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 7

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

11 MIGUEL A. CRUZ, and JOHN D. HANSEN,
 12 individually and on behalf of all others
 similarly situated,
 13 Plaintiffs,
 14 v.
 15 DOLLAR TREE STORES, INC.,
 16 Defendant.

CASE NO. C 07-02050 SC
**DEFENDANT DOLLAR TREE
 STORES, INC.'S NOTICE OF
 MOTION AND MOTION TO
 DISMISS PLAINTIFFS' FIRST
 AMENDED COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

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

DATE: September 21, 2007
TIME: 10:00 a.m.
DEPT: Crtm. 1; 17th Floor
JUDGE: Hon. Samuel Conti

COMPLAINT FILED: April 11, 2007
TRIAL DATE: No date set.

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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" from the First Amended Complaint (the "FAC") because (a) it is based exclusively upon alleged misrepresentations of California's wage and hour laws which cannot, as a matter of law, support a fraud claim (see Miller v. Yokohama Tire Corp., 358 F.3d 616, 620-621 (9th Cir. 2004) (holding that an employer's misrepresentation of the wage and hour laws to its employee did not constitute actionable fraud as a matter of law)); and (b) it is not pled with sufficient particularity as required by Fed. R. Civ. Proc. 9(b). Dollar Tree respectfully requests the Court dismiss Count VII from the FAC with prejudice.

II. RELEVANT FACTS & PROCEDURAL HISTORY

On April 7, 2007, Plaintiffs, who are or have been employed by Dollar Tree as store managers (¶¶ 12-13), filed their "Complaint for Damages, Injunctive Relief and Restitution" (the "Complaint"). The Complaint, styled as a putative class action, alleged nine separate causes of action against Dollar Tree.¹ The primary issue Plaintiffs raise is whether they, as store managers, were classified correctly as "exempt" employees under state and federal law (¶ 8). On May 9, Dollar Tree moved to dismiss Count VII (Fraud & Deceit) from the Complaint, pursuant to Rule 12(b)(6), on the ground that it was not pled with sufficient particularity as required by Fed. R. Civ. Proc. 9(b). On June 29, the Court granted the motion and dismissed Count VII from the Complaint without prejudice. See June 29, 2007 Order Granting Defendant's Motion to Dismiss Plaintiffs' Fraud Claim (the "June 29 Order") at p. 4. The June 29 Order provided Plaintiffs with clear instructions concerning amendments to the fraud claim:

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 [Plaintiffs'] fraud claim must meet the heightened pleading
 2 requirements of Rule 9(b). . . . Under the Rule 9(b)
 3 standard, Plaintiffs' Complaint fails to give sufficient detail
 4 with respect to the time, place, content, and identities of the
 5 parties engaged in the fraud. . . . Plaintiffs should identify
 6 specific oral statements or written documents indicative of
 fraud, including specific information on the timing of the
 incidents and employees involved.

7 Id. at pp. 3-4 (internal citations omitted). Pursuant to the June 29 Order, Plaintiffs filed
 8 the FAC on July 27, 2007.

9 III. ARGUMENT

10 A. The Motion to Dismiss Standard.

11 "A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of
 12 the pleadings." Silvas v. E*Trade Mortg. Corp., 421 F. Supp. 2d 1315, 1317 (S.D. Cal.
 13 2006); see also North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.
 14 1983). "Dismissal is appropriate where the Complaint lacks a cognizable legal theory."
 15 Id.; see also Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir.
 16 1984); Neitzke v. Williams, 490 U.S. 319, 326-27 (1989) ("Rule 12(b)(6) authorizes a
 17 court to dismiss a claim on the basis of a dispositive issue of law."). Although the court
 18 must assume the FAC's factual allegations are true, "legal conclusions need not be
 19 taken as true merely because they are cast in the form of factual allegations." Silvas,
 20 421 F. Supp. 2d at 1317. Further, where an amended complaint is on file, the "district
 21 court's discretion to deny leave to amend is 'particularly broad.'" Miller v. Yokohama Tire
 22 Corp., 358 F.3d 616, 620-621 (9th Cir. 2004) (citing Chodos v. W. Publ'g, 292 F.3d 992,
 23 1003 (9th Cir. 2002) (citations omitted). Leave to amend may be denied when the
 24 challenged defects cannot be cured. Albrecht v. Lund, 845 F.2d 193, 195-196 (9th Cir.
 25 1988) (amendment to fraud claim properly denied where alleged misstatements "could
 26 not be misrepresentations" as a matter of law). "Repeated failure to cure deficiencies by
 27 amendments previously allowed is another valid reason for a district court to deny a
 28

