial violation, fifty dollars (\$50) for each underpaid employee for each
6 pay period for which the employee was underpaid in addition to an amount
7 sufficient to recover underpaid wages. (2) For each subsequent violation,
8 one hundred dollars (\$100) for each underpaid employee for each pay
9 period for which the employee was underpaid in addition to an amount
10 sufficient to recover underpaid wages. (3) Wages recovered pursuant to
11 this section shall be paid to the affected employee.

12 88. The term "this Chapter" in CAL. LAB. CODE § 558 includes CAL. LAB. CODE §
13 510.

14 89. CAL. LAB. CODE § 558 (c) states that "The civil penalties provided for in this
15 section are in addition to any other civil or criminal penalty provided by law."

16 90. CAL. LAB. CODE § 1197.1 (a) states the civil penalty for violation of the overtime
17 provisions of the Orders of the California Industrial Wage Commission as follows:

18 Any employer or other person acting either individually or as an officer,
19 agent, or employee of another person, who pays or causes to be paid to any
20 employee a wage less than the minimum fixed by an order of the
21 commission shall be subject to a civil penalty as follows: (1) For any
22 initial violation that is intentionally committed, one hundred dollars (\$100)
23 for each underpaid employee for each pay period for which the employee is
24 underpaid. (2) For each subsequent violation for the same specific offense,
25 two hundred fifty dollars (\$250) for each underpaid employee for each pay
26 period for which the employee is underpaid regardless of whether the initial
27 violation is intentionally committed.

28 91. CAL. LAB. CODE § 1197.1 (f) further states:

Any employee who prevails in any action shall be entitled to an award of
reasonable attorney's fees and costs. Nothing in this section shall operate to
limit an employee's right to pursue other remedies available under state or
federal law, either separately or concurrently with an action taken under
this section.

92. By the conduct described above, Defendants have violated the provisions of

1 Section 510 of the Labor Code and the Orders of the Industrial Welfare Commission relating to
2 the payment of overtime compensation.

3
4 93. Therefore, Plaintiffs demand payment at the rate specified in CAL. LAB. CODE §
5 558 plus the rate specified in CAL. LAB. CODE § 1197.1 for all current or former employees who
6 are due overtime payments.

7
8 **EIGHTH CAUSE OF ACTION**
9 **UCL For Failing to Pay Federal Overtime**

10 94. Plaintiffs hereby incorporate by reference as though set forth at length herein each
11 of the allegations contained above.

12 95. CAL. BUS. & PROF. CODE § 17200, also known as the Unfair Competition Law or
13 UCL states: “As used in this chapter, unfair competition shall mean and include any unlawful,
14 unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading
15 advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of
16 Division 7 of the Business and Professions Code.”

17
18 96. In the case of *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303 (2003) the
19 California Supreme Court stated that Business and Professions Code section 17200 "borrows"
20 violations of other laws and treats these violations, when committed pursuant to a business
21 activity, as unlawful practices independently actionable under the UCL and subject to the distinct
22 remedies provided thereunder. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377,
23 383, 826 P.2d 730, 6 Cal. Rptr. 2d 487, italics added.) In other words, "an unlawful act in the
24 business context is, by definition, an action of unfair competition" that may support a UCL
25 action. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 579, 950 P.2d
26 1086, 71 Cal. Rptr. 2d 731 (conc. opn. of Baxter, J.), italics added.)
27
28

1 97. An action under the UCL may be predicated on a violation of a federal statute as
2 well as a state law.

3
4 98. The federal Fair Labor Standards Act (“FLSA” 29 U.S.C. 216) requires the
5 payment of overtime compensation at one and one half the regular rate of pay for all hours
6 worked in excess of 40 per week, and applies to all inside sales employees even if they are paid
7 on a commission basis unless they are employed by a retail establishment. [29 U.S.C. § 207\(i\)](#).
8 provides, in relevant part:

9
10 No employer shall be deemed to have violated subsection (a) of this
11 section by employing any employee *of a retail or service establishment*
12 for a workweek in excess of the applicable workweek specified therein, if
13 (1) the regular rate of pay of such employee is in excess of one and one-
14 half times the minimum hourly rate applicable to him under [section 206](#) of
this title, and (2) more than half his compensation for a representative
period (not less than one month) represents commissions on goods or
services.

