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12 behalf of others similarly situated

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 MIGUEL A. CRUZ and JOHN D.
16 HANSEN, individually and on behalf of
17 all others similarly situated,

18 Plaintiffs,

19 vs.

20 DOLLAR TREE STORES, INC.,

21 Defendants.

22 CASE NO. 07-02050 SC

23 CLASS ACTION

24 **OPPOSITION TO DEFENDANT**
25 **DOLLAR TREE STORE INC.'S**
26 **MOTION TO DISMISS**

27 Honorable Judge Samuel Conti

28 Courtroom 1, 17th Floor

Time: 10:00 a.,m., June 29, 2007

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Prosser, *Handbook on the Law of Torts* (4th ed., 1971),p. 8

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I. INTRODUCTION

Defendant alleges that Plaintiffs’ complaint is not particular enough in regard to its cause of action for fraud. In this allegation, Defendant is wrong.

The Plaintiffs dedicated thirteen paragraphs of their complaint to describing the Defendant’s business operations, the manner in which the Defendant treated its so-called “store managers,” and how these managers were virtually indistinguishable from rank and file employees. The Plaintiffs also dedicated at least nine additional paragraphs to describing how the hiring and treatment of the Plaintiffs and their Class was part of a fraudulent scheme to exploit the Plaintiffs and their Class by having them work long hours without overtime compensation, and convincing them (via this conduct) that they were not entitled to such compensation. The Plaintiffs have explained that the scheme was one that was devised by the corporation, a legal person, that the scheme was in effect throughout the four year period that is covered in the Complaint, and that the fraud at the base of the scheme was committed essentially by conduct. This fraud was perpetrated by Defendant through the treatment of the Plaintiffs and their class of “Store Managers” as exempt from overtime and the payment to them of salaries that remained fixed no matter how many hours in excess of forty per week they worked. The Plaintiffs have explained that the Defendant was aware of the standard they were required to uphold. Defendant was aware of it simply on account of the general requirement that knowledge of the law is imputed to all persons (including corporations) within the jurisdiction of this State, and, more precisely, because Defendant had been sued by a similar class of “store manager” plaintiffs a number of years ago for the same misclassification of that class as “exempt” from overtime.

Plaintiffs have satisfied the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. They have gone well beyond a mere recitation of the elements of fraud. Because of the detail articulated in Plaintiffs Complaint, the Defendant has been alerted to the precise misconduct with which they are charged, and

1 they are more than capable now of fashioning an appropriate answer and preparing
2 appropriate discovery in response. Consequently, Defendant's Motion should be denied.

3 **II. ARGUMENT**

4 **A. WHAT RULE 9 REQUIRES**

5 Federal Rule 9 states: "in all averments of fraud or mistake, the circumstances
6 constituting fraud or mistake shall be stated with particularity." On its face, what this
7 Rule means is that those alleging fraud must go beyond a mere accusation that a
8 Defendant violated the several elements of fraud. In other words, a Plaintiff must
9 generate a pound or two of factual flesh to cover the bare bones of the pleading.

10 Because it is a general rule, lacking particularity, Congress left the door open to
11 the Courts to more precisely define what constituted appropriate pleading when a
12 Plaintiff alleged fraud in the circumstances of each particular case. As noted by the
13 authors of the Federal Rules handbooks, the Courts have indeed filled in the gaps in
14 Congress' language, as well as explained the purpose of the Rule itself. The Courts have
15 determined that "requiring that such claims be pled with particularity: (1) ensures that the
16 defendants have fair notice of the plaintiff's claim, (2) helps safeguard the defendants
17 against spurious accusations, and the resulting reputational harm, (3) reduces the
18 possibility that a meritless fraud claim can remain in the case, by ensuring that the full
19 and complete factual allegation is not postponed until discovery, and (3) protects
20 defendants against "strike" suits." (*Federal Civil Rules Handbook 2005*, p. 270).

21 The Courts have provided further guidance on what is required of those who
22 would plead fraud. "When pleading fraud the claimant must allege more than mere
23 conclusory allegations of fraud or the technical elements of fraud." (*Id.*). The Courts
24 have stated that:

25
26 the amount of particularity or specificity required for pleading fraud
27 or mistake will differ from case to case, but generally depends upon
28 the amount of access the pleader has to the specific facts,

1 considering the complexity of the claim, the relationship of the
2 parties, the context in which the alleged fraud or mistake occurs, and
3 the amount of specificity necessary for the adverse party to prepare a
4 responsive pleading. (*Id.*, at p. 272 (emphasis added)).