1 party leave to amend.” McGlinchy v. Shell Chemical Co., 845 F.2d 802, 809-810 (9th Cir.
2 1988) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

3 **B. Count VII Should Be Dismissed Because Dollar Tree’s Alleged**
4 **Misrepresentations of the State and Federal Overtime and Exempt**
5 **Status Laws Do Not Constitute Actionable Fraud as a Matter Of Law.**

6 **1. Count VII Should Be Dismissed With Prejudice Because Fraud**
7 **Claims May Not Be Predicated Upon Misrepresentations of Law.**

8 Plaintiffs allege in Count VII that Dollar Tree is liable for fraud because
9 Dollar Tree (a) misclassified its store managers as “exempt” employees who would not
10 be entitled to overtime (Compl., ¶ 79); (b) communicated this purported mistake of law to
11 Plaintiffs through Messrs. Cassalano and Tellstrom (¶ 80);¹ and (c) repeatedly ratified
12 the mistake by issuing pay checks and wage statements which did not reflect the
13 payment of overtime compensation (¶¶ 81-82). Count VII fails because it replicates
14 Count I (Failure to Pay Overtime Wages; see ¶¶ 26-32) and because it is based upon an
15 incorrect premise: that Dollar Tree may be liable in fraud for misrepresenting to Plaintiffs
16 the “requirements of California State and Federal laws pertaining to the requirements of
17 overtime wages and exempt status.” FAC, ¶ 77(d) at p. 21:11-12. As a matter of law,
18 Dollar Tree cannot be found liable in fraud for misstating California’s wage and hour laws
19 to its employees. See Miller, 358 F.3d at 620-621 (9th Cir. 2004).

20 In Miller, plaintiff alleged he was a victim of a mail and wire fraud scheme
21 by his employer and its managers “who misrepresented his entitlement to overtime pay
22 and consequently underpaid him.” 358 F.3d at 618. Specifically, Miller alleged that
23 (a) he was ordered to work overtime but did not receive overtime pay; (b) the individually
24 identified managers “falsely represented to him and other employees that they were not
25 entitled to overtime pay because they were salaried”;² (c) his employer “had superior

26 ¹ Paragraph 80 of the FAC contains the only “communication” Plaintiffs allegedly received:
27 “CRUZ and HANSON were both informed by Cassalano and Tellstrom that they were exempt
28 managers who would not be entitled to overtime and whose duties would mostly include the
performance of non-managerial tasks.” As described below, this allegation fails to satisfy the
particularity requirements of Rule 9(b) and fails to comply with the June 29 Order.

² Miller’s complaint identified three Yokohama Tire Corporation managers by name and accused
(cont’d)

1 knowledge concerning his [exempt or non-exempt] status and entitlement to overtime
 2 pay"; and (d) the employer's fraudulent scheme was "furthered" through paychecks,
 3 wage statements and W-2 forms which did not reflect the payment of overtime wages.
 4 Id. at 618-619. Despite these allegations, the Court dismissed the fraud claim under the
 5 general rule "that fraud cannot be predicated upon misrepresentations of law or
 6 misrepresentations as to matters of law. Statements of domestic law are normally
 7 regarded as expressions of opinion which are generally not actionable in fraud even if
 8 they are false." Id. at 621 (citing Am. Jur. 2d of Fraud and Deceit § 97 (2001)).