15 99. 29 C.F.R. § 779.316 requires that the industry itself be considered a retail
16 establishment or have a “retail concept” in order for the commissioned sales persons to be
17 exempt from overtime. The federal regulation states, in part “that the term "retail or service
18 establishment" as used in the Act does not encompass establishments in industries lacking a
19 "retail concept". Such establishments not having been traditionally regarded as retail or service
20 establishments cannot under any circumstances qualify as a "retail or service establishment"
21 within the statutory definition of the Act, since they fail to meet the first requirement of the
22 statutory definition.”

23
24 100. The Secretary of Labor at 29 C.F.R. § 201(a)(1) has declared the following,
25 among other, industries to lack a retail concept such that their employees are not exempt from the
26 overtime provisions of the FLSA: “Investment counseling firms, Magazine subscription agencies
27 (*Wirtz v. Keystone Serv.* (5th Cir. 1969), 418 F. 2d 249). Newspaper and magazine publishers.”

1 101. Defendant publishes a newspaper for business investors (as opposed to
2 consumers) and therefore Defendant lacks a retail concept.

3
4 102. In addition, for purposes of this section of the Fair Labor Standards Act, A "Retail
5 or service establishment" means "an establishment 75 per centum of whose annual dollar volume
6 of sales of goods or services (or of both) is not for resale and is recognized as retail sales or
7 services in the particular industry." 29 C.F.R. §§ 29 CFR 779.312 and 779.411

8
9 103. Under 29 C.F.R. § 779.337, an establishment which is a "retail or service
10 establishment" within the FLSA's statutory definition of that term must, to qualify as an exempt
11 retail or service establishment meet the following test: More than 50 percent of the retail or
12 service establishment's total annual dollar volume of sales must be derived from sales of goods or
13 services (or both) which are made within the State in which the establishment is located. In other
14 words, to be exempt, more than 50% of the sales must be intrastate.

15
16 104. According to 29 C.F.R. §779.340 "a sale is made to an out-of-State customer and,
17 therefore, is not a sale made "within the State" in which the establishment is located, if delivery
18 of the goods is made outside the State. It should be noted that sales of goods or services that are
19 conditioned upon acceptance or rejection by an out-of-State source are interstates sales and not
20 sales made within the State for purposes of section 13(a)(2). For example, a contract entered into
21 in the State where the customer resides for the delivery of a magazine to the customer's residence,
22 is an interstate sale if the contract must be approved by the out-of-State home office of the
23 company publishing the magazine before it becomes effective."

24
25 105. Upon information and belief, more than 50% of the Defendant's sales are to out of
26 state entities, and thus, it does not meet the test of more than 50% of the goods being
27 manufactured in the same state as the purchaser.
28

1 106. Therefore, even if the inside salesmen were paid on a commission basis, they
2 would not be exempt from federal overtime requirements because Defendant itself is not a “*a*
3 *retail or service establishment*” under section 7(i) of the FLSA, 29 U.S.C. 207(i) and failing to
4 pay overtime compensation for work in excess of forty hours per week at one and one half the
5 regular rate of pay is a violation of CAL. BUS. & PROF. CODE § 17200.
6

7 WHEREFORE, Plaintiffs on behalf of themselves and on behalf of all Plaintiff class
8 members pray for judgment against Defendants, and each of them, according to proof, as follows:
9

10 a. On the First Cause of Action for overtime compensation under California
11 Law, additional compensation for all inside telephone sales agents, telemarketers,
12 associates and/or other inside sales personnel employed by Defendants or any of them,
13 within the State of California as required by law for all hours worked overtime within
14 three years plus 101 days of the filing of the original complaint until the date of entry of
15 judgment after trial, plus interest thereon, reasonable attorney’s fees and costs of suit.
16

