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7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 MIGUEL A. CRUZ, and JOHN D. HANSEN,
individually and on behalf of all others
12 similarly situated,

13 Plaintiffs,

14 v.

15 DOLLAR TREE STORES, INC.,

16 Defendant.
17
18
19
20

CASE NO. C 07-02050 JL

**DEFENDANT DOLLAR TREE
STORES, INC.'S NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS'
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

[Fed. R. Civ. Proc. 12(b)(6)]

DATE: TBD

TIME:

DEPT:

JUDGE: Pending Assignment

COMPLAINT FILED: April 11, 2007

TRIAL DATE: No date set.

21 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE that on a date certain¹ to be set by the United
23 States District Court for the Northern District of California, Defendant Dollar Tree Stores,
24 Inc. ("Dollar Tree") will ask that, pursuant to Fed. R. Civ. Proc. 12(b)(6), the Court
25 dismiss Count VII ("Fraud and Deceit") of the Complaint filed on April 11, 2007 by
26 _____

27 ¹ Defendant has filed a Declination to Proceed Before a Magistrate Judge and Request for
28 Reassignment to a United States District Judge. Defendant has not selected a hearing date for
this motion because this action has not yet been assigned to a United States District Judge.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELIEF REQUESTED

Pursuant to Fed. R. Civ. Proc. 12(b)(6), Dollar Tree respectfully requests that the court dismiss Count VII for "Fraud and Deceit" because it is not pled with sufficient particularity as required by Fed. R. Civ. Proc. 9(b).

II. RELEVANT FACTS

On April 7, 2007, Plaintiffs, both have been employed by Dollar Tree as Store Managers (¶¶ 12-13), filed their "Complaint for Damages, Injunctive Relief and Restitution." The Complaint is styled as a putative class action and it alleges nine separate causes of action.¹ The primary issue raised by Plaintiffs is whether they, as Store Managers, were classified correctly as "exempt" employees under state and federal law (¶ 8).

III. ARGUMENT

Under California law, the elements of fraud, which gives rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. Small v. Fritz Companies, Inc., 30 Cal. 4th 167, 173 (2003); see also Glen Holly Entertainment, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999).

"To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2)." Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003). However, where, as here, "a complaint includes allegations of fraud, Federal Rule of

¹ The nine Causes of Action are: Failure to Pay overtime (Count I); Failure to Pay Unpaid Wages at Termination (Count II); Failure to Provide Accurate Itemized Wage Statements (Count III); Meal Break Violations (Count IV); Rest Break Violations (Count V); Unfair Competition and Unfair Business Practices (Count VI); Fraud and Deceit (Count VII); Unjust Enrichment / Constructive Trust (Count VIII); and Equitable Relief including Preliminary and Permanent Injunctions (IX).

1 Civil Procedure 9(b) requires more specificity including an account of the time, place,
 2 and specific content of the false representations as well as the identities of the parties to
 3 the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)
 4 (internal citations and quotations omitted).

5 “To comply with Rule 9(b), allegations of fraud must be specific enough to
 6 give defendants notice of the particular misconduct which is alleged to constitute the
 7 fraud charged so that they can defend against the charge and not just deny that they
 8 have done anything wrong.” Id. Accordingly, “Plaintiff[s] must attribute false or
 9 misleading statements to a particular defendant and must set forth specific descriptions
 10 of the fraudulent representation. Allegations which are vague and conclusory are
 11 insufficient to satisfy Rule 9.” Campbell v. Allstate Ins. Co., 1998 U.S. Dist. LEXIS 12550
 12 (C.D. Cal. 1998). Moreover, where the defendant is a corporation, the complaint should
 13 identify the particular agent, employee or officer accused of uttering the alleged
 14 misrepresentation. Swartz, 476 F.3d at 764; see also Herndon v. Scientific Applications
 15 Int’l Corp., 2006 U.S. Dist. LEXIS 79520 (S.D. Cal. 2006) (dismissing complaint where,
 16 *inter alia*, plaintiff did not identify the individuals who executed or negotiated the
 17 allegedly fraudulent contracts, billings, or certifications); United States ex rel. Man Tai
 18 Lam v. Tenet Healthcare Corp., 2006 U.S. Dist. LEXIS 95946 (W. D. Tex. 2006)
 19 (dismissing fraud claim against hospital where plaintiff failed to specifically identify the
 20 physicians accused of fraud).

21 Here, Count VII alleges two theories—first, that certain unnamed
 22 individuals “suppressed facts and did not disclose to Plaintiffs” that Plaintiffs were non-
 23 exempt under state and federal law (§ 78); and second, that certain unnamed individuals
 24 incorrectly represented to Plaintiffs that Plaintiffs are exempt under state and federal law
 25 (§ 79). The generality of these allegations cannot be reconciled with Rule 9(b)’s
 26 command that “the circumstances constituting fraud or mistake shall be stated with
 27 particularity.”

28

1 Instead of specifically “identifying the parties to the misrepresentation,”
 2 Plaintiffs state only that Dollar Tree acted “through its officers, human resource directors,
 3 regional managers, district managers, area managers, **and others**” (¶ 77) (emphasis
 4 added). This open-ended list is insufficient on its face. Indeed, the inclusion of the
 5 phrase “and others” renders the pleading worthless to Dollar Tree. In order “to defend
 6 against the charge and not just deny that it has done anything wrong,” Dollar Tree must
 7 know who Plaintiffs believe “possessed knowledge of wrongdoing” and improperly
 8 “suppressed” this knowledge (¶ 78). Likewise, it must know who Plaintiffs believe made
 9 the supposedly “continuous” false representations (¶ 79).

10 Nor does the Complaint include “an account of the time, place, and specific
 11 content of the false representations.” Swartz, 476 F.3d at 764; see also Edwards v.
 12 Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) (To avoid dismissal under Rule
 13 9(b), Plaintiffs’ Complaint must “state the time, place, and specific content of the false
 14 representations.”). Instead, Plaintiffs include a single summary of their theory (¶ 79) and
 15 then another open-ended list of places where presumably some variation of this
 16 statement was uttered—i.e., “[t]hrough hiring interviews, meetings, inter-office memos,
 17 employment forms, job descriptions, **and other methods**” (¶ 79)(emphasis added).
 18 Plaintiffs do not even attempt to carry their “time, place and content” pleading burden.
 19 And, as previously explained, the inclusion of the ambiguous “and other methods”
 20 phrase renders this allegation of no value to Dollar Tree.

21 Finally, to the extent that Plaintiffs rely on supposedly fraudulent assertions
 22 contained in documents such as “inter-office memos, employment forms [and] job
 23 descriptions” (¶ 79), Dollar Tree is entitled to a comprehensive list thereof. E.g.,
 24 Behrman v. Allstate Life Ins. Co., 2005 U.S. Dist. LEXIS 7262 * 9 (S. D. Fla. 2005)
 25 (affirming dismissal of fraud claim where plaintiff failed to identify “the specified
 26 documents or oral representations in which such statements or omissions were allegedly
 27 made”); see also Marin Park, Inc., 356 F.3d at 1066 (affirming dismissal of fraud claim

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