9 Plaintiffs' fraud and deceit claim is factually indistinguishable from Miller.
 10 Count VII alleges that (a) class members were required to work overtime hours but were
 11 not paid overtime wages (¶¶ 20, 77, 86); (b) individually identified Dollar Tree officers,
 12 human resource directors and managers misrepresented California state and federal
 13 overtime laws to the putative class members (¶¶ 77(d), 78-80);³ (c) Dollar Tree had
 14 superior knowledge of the overtime laws (¶ 77(d) (referencing Dollar Tree's participation
 15 in a class action settlement for the alleged misclassification of "managers" as exempt
 16 from overtime); and (d) the fraudulent scheme was furthered by Dollar Tree's issuance of
 17 pay checks and itemized wage statements which did not reflect the payment of overtime
 18 wages (¶¶ 81-83). Whether Dollar Tree was ultimately correct in its interpretation of the
 19 overtime law is irrelevant to Plaintiff's fraud claim and, in any event, that issue will be
 20 redressed by Plaintiffs' remaining claims for relief. As a matter of law, however, Dollar
 21

22 (Continued)

23 "other high-ranking Yokohama employees" of participating in the fraudulent scheme. 358 F.3d at
 24 618.

25 ³ Plaintiffs allege that 11 individually named Dollar Tree "officers, human resource directors,
 26 regional managers, district managers and others . . ." (¶ 78) both "knew of the requirements of
 27 California State and Federal laws pertaining to the requirements of overtime wages and exempt
 28 status" (¶ 77(d)) and "devised a corporate policy to classify the Plaintiffs and members of their
 Class as exempt 'managers' who would not be paid overtime. . . ." (¶ 79). Plaintiffs also allege
 that two individually named "regional and area managers" informed Plaintiffs "that they were
 exempt managers who would not be entitled to overtime and whose duties would mostly include
 the performance of non-managerial tasks." (¶ 80). The failure of these general allegations to
 satisfy the particularity requirements of Rule 9(b) is discussed below.

1 Tree may not be liable for fraud for conveying its opinion about the state of those laws to
2 its employees and potential employees. Miller, 358 F.3d at 620-621.

3 Dollar Tree respectfully requests the Court dismiss with prejudice Count VII
4 from the FAC on this ground. See Albrecht, 845 F.2d at 195-196 (amendment to fraud
5 claim properly denied where alleged misstatements “could not be misrepresentations” as
6 a matter of law).

7 **2. Count VII Should Be Dismissed Because the FAC Alleges No**
8 **Applicable Exceptions to the Rule that Fraud Claims May Not**
9 **Be Predicated Upon Misrepresentations of Law.**

10 There are four “special situations” justifying reliance upon misrepresentations
11 of law which could allow a fraud claim to proceed: “Where the party making the
12 misrepresentation 1) purports to have special knowledge; 2) stands in a fiduciary or
13 similar relation of trust and confidence to the recipient;⁴ 3) has successfully endeavored
14 to secure the confidence of the recipient; 4) or has some other special reason to expect
15 that the recipient will rely on his opinion, misrepresentation of law may result in
16 actionable fraud”. See Miller, 358 F.3d at 621. The FAC fails to allege facts supporting
17 any of these situations.

18 First, the FAC does not allege that Dollar Tree’s officers, human resource
19 directors and managers had special knowledge that the alleged class members did not.
20 Miller, 358 F.3d at 621. To begin with, Miller stands for the propositions that employer
21 status alone is insufficient to confer “special knowledge” of the wage and hour laws in a
22 fraud claim asserted by an employee. Id. (“nor are we willing to impute hypothetical
23 knowledge on the basis of [the employment relationship]”). Nor do the facts alleged here
24 establish “special knowledge.” The FAC merely alleges that 11 Dollar Tree officers,
25 human resource directors and managers had “notice” that “Defendant participated in a
26 class action settlement” in a case involving the “alleged misclassification of managers as

27 ⁴ The Miller Court frames this exception as whether a “confidential relationship” exists between
28 the employee and the employer, as described below. Miller, 358 F.3d at 621.

1 exempt from overtime” (§§ 77(d) and 78). Plaintiffs do not allege “special knowledge.”
2 Rather, they allege the identified individuals were aware of facts which were generally
3 available to the public at large. Indeed, the court records and files pertaining to the
4 referenced case are a matter of public record (as indicated by Plaintiffs’ reference to the
5 alleged settlement payment amount and underlying allegations). Thus, the knowledge
6 imparted by the existence of that lawsuit was as available to the identified Dollar Tree
7 officers, human resource directors and managers as it was to all members of the
8 putative class. The specific knowledge exception does not apply.

