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BDS NATURAL PRODUCTS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL CIVIL WEST COURTHOUSE

TAMARA REASONER, individually and on behalf of all other similarly situated employees,

Plaintiff,

vs.

BDS NATURAL PRODUCTS, INC., a California corporation; and DOES 1 through 250, inclusive,

Defendant.

Case No. BC676646

ASSIGNED FOR ALL PURPOSES TO:
HON. KENNETH FREEMAN
DEPARTMENT 310

JOINT REPORT REGARDING DEFENDANT'S ANTICIPATED DEMURRER AND/OR MOTION TO STRIKE

TOLL-FREE CALL IN NO. (888) 245-3978
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Date Action Filed: September 21, 2017
Trial Date: Not Set Yet

This Joint Report is submitted by Plaintiff Tamara Reasoner ("Plaintiff") and Defendant BDS Natural Products, Inc. ("Defendant")(collectively "Parties").

A. DISPUTED ISSUES

1. Improper Definition Of Proposed Class

Plaintiff's definition of the proposed class is improper. Namely, Plaintiff states that the "proposed Class consists of and is defined as: All current and/or former non-exempt employees that worked for Defendants in California within four years prior to the filing of Plaintiff's complaint with the Division of Labor Standard Enforcement ('DLSE')." (First Amended Complain [FAC], ¶ 33.) Plaintiff alleges in her Complaint that "regardless of the hours worked each day by Plaintiff (including overtime hours), she was only paid for 8 hours per day, all of which was paid at her regular rate of pay." (FAC, ¶ 18.) Therefore, she claims that she was not paid for overtime hours that she worked.

Most of the putative class members, however, worked an Alternative Workweek Schedule ("AWS"), and Plaintiff did not. (*See https://www.dir.ca.gov/databases/oprl/DLSR-AWE.ASP?Company+Name=bds+natural&Address=&City=&county=&State=&ZIP=&Date+of+Election=&sortfield*= [reflecting that AWS employees worked a shift that provided for "10 regular hours and 2 overtime hours per day"].) On the other hand, Plaintiff worked in a unique position, since she was the only non-exempt employee in the business office at BDS. Because Plaintiff was scheduled to work an 8-hour day, 40-hour week, she defines the class as all non-exempt employees who "worked in excess of eight hours per day and/or 40 hours per week." This class is, however, too expansive, because AWS employees worked more than 8 hours per day, but were not entitled to overtime pay. Accordingly, Plaintiff's class definition is defective, since she cannot and does not state that she was part of the AWS or confine the definition of the proposed class to those employees who worked a normal, 40-hour workweek schedule like she did. While Plaintiff alleges in Paragraph 37 that her claims are typical of all class members, there are undeniable differences between claims for an office employee working a normal 8-hour workday and those working an AWS schedule with built-in overtime. As the large majority of the putative class members Plaintiff seeks to represent were subject to an AWS, Plaintiff is not

common or typical of the putative class members, and her allegations are defective.

Plaintiff's Response:

Despite first citing to the general class definition, Defendant's position above appears to focus solely on the Overtime Sub-class definition, on which it relies to state that Plaintiff is not typical of others in the proposed overtime subclass. None of the above addresses the other claims. So it appears that Defendant is not seeking to have the Court address those items at this time. Additionally, Defendant has not cited to the entire sub-class definition, which is not just limited to anyone who works over 8 hours a day or 40 hours in a week. Paragraph 34 notes that this subclass includes class members who "were not paid overtime compensation **for all hours worked** in excess of eight hours per day and/or 40 hours per week." As such, the fact that AWS employees were being paid overtime per the AWS agreement is irrelevant. Plaintiff has alleged that class members (which include AWS and Non-AWS) were not paid for all overtime hours worked as the hours were reduced by Defendant from what was actually worked, not that no overtime was ever paid to any employee. SAs such, the fact AWS employees were paid for some overtime does not make the class definition improper.

While Plaintiff listed in the FAC that she was not paid properly for hours overtime when working over 8 hours in a day, FAC Paragraph 20 (cited by Defendant above as 18) clearly states this is an example of Defendant's refusal to pay Class members for all hours worked. Paragraph 21 alleges that the arbitrary reduction of hours applied to all. Plaintiff has alleged that Defendant arbitrarily reduced hours and thus did not properly pay employees for all hours worked. As such, as Plaintiff's counsel has repeatedly told Defendant's counsel, the issue is not whether AWS employees got overtime or not, it is whether the hours were accurate. Defendant has pointed to payroll earnings records showing that AWS employees were paid overtime. However, even if they are paid 10 hours per day and the 2 hours of overtime per the AWS, the issue is whether they were actually working only 12 hours and paid for it properly, or if they were working more hours and only being paid for 12 hours. As such, the class definition would apply to all AWS and non-AWS employees. Furthermore, Defendant is unable to provide proof that AWS employees or other were paid based on the actual time worked because the time records prior to around April or

May 2015 were destroyed by Defendant. Whether employees are on an AWS or not, the class/sub-class definition is proper as the allegation is that they were not accurately paid for all hours worked, regardless of their schedule. Furthermore, although other claims aren't addressed, items such as failure to provide meal periods and rest breaks are not affected an AWS.