5
6 The Court's have been careful to point out:

7
8 [t]he particularity requirement of Rule 9 is not...intended to abrogate
9 or mute the Rule 8 "notice" pleading standard that applies in federal
10 courts, and the two Rules must be read in harmony with one another.
11 Plaintiffs are still obligated to plead only notice of a fraud or mistake
12 claim; Rule 9(b) simply compels a higher degree of notice. Thus,
13 Rule 9(b) generally requires the pleader to fill-in "the first paragraph
14 of any newspaper story"—the "who, what, when, where, and how"
15 of the alleged scheme. In the context of fraud claims, many courts
16 require the pleader to allege (1) the time, place, and contents of the
17 false representations or omissions, and explain how they were
18 fraudulent, (2) the identity of the person making the
19 misrepresentations, (3) how the misrepresentations misled the
20 plaintiff, and (4) what the speaker gained from the fraud. (*Id.*).

21
22 The degree and style of the information required to satisfy the heightened pleading
23 requirement indeed varies from cases to case. As described by the Third Circuit:

24
25 Rule 9(b) requires plaintiffs to plead with particularity the
26 "circumstances" of the alleged fraud in order to place the defendants
27 on notice of the precise misconduct with which they are charged,
28 and to safeguard defendants against spurious charges of immoral and
 fraudulent behavior. It is certainly true that allegations of "date,

1 place or time” fulfill these functions, but nothing in the rule requires
2 them. Plaintiffs are free to use alternative means of injecting
3 precision and some measure of substantiation into their allegations
4 of fraud.... The complaint [before the court] sets forth the nature of
5 the alleged misrepresentations, and while it does not describe the
6 precise words used, each allegation of fraud adequately describes the
7 nature and subject of the alleged misrepresentation. (*Seville Indus.*
8 *Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, at
9 791, (3 Cir., 1984)).

10
11 The 9th Circuit has highlighted the root purpose of the rule thusly:

12 To comply with Rule 9(b), allegations of fraud must be specific
13 enough to give defendants notice of the particular misconduct which
14 is alleged to constitute the fraud charged so that they can defend
15 against the charge and not just deny that they have done anything
16 wrong. (*Swartz v. KPMG LLP* 476 F.3d 756, at 764 (9th Cir.2007);
17 citing *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.2001)
18 (internal quotations omitted)).¹
19

20
21 Defendants in this case cannot credibly assert, in the face of the very detailed
22 Complaint in this case, that Plaintiffs have pled mere conclusory allegations. Defendants
23 in this case cannot credibly assert that they do not understand the nature of Plaintiffs’
24 claims or the fraud alleged, and cannot adequately respond.
25 /
26 /

27
28 ¹ It is worth noting that the Court’s greatest expression of concern in the *Swartz* case was that there were multiple defendants and the complaint failed to identify which of the defendants was involved in the various misrepresentations alleged. The case at bar contains only one Defendant. There is no such uncertainty in this case.

1 **B. WHAT PLAINTIFFS HAVE ACTUALLY PLED**

2 In order to prevail on its Motion, Defendant must be able to demonstrate that the
3 Plaintiffs pled merely the bare elements of fraud, without providing the adequate
4 particulars of the misconduct. Upon examination of the Complaint, it is clear that
5 Defendant cannot prevail.

6 In addition to incorporating by reference, the previous 76 paragraphs of the
7 Complaint, the relevant portion of the Plaintiffs' Seventh Cause of Action reads as
8 follows:

9
10 77. Plaintiffs, on information and belief, allege that
11 Defendant DOLLAR TREE, by and through its officers,
12 human resource directors, regional managers, district
13 managers, area managers and others, for the last two and/or
14 four years has known that the Plaintiffs and members of their
15 Class did not meet the legal requirements of exempt
16 employees and knew that the Plaintiffs and members of their
17 Class could not be ordered to work more than eight (8) hours
18 per day or forty (40) hours per week without being paid
19 overtime. Specifically:

20 a. Defendant regularly observed and required
21 Plaintiffs and members of their Class to perform non-exempt
22 work, through periodic inspections and visits of store
23 locations by Area Managers, District Managers, and Regional
24 Managers.