9 Second, the FAC does not allege that this case involves a confidential
10 relationship between Dollar Tree and the putative class members. Miller, 358 F.3d at
11 621. Indeed, “[n]o presumption of a confidential relationship arises from the bare fact
12 that parties to a contract are employer and employee; rather additional ties must be
13 brought out in order to create the presumption of a confidential relationship between the
14 two.” Id. (citing Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123 (1996)); see also
15 Slocomb v. City of Los Angeles, 197 Cal. App. 2d 794, 800 (1961) (affirming dismissal of
16 fraudulent failure to pay overtime claim because plaintiffs failed to allege that “any
17 confidential relationship existed between the employers and the employees.”). Because
18 the FAC is void of such allegations, the confidential relationship exception cannot apply.

19 Third, the FAC does not (and cannot) allege that Dollar Tree’s officers,
20 human resource directors and managers sought “to secure the confidence” of Plaintiffs.
21 Miller, 358 F.3d at 622. This exception “is usually applicable to situations where ‘the
22 maker gains the other’s confidence by stressing their common membership in a religious
23 denomination, fraternal order, or social group or the fact that they were born in the same
24 locality.” Id. (citing Restatement (Second) of Torts § 542(c) (1977)). The facts alleged in
25 the FAC are nothing like these situations and the “secured confidence” exception cannot
26 apply.

27 Fourth, the FAC does not allege facts supporting the “other special reason”
28 exception to the general rule that fraud claims may not be premised upon

1 misrepresentations of law. Miller, 358 F.3d at 622. For example, there is no claim here
 2 that the Plaintiffs have “a particular lack of intelligence or [are] particularly gullible.” Id.
 3 (citing Restatement (Second) of Torts § 542, cmt. i (explaining that the main application
 4 of the other special reason clause is “to cases in which the maker of the representation
 5 knows of some special characteristic of the recipient, such as lack of intelligence . . .
 6 which gives the maker special reason to expect the opinion to be relied on.”). Therefore,
 7 the final exception is not applicable.

8 For each of the foregoing reasons, the Court should dismiss Count VII from
 9 the FAC with prejudice. See Albrecht, 845 F.2d at 195-196 (amendment to fraud claim
 10 properly denied where alleged misstatements “could not be misrepresentations” as a
 11 matter of law).

12 **C. Count VII Should Be Dismissed With Prejudice For the Separate and**
 13 **Independent Reason That It Fails to Allege Fraud With Particularity As**
 14 **Required By Rule 9(b).**

15 To the extent the Court can distinguish any alleged misrepresentations of
 16 fact from the misrepresentations of law, described above, Count VII still fails because it
 17 does not comply with the particularity requirements of Rule 9(b). “To survive a motion to
 18 dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must
 19 satisfy only the minimal notice pleading requirements of [Federal] Rule [of Civil
 20 Procedure] 8(a)(2).” Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003). However,
 21 where “a complaint includes allegations of fraud, Federal Rule of Civil Procedure 9(b)
 22 requires more specificity including an account of the time, place, and specific content of
 23 the false representations as well as the identities of the parties to the
 24 misrepresentations.” Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)
 25 (citation omitted); see *also* June 29 Order at p. 3. “To comply with Rule 9(b), allegations
 26 of fraud must be specific enough to give defendants notice of the particular misconduct
 27 which is alleged to constitute the fraud charged so that they can defend against the
 28 charge and not just deny that they have done anything wrong.” Bly-Magee v. California,
 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and quotation omitted). Further, Plaintiffs

1 must "identify specific oral statements or written documents indicative of fraud, including
 2 specific information on the timing of the incidents and employees involved." *Id.* at p. 4:7-
 3 9; see also *Campbell v. Allstate Ins. Co.*, 1998 U.S. Dist. LEXIS 12550 (C.D. Cal. 1998)
 4 ("Plaintiff[s] must attribute false or misleading statements to a particular defendant and
 5 must set forth specific descriptions of the fraudulent representation. Allegations which
 6 are vague and conclusory are insufficient to satisfy Rule 9."). Count VII fails to satisfy
 7 these standards.

