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11 HANSEN, individually and on  
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.

) CASE NO. 07-02050 SC

) CLASS ACTION

) **OPPOSITION TO DEFENDANT**  
) **DOLLAR TREE STORE INC.'S**  
) **MOTION TO DISMISS**

) Honorable Judge Samuel Conti

) Courtroom 1, 17<sup>th</sup> Floor

) Time: 10:00 a.,m., September 21, 2007

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## **I. INTRODUCTION**

1  
2 Defendant alleges that Plaintiffs' complaint is defective in two ways. The first  
3 way is familiar to this Court due to an earlier Motion to Strike—that is, that the Plaintiff's  
4 cause of action for fraud lacks sufficient particularity. The second alleged defect in the  
5 Plaintiff's complaint is entirely novel—that is, that misstatement of wage and hour law  
6 cannot form the basis of fraud. In truth, these defects are non-existent. On an earlier  
7 occasion, it is true that the Court determined the Plaintiff's original complaint to lack  
8 sufficient particularity, and dismissed the Fraud Cause of Action with leave to amend.  
9 Plaintiff has indeed amended the Complaint and provided all the particularity required at  
10 the pleading stage. With respect to the Defendant's claim that misstatement of wage and  
11 hour law cannot form the basis of a fraud action, Plaintiff of course wonders why this  
12 argument was not brought up in the Defendant earlier demurrer. More importantly,  
13 Plaintiff agrees with the Defendant's reading of the case from which it derives this rule.  
14 What Plaintiff disagrees with is its application to the Plaintiff's case. Specifically, we are  
15 not dealing with a misstatement of law as the basis of fraud. Instead, Plaintiff has alleged  
16 a misstatement of fact in the form of an intentional misclassification of employees as  
17 overtime-exempt managers. Defendants did not misrepresent the law at all. They are  
18 correct in their conclusion that managers are exempt from overtime. It is their  
19 misrepresentation of the actual classification that was the basis of the fraud.

## **II. ARGUMENT**

### **A. PLAINTIFF'S HAVE PLED FRAUD WITH THE REQUISITE DEGREE OF PARTICULARITY**

#### **1. What Rule 9 Requires**

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

1           Because it is a general rule, lacking particularity, Congress left the door open to  
2 the Courts to more precisely define what constituted appropriate pleading when a  
3 Plaintiff alleged fraud in the circumstances of each particular case. As noted by the  
4 authors of the Federal Rules handbooks, the Courts have indeed filled in the gaps in  
5 Congress' language, as well as explained the purpose of the Rule itself. The Courts have  
6 determined that "requiring that such claims be pled with particularity: (1) ensures that the  
7 defendants have fair notice of the plaintiff's claim, (2) helps safeguard the defendants  
8 against spurious accusations, and the resulting reputational harm, (3) reduces the  
9 possibility that a meritless fraud claim can remain in the case, by ensuring that the full  
10 and complete factual allegation is not postponed until discovery, and (4) protects  
11 defendants against "strike" suits." (*Federal Civil Rules Handbook 2007*, p. 300).

12           The Courts have provided further guidance on what is required of those who  
13 would plead fraud. "When pleading fraud the claimant must allege more than mere  
14 conclusory allegations of fraud or the technical elements of fraud." (*Id.*, pp. 300-301).  
15 The Courts have stated that:

16  
17                   the amount of particularity or specificity required for pleading fraud  
18 or mistake will differ from case to case, but generally depends upon  
19 the amount of access the pleader has to the specific facts,  
20 considering the complexity of the claim, the relationship of the  
21 parties, the context in which the alleged fraud or mistake occurs, and  
22 the amount of specificity necessary for the adverse party to prepare a  
23 responsive pleading. (*Id.*, at p. 301-302 (emphasis added)).

24  
25           The Courts have been careful to point out:

26  
27                   [t]he particularity requirement of Rule 9 is not...intended to abrogate  
28 or mute the Rule 8 "notice" pleading standard that applies in federal  
courts, and the two Rules must be read in harmony with one another.