25 b. Defendant knew that Plaintiffs and members of
26 their Class were required to perform the work necessary to
27 restock shelves and process customer purchases. Despite this
28

1 knowledge, Defendant refused to allocate sufficient labor
2 hours for non-exempt employees to complete these duties.

3 c. Defendant knew that Plaintiffs and members of
4 their Class regularly spent far less than fifty percent (50%) of
5 their work time performing management duties, since most
6 store management functions were mostly controlled at the
7 district, regional and corporate levels, and the actual
8 management duties performed at the store level-- including
9 the writing of weekly work schedules and occasional training
10 and coaching or directing of staff-- only required a few hours
11 per week to be adequately performed.

12 d. Defendant knew, or should have known, of the
13 requirements of California State and Federal laws pertaining
14 to the requirements of overtime wages and exempt status.
15 More specifically, Defendant had been previously sued in
16 California for misclassifying its managers as "exempt" from
17 overtime and, therefore, had specific notice of the legal
18 requirements necessary to justify classification of workers as
19 "exempt".

20 78. Despite possessing this knowledge, the Defendant
21 suppressed facts and did not disclose them to Plaintiffs and all
22 other Class members. Defendant did this even though they
23 had a legal duty under the *Labor Code*, and IWC Wage Order
24 7-80 (revised) to disclose the knowledge to Plaintiffs and
25 members of their Class.

26 79. Through hiring interviews, meetings, inter-office
27 memos, employment forms, job descriptions, and other
28 methods, Defendant has continuously represented to Plaintiffs

1 and members of their Class that, as managers, they are
2 salaried or exempt employees who can be required to work
3 more than eight (8) hours per day and more than forty (40)
4 hours per week for a flat monthly salary, with no overtime
5 compensation.

6 80. When Defendant made these statements to Plaintiffs
7 and members of their Class, they knew the statements
8 (particularly the assertion that no overtime pay was required
9 to be paid to the class members) were false.

10 81. These statements were purported by Defendant to be
11 facts and were made for the purpose of inducing Plaintiffs
12 and members of their Class to work in excess of eight (8)
13 hours per day and forty (40) hours per week without any
14 expectation on their part that they were entitled to receive
15 compensation for overtime worked.

16 82. Plaintiffs, and each member of their Class, reasonably
17 believed and relied on Defendant's assertions that they were
18 exempt employees who could be required to work overtime
19 without compensation.

20 83. In reliance on the assertions and to the detriment and
21 prejudice of Plaintiffs and each member of Plaintiffs' Class,
22 Plaintiffs and members of their Class have worked more than
23 eight (8) hours per day and more than forty (40) hours per
24 week, in violation of IWC Wage Order 7-80 (revised) and the
25 *Labor Code*, without being paid overtime.

26 84. As a direct result of the knowingly false assertions and
27 the concealment of fact by the Defendant, Plaintiffs and
28 members of their Class have earned, but have not been paid,

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overtime wages, plus interest, in an amount to be proven at trial.

85. In addition to causing actual damages, the suppression of true facts and assertion of false information was done with malice, oppression and/or fraud on the part of the Defendant for the purpose of depriving Plaintiffs and members of their Class of their legal property rights to overtime pay and to gain an unfair advantage over Defendant’s competitors. Such acts were done with the authorization, ratification, and/or advance knowledge of the officers and/or directors of DOLLAR TREE. Such acts, committed with malice, oppression, and/or fraud, justify the awarding of punitive damages to the Plaintiffs and each member of their Class in an amount commensurate with the enormity of the wrongfulness of the acts themselves, for the purpose of punishing the Defendant and deterring it from conducting itself in a similar fashion at any time in the future.

While Plaintiffs provided far more specific information than the following, a summary of the particulars of the allegations reveals the “who, what, how, when and where” of the fraud alleged.

The WHO: The corporation, Dollar Tree Stores, Inc.

The WHAT: The false designation and treatment of Store Managers as “exempt” from overtime.