8 First, although Plaintiffs amended Count VII to include the names of
 9 various Dollar Tree officers, human resource directors and managers (see ¶¶ 78, 80),
 10 they have not amended Count VII to include false and misleading statements of fact by
 11 those individuals, whether oral or written. Indeed, Count VII merely alleges that these
 12 individuals "and others devised a corporate policy" to misclassify Plaintiffs and the
 13 putative class members. ¶ 79 at p. 22:5-8 (emphasis added).⁵ Count VII fails to
 14 describe whether that policy was oral or written. Similarly, Plaintiffs contend these same
 15 individuals issued instructions to others to follow the purported policy. *Id.*, ¶ 80. But, the
 16 FAC does not identify any of the alleged "regional and area managers" who Plaintiffs
 17 contend received and implemented those instructions, other than Messrs. Cassalano
 18 and Tellstrom. *Id.* Similarly, Count VII includes no facts concerning how, when, to
 19 whom and in what manner those instructions were made. Finally, Plaintiffs allege that
 20 Messrs. Cassalano and Tellstrom communicated this "policy" to the named Plaintiffs at
 21 an unspecified time and in an unspecified manner. ¶ 80. Even if these purported
 22 misstatements of law could support a fraud claim (and they cannot), they are not
 23 particular enough to satisfy Rule 9(b). See *Marin Park, Inc.*, 356 F.3d at 1066 (To avoid
 24 dismissal under Rule 9(b), Plaintiffs' Complaint must "state the time, place, and specific

25 _____
 26 ⁵ The inclusion of the phrase "and others" renders the allegation worthless to Dollar
 27 Tree. In order "to defend against the charge and not just deny that it has done anything
 28 wrong," Dollar Tree must know who Plaintiffs believe "possessed knowledge of
 wrongdoing" and improperly "suppressed" this knowledge (¶ 78). Likewise, it must know
 who Plaintiffs believe made the supposedly false representations (¶ 79).

1 content of the false representations."); see also June 29 Order at p. 3 ("Plaintiffs'
2 Complaint fails to give sufficient detail with respect to the time, place, content, and
3 identities of the parties engaged in the fraud.")

4 Second, the purportedly fraudulent policy is insufficiently alleged to
5 establish either a predicate factual misrepresentation or detrimental reliance. See Small
6 v. Fritz Companies, Inc., 30 Cal. 4th 167, 173 (2003) (setting forth the elements of a
7 fraud and deceit claim). In fact, the generally alleged policy contains no factual
8 misstatements at all, much less a "specific oral statement[]" or "written document[]"
9 indicative of fraud." June 29 Order at p. 4. Count VII merely alleges that Dollar Tree's
10 overtime policy states that it does not pay its store managers for overtime. ¶ 79. Count
11 VII also alleges that Dollar Tree did not pay its store managers overtime in conformity
12 with this policy. ¶ 85. Contrary to Plaintiffs' argumentative pleading, Dollar Tree did not
13 deceive Plaintiffs or putative class members; Dollar Tree paid its store managers as it
14 represented it would. Nor can the Plaintiffs or putative class members argue that they
15 relied on these statements to their damage. Indeed, based on these allegations, the
16 Plaintiffs worked overtime hours with full knowledge that Dollar Tree did not intend to pay
17 it. Thus, the written documents (e.g. pay checks and wage statements) merely
18 confirmed the understanding both Dollar Tree and the Plaintiffs had concerning
19 overtime. See id., ¶¶ 81-85. If that understanding was premised upon a
20 misinterpretation of law, Plaintiffs will have an opportunity to address it through their
21 remaining claims for relief.

22 Plaintiffs have not alleged fraud here, much less made a particularized
23 showing, despite having clear instructions from the Court in the June 29 Order. Count
24 VII should therefore be dismissed with prejudice. McGlinchy, 845 F.2d at 809-810
25 ("Repeated failure to cure deficiencies by amendments previously allowed is another
26 valid reason for a district court to deny a party leave to amend.").

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