1 Plaintiffs are still obligated to plead only notice of a fraud or mistake  
2 claim; Rule 9(b) simply compels a higher degree of notice. Thus,  
3 Rule 9(b) generally requires the pleader to fill-in “the first paragraph  
4 of any newspaper story”—the “who, what, when, where, and how”  
5 of the alleged scheme. In the context of fraud claims, many courts  
6 require the pleader to allege (1) the time, place, and contents of the  
7 false representations or omissions, and explain how they were  
8 fraudulent, (2) the identity of the person making the  
9 misrepresentations, (3) how the misrepresentations misled the  
10 plaintiff, and (4) what the speaker gained from the fraud. (*Id.*, p.  
11 302).<sup>1</sup>  
12

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

15  
16 Rule 9(b) requires plaintiffs to plead with particularity the  
17 “circumstances” of the alleged fraud in order to place the defendants on  
18 notice of the precise misconduct with which they are charged, and to  
19 safeguard defendants against spurious charges of immoral and fraudulent  
20 behavior. It is certainly true that allegations of “date, place or time” fulfill  
21 these functions, but nothing in the rule requires them. Plaintiffs are free to  
22 use alternative means of injecting precision and some measure of  
23 substantiation into their allegations of fraud.... The complaint [before the  
24 court] sets forth the nature of the alleged misrepresentations, and while it  
25 does not describe the precise words used, each allegation of fraud  
26

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27 <sup>1</sup> The *Handbook* cites the following cases as following the who, what, when, where, and  
28 how rule of pleading fraud: *In re Alpharma Inc. Secs. Litig.* (3d Cir. 2004) 372 F.3d 137,  
*Alternative Sys. Concepts, Inc. v. Synopsys, Inc.* (1<sup>st</sup> Cir. 2004) 374 F.3d 23, *United States ex rel.*  
*Doe v. Dow Chem. Co.* (5<sup>th</sup> Cir. 2003) 343 F.3d. 235, and *DiLeo v. Ernest & Young* (7<sup>th</sup> Cir.  
1990) 901 F.2d 624.

1 adequately describes the nature and subject of the alleged  
2 misrepresentation. (*Seville Indus. Machinery Corp. v. Southmost*  
3 *Machinery Corp.*, 742 F.2d 786, at 791, (3 Cir., 1984)).  
4

5 The 9<sup>th</sup> Circuit has highlighted the root purpose of the rule thusly:

6 To comply with Rule 9(b), allegations of fraud must be specific enough to  
7 give defendants notice of the particular misconduct which is alleged to  
8 constitute the fraud charged so that they can defend against the charge and  
9 not just deny that they have done anything wrong. (*Swartz v. KPMG LLP*  
10 476 F.3d 756, at 764 (9th Cir.2007); citing *Bly-Magee v. California*, 236  
11 F.3d 1014, 1019 (9th Cir.2001) (internal quotations omitted)).<sup>2</sup>  
12

13 Defendants in this case cannot credibly assert, in the face of the very detailed  
14 Complaint in this case, that Plaintiffs have pled mere conclusory allegations. Defendants  
15 in this case cannot credibly assert that they do not understand the nature of Plaintiffs'  
16 claims or the fraud alleged, and cannot adequately respond.  
17

## 18 **2. What Plaintiffs Have Actually Pled**

19 In order to prevail on its Motion, Defendant must be able to demonstrate that the  
20 Plaintiffs pled merely the bare elements of fraud, without providing the adequate  
21 particulars of the alleged misconduct. Upon examination of the Complaint, it is clear that  
22 Defendant cannot prevail.

23 In its Order dated June 29, 2007, the Court stated: "to satisfy Rule 9(b), Plaintiffs  
24 should identify specific oral statements or written documents indicative of fraud,  
25 including specific information on the timing of the incidents and employees involved."  
26

---

27 <sup>2</sup> It is worth noting that the Court's greatest expression of concern in the *Swartz* case was  
28 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 The Plaintiff heeded the Court's ruling and amended its Seventh Cause of Action  
2 accordingly. The relevant portion of the Plaintiffs' amended Seventh Cause of Action  
3 reads as follows:

4  
5 77. Plaintiffs allege that Defendant DOLLAR TREE, by and  
6 through its officers, human resource directors, regional managers, district  
7 managers, area managers and others, during the entire class period has  
8 known that the Plaintiffs and members of their Class did not meet the legal  
9 requirements of exempt employees and knew that the Plaintiffs and  
10 members of their Class could not be ordered to work more than eight (8)  
11 hours per day or forty (40) hours per week without being paid overtime.  
12 Specifically:

13 a. Defendant regularly observed and required Plaintiffs and  
14 members of their Class to perform non-exempt work, through periodic  
15 inspections and visits of store locations by Area Managers, District  
16 Managers, and Regional Managers.