17 b. On the Second Cause of Action for unjust enrichment from unconscionable
18 chargebacks, either 1) return of all wages unlawfully deducted from all inside telephone
19 sales agents, telemarketers, associates and/or other inside sales personnel employed by
20 Defendants or any of them, within the State of California within four years and 101 days
21 of the filing of the original complaint until the date of entry of judgment after trial, and
22 reversal of all commission chargebacks and repayment of any subsequent reduction of
23 commission as a result of chargebacks, or 2) the amount of revenue generated and
24 retained by Defendants unjustly for all sales made on accounts that were charged back,
25 including both subscription revenue and advertising revenue, for the same time period,
26 whichever is greater.
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1 c. On the Third Cause of Action for unlawful wage deductions, return of all
2 wages unlawfully deducted from all inside telephone sales agents, telemarketers,
3 associates and/or other inside sales personnel employed by Defendants or any of them,
4 within the State of California within four years and 101 days of the filing of the original
5 complaint until the date of entry of judgment after trial, and reversal of all commission
6 chargebacks and repayment of any subsequent reduction of commission as a result of
7 chargebacks.
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10 d. On the Fourth Cause of Action for Waiting Penalties, thirty days of pay as a
11 penalty for not paying all wages due at time of termination for all employees who
12 terminated employment within three years and 101 days of the filing of the original
13 complaint until the date of entry of judgment after trial as provided by CAL. LAB. CODE §
14 203
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16 e. On the Fifth Cause of Action for Violation of CAL. BUS. & PROF. CODE
17 17200, et. Seq., an order of Court

18 i. Prohibiting and enjoining Defendants and each of
19 them from ever again failing to pay additional overtime compensation
20 as required by law to all inside telephone sales agents, telemarketers,
21 associates and/or other inside sales personnel employed by Defendants
22 or any of them within the State of California; and

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24 ii. Prohibiting and enjoining Defendants and each of
25 them from ever again accepting, directly or indirectly, money paid as
26 wages or commissions to any of its all inside telephone sales agents,
27 telemarketers, associates and/or other inside sales personnel employed
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by Defendants or any of them within the State of California; as chargebacks for commissions earned on completed sales, regardless of the financial performance of the customer after the sale; and

iii. Making restitution of all overtime compensation due to each and every inside telephone sales agents, telemarketers, associates and/or other inside sales personnel employed by Defendants or any of them within the State of California within four years and 101 days of the filing of the original complaint until the date of entry of judgment after trial; and

iv. Making restitution of all unlawful wage deductions in the form of chargebacks of commissions due or applied to reduce future commissions to each and every inside telephone sales agents, telemarketers, associates and/or other inside sales personnel employed by Defendants or any of them within the State of California within four years and 101 days of the filing of this complaint until the date of entry of judgment after trial.

f. On the Sixth Cause of Action for the individual wrongful termination claim by

Toby Harris, only:

i. Damages for lost wages according to proof;

ii. Damages for emotional distress according to proof; and

iii. Punitive damages according to proof but the sum of at least \$10,000,000.00.

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g. On the Seventh Cause of Action for payment of Civil Penalties pursuant to the Labor Code Private Attorneys General Act of 2004 at the rate specified in CAL. LAB. CODE § 558 plus the rate specified in CAL. LAB. CODE § 1197.1 for all current or former employees whom are due overtime payments

h. On the Eighth Cause of Action for a violation of the UCL For Failing to Pay Federal Overtime, additional compensation for all inside telephone sales agents, telemarketers, associates and/or other inside sales personnel employed by Defendants or any of them, within the State of California as required by law for all hours worked overtime within three years plus 101 days of the filing of the original complaint until the date of entry of judgment after trial, plus interest thereon, reasonable attorney’s fees and costs of suit..

i. For attorneys’ fees and costs of suit, pursuant to California Labor Code section 218.5 and other statutes.

j. For Pre judgment Interest on unpaid wages as required by Labor Code Section 218.6.

k. For such other relief as the Court deems just and proper.

Dated: March 22, 2004.

THIERMAN LAW FIRM
ERIC M. EPSTEIN, APC

By: _____
Eric M. Epstein