The HOW: By having a corporate policy and practice that treats all California store managers as “exempt” from overtime.

The WHEN: For the entire employment of the class representatives, and the class period.

1 **The WHERE:** Every single Dollar Tree Store in the State of California.

2 **To WHAT END:** Plaintiffs and the class relied upon the Defendant's
3 classification of them as "exempt" from overtime and Defendant was thus able to keep
4 the money that it was lawfully required to pay its employees.

5 In addition, it is worth noting that Rule 9(b) itself states that the intent element
6 may be alleged generally. Despite the permissiveness of general allegations of intent,
7 Plaintiffs' Complaint went further than was required when it expressly referred to a prior
8 California litigation involving the exact same misclassification of store managers as
9 "exempt" and the failure *by the same Defendant* to remedy that misclassification (which
10 obviously results in a higher level of intent concerning that misclassification).

11 What the Plaintiffs essentially plead is the existence of a corporate policy to
12 falsely designate hundreds of employees as managers in order to avoid paying them
13 overtime, so as to lower its overhead and increase corporate profits. The fraud arose
14 from the corporations' decision to designate Plaintiffs and members of their class as
15 "managers," and to then exempt those "managers" from the benefits they were entitled to
16 by the law of the State of California. The Defendant corporation's designation and
17 treatment of the class member store managers as "exempt" from overtime was not merely
18 a violation of the statute, but a fraudulent one. As pled in the Complaint, the Defendant
19 is not only presumed to know the law (as ignorance of the law is never an excuse), this
20 particular Defendant had been sued for this exact same conduct previously, and therefore,
21 had knowledge of the legal requirements of classifying a class of employees as "exempt"
22 from overtime. To continue treating its store managers as "exempt" in light of this
23 knowledge is fraudulent.

24 The fraud alleged in the Complaint continued each time the Plaintiffs and
25 members of their Class were issued a paycheck, along with an itemized wage statement,
26 which falsely designated the amount that the Plaintiffs earned by falsely failing to state
27 those hours worked which by law were to be compensated at a premium rate, and what
28 that premium rate should have been. As will be explained more fully below, the

1 representations, statements and assertions referred to in Paragraphs 79 through 85 are not
2 purely verbal or written representations, statements, and assertions. Rather, they are
3 merely symbols of the fraudulent conduct by Defendant that were designed to affirm, and
4 which did in fact affirm, the false designation of Plaintiffs and members of the Class as
5 managers who were not entitled to overtime compensation.

6
7 **C. PLAINTIFFS HAVE SATISFIED THE HEIGHTENED**
8 **PLEADING REQUIREMENT BY PROVIDING SUFFICIENT**
9 **INFORMATION AS TO THE DETAILS OF THE DEFENDANT'S FRAUD**

10 Defendant claims that Plaintiffs have failed to identify the persons who uttered or
11 published the misrepresentations that are at the root of the alleged fraud. Defendant also
12 claims that the Plaintiffs have not identified the precise time, place and specific content
13 of the false representations, and have failed to specify documents in which these
14 representations were made. Following an analysis of these claims, it is easy to conclude
15 that Defendant is wrong and its request for relief must be denied.

16 Underlying each of Defendant's claims as to the inadequacy of the Plaintiffs fraud
17 allegations can be found the false presumption that a cause of action for Fraud must be
18 based upon a particular and insular false statement of fact. It is true that Fraud (or Deceit
19 as it was formerly known) is generally understood to rest on false representations or
20 willful nondisclosures of a material fact. But as William Prosser has pointed out:

21
22 it is not necessarily so limited. The exhibition of a document,
23 turning back the odometer of an automobile offered for sale,
24 drawing a check without funds, or a wide variety of other
25 conduct calculated to convey a misleading impression under
26 the circumstances of the case, may be sufficient. Merely by
27 entering into some transactions at all, the defendant may
28 reasonably be taken to represent that some things are true—as

1 for example, that a bank which receives deposits is solvent, or
2 that a stock certificate sold is a valid one, and that he has a
3 permit to sell it. It is trite to say in such cases that “actions
4 may speak louder than words.” (Prosser, *Handbook on the*
5 *Law of Torts* (4th Ed., 1971) § 106, p. 694-695; *Prosser &*
6 *Keeton On Torts* (5th Ed., 1984), § 106, p. 736).