17 b. Defendant knew that Plaintiffs and members of their Class  
18 were required to perform the work necessary to restock shelves and process  
19 customer purchases. Despite this knowledge, Defendant refused to allocate  
20 sufficient labor hours for non-exempt employees to complete these duties.

21 c. Defendant knew that Plaintiffs and members of their Class  
22 regularly spent far less than fifty percent (50%) of their work time  
23 performing management duties, since most store management functions  
24 were mostly controlled at the district, regional and corporate levels, and the  
25 actual management duties performed at the store level-- including the  
26 writing of weekly work schedules and occasional training and coaching or  
27 directing of staff-- only required a few hours per week to be adequately  
28 performed.



1           d. Defendant knew of the requirements of California State and  
2 Federal laws pertaining to the requirements of overtime wages and exempt  
3 status. More specifically, not only is Defendant, as anyone doing business  
4 in California, charged with knowing California labor law, Defendant had  
5 been previously sued in 2001 in California for misclassifying its managers  
6 as “exempt” from overtime and, therefore, had specific notice of the legal  
7 requirements necessary to justify classification of workers as “exempt”.  
8 Indeed, Defendant participated in a class action settlement of a case entitled  
9 *Michael Williams v. Dollar Tree Stores Inc., et al.*, Orange County Superior  
10 Court, Case No. 01CC00329. Pursuant to that approved class action  
11 settlement, defendants, including Dollar Tree Stores Inc., paid \$7,644,240  
12 for the alleged misclassification of “managers” as exempt from overtime.  
13 Despite this, Defendant has continued to misclassify its “managers” so as to  
14 avoid payment of overtime wages.

15           78. Those officers, human resource directors, regional managers,  
16 district managers, area managers and others referred to in the preceding  
17 paragraph, who had the knowledge of the true status of the Plaintiffs and  
18 members of their Class included Gary Philbin (Senior Vice President of  
19 Stores), Rene Lefrancois (Vice President of West Coast Zone), James  
20 Fothergill (Chief People Officer), Cindy Warren (Director of  
21 Compensation), Betty Martin (Payroll Manager), Cheri Kiper (Manager of  
22 Retirement Services and Personnel), David McDearmon (Director of Field  
23 Human Resources), Tim Lorenz, Chris Nygren and Jerry Sankey (Zone  
24 Human Resource Managers), Candace Camp (Regional Human Resources  
25 Manager).

26           79. The persons identified in Paragraph 78 did not merely possess  
27 the knowledge attributed to them in Paragraph 77. In addition, they and  
28 others devised a corporate policy to classify the Plaintiffs and members of

1 their Class as exempt “managers” who would not be paid overtime, even  
2 though the duties they would perform were consistent with those of non-  
3 exempt non-managerial rank and file employees. The reason this policy  
4 was devised was in order to employ workers to do non-managerial tasks for  
5 longer than eight hours a day or forty hours a week without paying them  
6 overtime. This policy was devised and first implemented prior to the  
7 advent of the class period identified in this complaint, but remained in place  
8 when the class period commenced and remains in place to the present date.

9 80. The persons identified in Paragraph 78 instructed regional  
10 and area managers, who oversaw operation of more than a single store, to  
11 hire store managers as employees who were exempt from overtime but to  
12 instruct them to perform non-managerial tasks for most of the time they  
13 were on duty. Among those regional and area managers who were  
14 instructed to do this were Mike Cassalano and Rick Tellstrom. It was these  
15 two men who hired a number of store managers, including the Plaintiffs  
16 CRUZ and HANSON. CRUZ and HANSON were both informed by  
17 Cassalano and Tellstrom that they were exempt managers who would not  
18 be entitled to overtime and whose duties would mostly include the  
19 performance of non-managerial tasks.

20 81. Each week throughout the class period identified in this  
21 complaint, Defendant issued each Plaintiff and each member of the  
22 Plaintiffs’ Class a pay check and itemized wage statement. The pay checks  
23 and wage statements together provided inaccurate information regarding  
24 time worked and money earned. These inaccuracies were not inadvertent.  
25 Instead, they were deliberate. They were designed not merely to deprive  
26 the Plaintiffs and their class of what they rightfully earned in the form of  
27 overtime pay, but also to reinforce their incorrect understanding of their  
28 status as exempt managers.