Furthermore, this topic is premature as such an issue of the class definition should be addressed in regarding the class certification motion after discovery is conducted into such claims.

2. Plaintiff's Sixth Cause of Action For Violation of California Labor Code Section 226(a) is Time Barred Or The Time Period Is

Plaintiff's sixth cause of action alleges that BDS failed to provide employees with complete and accurate wage statements. (FAC, ¶ 79.) It further alleges that Plaintiff and class members are entitled to recover the greater of their actual damages caused by Defendants' failure to comply with California Labor Code section 226(a), or an aggregate penalty not exceeding four thousand dollars per employee. (*Id.* at ¶ 83.) However, the FAC also states that Plaintiff worked as a shipping and receiving receptionist for Defendants from March 2010 through May 2015. (*Id.* at ¶ 7.) As Plaintiff was not employed by BDS after May 2015, and therefore did not receive an allegedly inaccurate wage statement after this date, Plaintiff's claim is time-barred as it was not filed within the one-year statute of limitations period governing recovery of penalties by statute. *See* CIVIL PROC. CODE § 340(a). Plaintiff filed her original Complaint on September 21, 2017, over 2 years after her employment with BDS ended.

Although Plaintiff's broad reference to equitable tolling of her "employment rights" is alleged in Paragraph 11 of her FAC, Plaintiff did not seek penalties for inaccurate or incomplete wage statements in either her DLSE Complaint or Amended DLSE Complaint. Moreover, Plaintiff cannot toll a class action on behalf of putative class members by filing a DLSE Complaint. Accordingly, Plaintiff's sixth cause of action is barred by the statute of limitations.

Plaintiff's Response:

Defendant has stated in the meet and confer process that its position is that the Section 226 claim is not tolled because the DLSE complaints did not specifically cite to that code section. However, that is not what is required for equitable tolling. Defendant is only required to be

provided notice of the claims. The California Supreme Court has made it clear that there are three requirements that must be met for equitable tolling: 1) timely notice, 2) lack of prejudice to the defendant and 3) reasonable and good faith conduct on the part of the plaintiff." *Addison v. State of California*, 21(1978) 21 Cal.3d 313, 319; accord, *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1100; *Collier*, supra, at p. 924-926. Equitable tolling is "designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied." *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38. When the doctrine is applied, it suspends or extends the statute of limitations as necessary to "ensure fundamental practicality and fairness." *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370. The doctrine also protects defendants' "interest in being promptly apprised of claims against them in order that they may gather and preserve evidence" because that notice interest is satisfied by the filing of the first proceeding that gives rise to tolling. *v. Derby* (1974) 12 Cal.3d 410 417-418; see also *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 925-926).

Plaintiff's DLSE complaint alleged in part that she was not paid properly for all overtime hours worked, which clearly results in a pay stub that is not accurate. As such, Defendant was on notice of the derivative Section 226 claim. Furthermore, as Defendant was represented by counsel at the DLSE, it is clear there was no prejudice as it had the ability to investigate and gather evidence. Plaintiff acted reasonably as she promptly filed the present lawsuit shortly after the DLSE case was dismissed, which re-started the running statute of limitations. Thus her claim was stayed for almost 2 years and this complaint was thus filed within one year of her last wage statement, making it timely. As her claim is valid, she can represent the class on this proper claim.

B. <u>PARTIES STIPULATIONS</u>.

After Defendant requested a pre-filing conference with the Court, the Parties agreed to stipulate to resolve the following issues:

1. As part of her seventh cause of action for violation of Bus. & Prof. Code section 17200, Plaintiff requested disgorgement of profits as a remedy. (FAC, ¶ 99.) Plaintiff has agreed to stipulate that she is requesting restitution only.

2. Plaintiff's FAC defines the proposed class period as current and/or former employees that worked for Defendants in California within "four years prior to the filing of Plaintiff's complaint with the Division of Labor Standards Enforcement." Plaintiff agreed to stipulate that the class period will run from the filing of the civil Complaint by Plaintiff, not from the filing of her administrative complaint.

The Parties expect to file the Joint Stipulation in the next few days.

C. REQUEST FOR COURT'S GUIDANCE.

Defendant would like the court's guidance on how to address Plaintiff's time-barred PAGA claim. As set forth above, Plaintiff was terminated in May 2015, but did not send a PAGA letter to the LWDA until September 19, 2017. Therefore, the claim is barred. The court has stayed the PAGA portion of the case, but Defendant cannot bring a later Demurrer to address this claim. Therefore, Defendant seeks the Court's guidance on whether the argument should be addressed in the Demurrer.

This was already addressed by the court at the ISC. Defendant's counsel Brian Sinclair asked the court what it wanted to do regarding pleading challenges in this stayed cause of action and if this would be dealt with now or later in the case. The Court stated that with the it stayed, the matter would be addressed later (which Plaintiff's counsel understood to mean after stay is lifted). As such, there is no need for the court to address it again. If the court wishes to address this item at this point, then Plaintiff requests a second hearing later to address it and allow the parties to fully meet and confer and address this prior to an informal hearing on the issue.

Dated: March 6, 2018

RUTAN & TUCKER, LLP

By: Radhika Sood
Radhika Sood
Attorneys for Defendant

Dated: March 6, 2018

LAW OFFICES OF CARLIN & BUCHSBAUM LLP

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