7
8 When one alleges a fraud that is committed, not by a particular and insular
9 misrepresentation, but by conduct, it is the conduct itself that stands in the place of the
10 statements that were either made or should have been made. When pleading fraud by a
11 course of corporate conduct, Plaintiff is not required to detail what exact verbiage was
12 contained in particular statements pursuant to that course of conduct, or provide a list of
13 corporate representatives who followed that course of conduct. He need not do this
14 because to do so would be impossible, if not absurd. What the Plaintiff must do instead
15 is describe the conduct with sufficient detail. That is exactly what the Plaintiffs have
16 done in their Complaint.

17 With regard to the Plaintiffs’ alleged failure to identify the persons who uttered or
18 published the fraud, Plaintiffs admit that no individual person was identified in the
19 Complaint. As noted in the previous paragraphs of this Opposition brief, the fraud
20 alleged by Plaintiffs is not of the kind that is susceptible to the detailing of a particular
21 spoken or written misrepresentation, by a particular person on a particular day. It is
22 evident, instead, in conduct. Moreover, this is *not* a case (primarily) where *one*
23 *individual person* knowingly and falsely assured another that something was true and
24 then obtained a benefit to that other person’s detriment. This case, instead, involves the
25 wrongdoing of *a corporate person*. The law in effect in the Federal Courts has long
26 recognized corporations are persons (albeit fictitious), entitled to rights that any actual
27 human being is entitled to, including the protections of the fourteenth amendment and the
28 Bill of Rights, and to which, through its agents and employees, a will is imputed, and to

1 which malice can be ascribed.² In our case, a corporate person (the Defendant) adopted
2 an illegal policy to treat rank and file workers as exempt managers to avoid paying them
3 overtime and then treated them in accordance with that policy, all the while giving no
4 occasion for the employees (including Plaintiffs and their Class) to believe they had
5 reason to expect anything more. (And all the while having reason to know the
6 designation falsely robbed its employees of their rightful wages.) Since this is all fully
7 explained in the Plaintiffs' Complaint, the Defendant's Motion should be denied.

8 With regard to Defendant's contention that Plaintiffs failed to account for the time,
9 place and specific content of each false representation, Plaintiff must also disagree.
10 Again, we are not dealing, in this case, so much with a single misrepresentation, or even a
11 series of them, as we are with a continuing and constant course of conduct which itself
12 was founded on a corporate policy that antedated the hiring of the Plaintiffs and the
13 members of their Class. Instead of particular misrepresentations, what are primarily at
14 issue are things analogous to them: fraudulent actions. And with regard to these actions
15 that are at the root of the alleged fraud, Plaintiffs have satisfied their burden under Rule
16 9(b). Plaintiffs have indeed designated the time when the perpetration of the fraudulent
17 conduct, and the scheme of which it is a manifestation, occurred. Plaintiffs have said that
18 *for the entire Class period* the policy of falsely designating the Plaintiffs and their Class
19 as exempt managers was in place, and that during this entire period Plaintiffs and their
20 Class received from the Defendant itemized wage statements that did not correctly state
21 the hours they worked or the rates of pay that were operative for each of those hours.
22 This policy and practice permeated the very atmosphere of the corporation and all Dollar
23

24 ² This paragraph summarizes a massive area of law that cannot be easily summarized with
25 reference to authorities. Any compendium of authorities would, however, include: *Darmouth*
26 *College v. Woodward* (1819) 17 U.S. 518, 4 Wheat. 518, where the Supreme Court
27 acknowledged that Corporations were fictitious persons; *Chicago, Milwaukee and St. Paul*
28 *Railway Company v. Minnesota* (1890) 134 U.S. 418, 10 S.Ct. 462, where the Court held that
Corporations were entitled to due process rights pursuant to the Fifth and Fourteenth
Amendments; and the jurisprudence arising from the Sherman Act—a law that expressly
provided that Corporations would be treated as persons for purposes of imputing malice in the
commission of acts to restrain commerce.

1 Tree stores where Plaintiffs and their Class were employed. It was always present, ever
2 in effect. In other words, the fraud was a constant, fundamental underpinning to the
3 relationship between Defendant and its so-called “store managers.”