1           82. Each week Defendant authored the checks and wage  
2 statements to Plaintiffs and members of their Class, Defendant knew the  
3 statements (particularly the assertion that no overtime pay was required to  
4 be paid to the class members) were false. The weekly paychecks and pay  
5 statements authored by Defendant and provided to Plaintiffs, and members  
6 of their class, were themselves fraudulent representations that the  
7 “managers” were exempt. These documents are also evidence of the  
8 broader fraudulent scheme by Defendant to convince its “managers” of  
9 their exempt status.

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

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

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

23  
24 **3. Plaintiffs Have Satisfied The Heightened Pleading Requirement By Providing**  
25 **Sufficient Information As To The Details Of Defendant’s Fraud**

26           Again, Rule 9(b) merely requires a summary of the details of the fraud, not minute  
27 recreation of every step of the fraud and descriptions of all evidence, including all  
28 documents, which confirm its existence. The Standard relied by Federal Courts

1 throughout the United States is the one noted earlier in this Opposition: the who, what,  
2 when, where, why, how standard.

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

6 **The WHO:** Gary Philbin (Senior Vice President of Stores), Rene Lefrancois  
7 (Vice President of West Coast Zone), James Fothergill (Chief People Officer), Cindy  
8 Warren (Director of Compensation), Betty Martin (Payroll Manager), Cheri Kiper  
9 (Manager of Retirement Services and Personnel), David McDearmon (Director of Field  
10 Human Resources), Tim Lorenz, Chris Nygren and Jerry Sankey (Zone Human Resource  
11 Managers), Candace Camp (Regional Human Resources Manager), Rick Cassalano, and  
12 Rick Tellstrom.

13 **The WHAT:** The false classification and treatment of what were in fact regular  
14 rank and file employees as “Store Managers” who were “exempt” from overtime and the  
15 induction of reliance by these employees that this classification was factually correct.

16 **The HOW:** By having a corporate policy and practice that purposefully  
17 misclassifies certain employees as “store managers” in order to avoid paying them  
18 overtime.

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

21 **The WHERE:** Every single Dollar Tree Store in the State of California, which, as  
22 noted elsewhere in the Complaint, number more than 200.

23 In addition, the Complainant indicates the **END** to which the Fraud was aimed: to  
24 induce the reliance by its “Store Managers” on the misclassification of rank and file  
25 employees as “Store Managers” and thus be able to retain money that it was actually  
26 lawfully required to pay its “Store Managers” in the form of overtime wages.

27 Defendant, in its very short discussion of the Plaintiff’s supposed failure to plead  
28 fraud with particularity states that Plaintiff has failed to “include false and misleading

1 statements of fact by” the individuals named, “whether oral or written,” that Plaintiffs  
2 have failed to “describe whether the policy was oral or written,” failed to “identify any of  
3 the alleged ‘regional and area managers’ who Plaintiffs contend received and  
4 implemented those instructions, other than Messrs. Cassalano and Tellstrom, and failed to  
5 identify when precisely Cassalano and Tellstrom.

6 In fact, Plaintiff’s Complaint identified each paycheck and itemized wage  
7 statement as false and misleading statements incident to the alleged fraud. The  
8 Complaint identified a dozen individuals who were charged with authorizing and issuing  
9 these paychecks and wage statements to the Plaintiff and his Class. It indicated that these  
10 checks and statements were in writing. The Complaint did indeed identify Messrs.  
11 Cassalano and Tellstrom as two of the area or regional managers involved in  
12 implementing the fraudulent policy and practice of hiring “Store Managers” but primarily  
13 employing them to perform rank and file duties (Plaintiff certainly is not required to  
14 name every single area or regional manager involved in the scheme). There are certainly  
15 many more facts that could have been pled. But, Plaintiff is not required by law to pled  
16 all of the facts incident to a fraudulent scheme. It only need plead facts enough to  
17 provide the Defendant with sufficient notice.

18 Finally, we should make note of the Defendant’s statement that Defendant never  
19 made any factual misstatements that support any allegation of fraud—that it paid the  
20 Plaintiffs what it promised it would pay them, and that Plaintiffs worked more than forty  
21 hours per week knowing they would not receive overtime pay. Plaintiffs do not contest  
22 this. This is not where the fraud lies. The fraud lies in the Defendant’s classification of  
23 the Plaintiffs as “managers” in order to exempt them from overtime pay. Every time one  
24 of these “managers” was issued a pay check and wage statement, and no extra payment  
25 for hours worked in excess of eight per day and/or forty per week was indicated or  
26 provided, the Defendant made a misstatement of fact that was intended to reinforce the  
27 Plaintiffs’ understanding, and induce their detrimental reliance thereon, that they were in  
28 fact “managers” who were thus not entitled to overtime, all the while employing the

1 Plaintiffs almost exclusively to perform routine shelf stocking and cashiering duties  
2 indistinguishable from the duties performed by mere rank and file employees.

3 **B. THE MISCLASSIFICATION OF PLAINTIFFS AS MANAGERS WAS A**  
4 **MISTATEMENT OF FACT NOT OF LAW**

5 In its fifteen page Motion, Defendant uses a mere two and a half pages to discuss  
6 the alleged failure of Plaintiffs' to plead fraud with the requisite degree of particularity.  
7 The rest of the Motion is dedicated to a discourse on the case of *Miller v. Yokohama Tire*  
8 *Corp.* (9<sup>th</sup> Cir. 2004) 358 F.3d 616. The case is manifestly off point, hence Defendant's  
9 discourse upon it is irrelevant.

10 *Miller* it should be pointed out dealt with RICO claims. RICO is a federal  
11 criminal statute aimed at punishing, deterring and ultimately defeating organized crime.  
12 The standards used to define the elements of RICO violations are federally devised.  
13 They are not the product of state positive law, or state common law. As we consider the  
14 applicability of the rule of *Miller* to our case, these distinctive hallmarks of *Miller* should  
15 not be lost sight of.

16 The case itself arose in California. The Plaintiffs in the case were employees of  
17 the Defendant. They alleged that the communication to them by the Defendant's  
18 managers that they were salaried rather than hourly employees and thus not eligible for  
19 overtime pay constituted a predicate act of criminal fraud. Fraud in the RICO context  
20 was said by the Court to have already been defined by the Supreme Court of the United  
21 States. The Supreme Court had determined that RICO fraud was consistent with the  
22 generic common law definition of fraud. The *Miller* Court agreed that the employer's  
23 managers had indeed misstated California law. However, the Court concluded that,  
24 "under the common law," "fraud cannot be predicated upon misrepresentations of law or  
25 misrepresentations as to matters of law."

26 We must emphasize that the *Miller* decision was a case arising under federal law  
27 and involved the Court relying on federally adopted definitions while interpreting a  
28

1 federal criminal statute. It was not a case interpreting the meaning of California law, nor  
2 even of California's definition of what civil fraud is.

3 But this observation is of only marginal importance. What is pre-eminently  
4 important in this discussion of *Miller* is that *Miller* was concerned with  
5 *misrepresentations of law*, and that the Rule articulated in *Miller* was that  
6 misrepresentations of law cannot serve as predicates to fraud. *Miller* is unmistakably  
7 distinguishable on this point from the case brought by the *Cruz* Plaintiffs. *The Cruz*  
8 *Plaintiffs' case hinges, not on misrepresentations of law by the Defendant, but on the*  
9 *Defendant's misrepresentation of fact.*

10 It is true that the Yokohama managers in *Miller* misstated the law. The Yokohama  
11 Managers stated that salaried employees are not entitled to overtime under California  
12 law. Plaintiff does not contest the general rule that mere misstatements of law are not  
13 actionable as fraud. What Plaintiffs do contest is the similarity of their case with *Miller*.  
14 Plaintiffs have not alleged that Defendant's fraud rested primarily on the  
15 misrepresentation of law. Indeed, the law was actually correctly represented. Plaintiffs  
16 were told that managers in California are exempt from overtime. Instead, Plaintiffs have  
17 alleged that *the fact they were truly managers was misrepresented*. Plaintiffs alleged that  
18 they were employed to perform all the duties of a rank and file employee, but were  
19 classified as "managers" who, in California, are exempt for overtime compensation laws.  
20 Whether someone is a manager in California is a question, of fact, not law.