4 Plaintiffs have also adequately described the place where the fraudulent conduct
5 occurred. Plaintiffs have made it clear that the policy out of which the conduct at issue
6 sprang was a company policy and practice put into effect throughout California. The
7 Plaintiffs have alleged that the Defendant owns and operates approximately two hundred
8 stores in California. If the Plaintiffs stated that the same fraudulent scheme was in effect
9 at each of these locations, it should not later be found to be necessary to describe with
10 particularity each of these locations. If each fraud was different, and a different fraud
11 occurred at each location where Plaintiffs and members of their Class were employed, the
12 precise location where each fraud occurred would undoubtedly be called for. But that is
13 not the case here. The allegation in the Complaint that the fraud was perpetrated at each
14 of Defendant’s two hundred stores is sufficient to satisfy the requirements of Rule 9(b).

15 Finally, *Defendant is completely wrong* in asserting that Plaintiffs’ failure to
16 precisely identify and describe documents more generally referred to in Plaintiffs’
17 complaint is grounds for dismissing Plaintiffs’ Fraud Cause of Action. It is true that
18 Plaintiffs did refer to documents in Paragraph 79 of their Complaint, but the reference
19 was not to documents that form the basis of the fraud. Rather the documents referred to
20 in Paragraph 79 were documents that merely evidenced the existence of the fraudulent
21 scheme, and the course of conduct entered into by Defendant, to treat the Plaintiffs and
22 their Class as workers who were not entitled to overtime pay. The origin of the scheme
23 itself predated any of these written statements, and was independent of them, and was
24 rooted not in the statements written but in the systematic treatment by Defendant of the
25 Plaintiffs and their Class. In its designation of the Plaintiffs and their Class as “Store
26 Managers,” and their automatic exemption of these “Store Managers” from overtime pay,
27 and their regular and repeated refraining from paying these “Store Managers” overtime
28

1 when it was earned, Defendant's actions, in the words of Dean Prosser, spoke louder than
2 words.

3 In reflecting on the meaning of Rule 9 (b), Congress could hardly have intended
4 that a Plaintiff must identify with particularity documents that are merely evidence of a
5 pre-existing and nearly self-perpetuating fraud rooted in a broad course of conduct. If the
6 Plaintiffs here were required to identify such documents such a requirement would lead
7 them far astray from the essential facts of the case, decimate the practical meaning of the
8 notice pleading standard that is the hallmark of the Federal Rules, and burden the
9 Plaintiffs with the identification of so many documents and the statements made therein
10 as to transform the Complaint into an exercise in discovery, rather than of Pleading.
11 Indeed, nothing would be gained from a pleading or notice perspective if the Plaintiffs
12 were able to specifically identify each and every paycheck and paystub in which they
13 were treated as "exempt" from overtime.

14 Again, Rule 9(b) merely requires a summary of the details of the fraud, not minute
15 recreation of every step of the fraud and descriptions of all evidence, including all
16 documents, which confirm its existence. The Defendant's employment classification
17 practices with regard to Plaintiffs and their Class is the fraud in this case, not the
18 documents referred to in the Complaint. This policy is evident not so much in documents
19 as in the regular treatment by the Defendant of the Plaintiffs and their Class as exempt
20 "Store Managers" and the withholding from them of payment of all overtime wages the
21 Plaintiffs and members of their Class earned as a result of working in excess of eight
22 hours per day and more than forty hours per week.

23 III. CONCLUSION

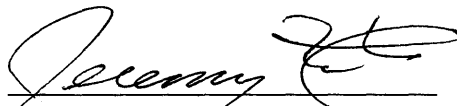
24 Plaintiffs have more than satisfied the requirements of the Federal Rules, and
25 applicable common law authority. Defendant's Motion should be denied. As the Courts
26 have held time and time again, the purpose behind the heightened pleading requirements
27 is to give defendants enough information so that they are able to effectively respond to
28 the Complaint. The very detailed Complaint in this matter certainly does so.

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In the event, however, that the Court is not satisfied that the Plaintiffs have pled with sufficient particularity, Plaintiffs respectfully request leave to amend the Complaint and direction by the Court of what more is required of them.

Dated: June 7, 2007

EDGAR LAW FIRM

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