21 *California Labor Code* §515 (a) permits the Industrial Welfare Commission to  
22 establish exemptions from the overtime pay requirements found in *Labor Code* §510 with  
23 respect to "executive, administrative, and professional employees." An exempt  
24 employee, says the Legislature, must be "primarily engaged in the duties that meet the  
25 test of the exemption, customarily and regularly exercise discretion and independent  
26 judgment in performing those duties, and earn a monthly salary equivalent to no less than  
27 two times the state minimum wage for full-time employment." (*Labor Code* §515(e)).  
28 Acting on the authority vested in it by the Legislature, the Industrial Welfare Commission

1 issued Wage Order 7-2001. This Wage Order exempts “managers” or “executive  
2 employees” from overtime pay. As noted by Judge Fischer of the Northern District  
3 Court, “an executive employee is one whose duties involve management of the  
4 enterprise; who regularly supervises two or more employees; who has the authority to  
5 hire or fire other employees or to make meaningful recommendations as to hiring, firing,  
6 advancement and promotion; who regularly exercises managerial discretion, and who is  
7 primarily engaged in exempt duties, as defined by federal regulations.” (*Sepulveda v.*  
8 *Wal-Mart Stores, Inc.* (2006) 237 F.R.D. 229, 241, citing *Cal. Code of Regs.* Tit. 8,  
9 11070, subd. 3 (A)(1)). Whether someone who has been classified as an “executive  
10 employee” or manager is actually an “executive employee” (or manager) and thus truly  
11 exempt from overtime pay is obviously a question of fact, not law. Each of the factors  
12 identified by Judge Fischer must be considered before that determination can be  
13 definitively made. Clearly, a wide array of facts, supported by evidence, must  
14 necessarily be weighed when the question of whether someone has been properly  
15 classified as an “executive employee” is entertained.

16 When the *Miller* Plaintiffs were told they were exempt from overtime pay because  
17 salaried workers are not entitled to overtime, this was a misrepresentation of California  
18 law. When Miguel Cruz and other members of his putative class were classified as  
19 managers, and then treated as managers, *this was not a misrepresentation of law*. It was  
20 not a misrepresentation of law because it is entirely true that managers in California are  
21 indeed exempt from overtime pay. Instead, *it was a misrepresentation of fact*. Managers  
22 may be ineligible to earn overtime pay by law, but **when an employer merely classifies**  
23 **someone as a manager and then employs them to perform mostly non-managerial**  
24 **tasks, a misrepresentation of the fact of the employee’s status has occurred**, which in  
25 turn results in a violation of the law when the employee works more than eight hours in a  
26 day and is not compensated at the requisite overtime rate of pay. **That the Defendant**  
27 **intended to circumvent wage and hour laws, particularly the law mandating**  
28 **payment of overtime, renders this misrepresentation of fact a fraudulent act.**



1 The *Miller* Plaintiffs were told they were exempt from overtime pay even though  
2 they were rank and file employees. The reason given for their exemption from overtime  
3 was that salaried workers are not paid overtime. The Plaintiffs in the case at bar were  
4 never told they were exempt from overtime simply because they were salaried. Instead  
5 they were classified as managers, who are by law exempt from overtime. The *Miller* case  
6 and the instant case are *clearly distinguishable*. Again, the *Miller* case turns on a  
7 misrepresentation of the law— that representation being that workers who are paid a  
8 salary are not eligible to be paid overtime wages. Our Plaintiffs’ case turns on a  
9 misrepresentation of fact—that fact being that they were overtime-exempt managers. A  
10 motion to dismiss a fraud cause of action may be proper when misrepresentations of law  
11 form the basis of the allegation of fraud. This is the conclusion of *Miller*. A motion to  
12 dismiss a fraud cause of action is not proper when the misrepresentation alleged is one of  
13 fact. Since the Plaintiffs’ fraud claim is premised on a misrepresentation of fact, not law,  
14 *Miller* and its progeny do not apply and the Defendant’s Motion to dismiss pursuant to  
15 *Millers*’ rationale cannot be granted.

### 16 III. CONCLUSION

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

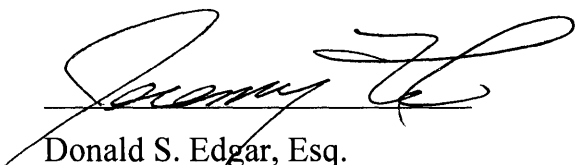
22 Additionally, Defendants reliance on *Miller v. Yokohama* to demonstrate that  
23 representations of law cannot form the basis of fraud is misplaced. Plaintiffs have  
24 alleged not a misrepresentation of law, but of fact, hence *Miller* can form no legal  
25 foundation for dismissal of Plaintiff’s Fraud Cause of Action.

26 In the event, however, that the Court is not satisfied that the Plaintiffs efforts to  
27 amend their Complaint, Plaintiffs respectfully request leave to amend the Complaint and  
28 direction by the Court of what more is required of them.

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Dated: 31 August 2007

**EDGAR LAW FIRM**

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