SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 504

VIENNA HALL, et al.,

Plaintiffs,

vs.

CINEMA 7, INC., et al.,

Defendants.

Case No. CGC-02-409105

PROPOSED STATEMENT OF DECISION

PHASE 1 TRIAL

This matter came on regularly for trial on January 29, 2007, in Department 504 of the San Francisco Superior Court, the Honorable Mary E. Wiss, Judge, presiding without a jury.

This is a class action on behalf of certain current and former employee-dancers of the Mitchell Brothers O'Farrell Theatre. The class was certified on July 9, 2003.[1] After a period for opt outs, the remaining class consists of approximately 370 current and former dancers of the O'Farrell Theatre. The representative plaintiffs are Vienna Hall, Taylor Thomas and Dusty Brown. These named plaintiffs represent the class which is defined as:

[1] An order modifying the start date of the class period (from June 13, 1998 to July 1, 1998) was entered on April 28, 2006.

"Any person employed as an exotic dancer by Defendant Cinema 7, Inc. at any time during the period from July 1, 1998 until the present, who was: (i) allegedly paid for her employment by Cinema 7, Inc. under a piece rate system whereby the person purportedly received compensation based solely on the number of Private Dances allegedly performed by the person; (ii) allegedly required to execute a written waiver of the person's right to a rest or break period under California law; (iii) required to pay for alleged employment-related expenses, including but not limited to costumes, props and make-up; or (iv) required to sign an arbitration agreement regarding employment-related disputes."

The plaintiff class is represented by James A. Quadra, G. Scott Emblidge and Andrew E. Sweet of Moscone, Emblidge & Quadra, LLP.

The defendant is Cinema 7, Inc., a California Corporation which does business as Mitchell Brothers O'Farrell Theatre. Defendant is represented by Donna M. Rutter, Felicia R. Reid and Geoffrey M. Hash of Curiale Dellaverson Hirschfeld & Kraemer, LLP.

Pursuant to order of the Court, trial of this certified class action was bifurcated. Phase 1 of the trial commenced on January 29, 2007. Testimony concluded on March 20, 2007, additional exhibits were admitted in evidence on March 26, 2007, argument was on April 6, 2007 and the matter was deemed submitted on that date.

Prior to commencement of trial, plaintiffs dismissed the following causes of action:

1st Cause of Action – Violation of Labor Code §§350-353, et seq.

2nd Cause of Action – Failure to pay Minimum Wage Compensation

3rd Cause of Acton – Failure to Compensate for All Hours Worked

5th Cause of Action – Illegal Access or Stage Fees

6th Cause of Action – Failure to Indemnify Employment Expense

8th Cause of Action – Fraud

Phase 1 was a bench trial of defendant's liability on the Ninth Cause of Action alleging violation of the unfair competition law codified in Business and Professions Code §17200, et seq. ("UCL") and defendant's affirmative defenses of unclean hands and equitable estoppel.

Following the Court's decision on Phase 1 issues, the case will continue with trial on the following issues: plaintiffs' Fourth Cause of Action alleging illegal waiver of meal, break and rest periods; plaintiffs' Seventh Cause of Action alleging failure to maintain records; remedies arising out of Phase 1

and trial of the remaining issues; and defendant's affirmative defense of offset. The order of trial of the remaining issues was reserved as set forth in the record on January 30, 2007.

The Court, having considered all of the evidence admitted and the argument of counsel issued its Tentative Decision on April 26, 2007. Both Petitioner and Respondent filed objections to the Tentative Decision and specified controverted issues. The Court, having considered the parties objections and specified controverted issues, now renders this Proposed Statement of Decision.

FACTUAL BACKGROUND

Defendant operates an exotic dance theater in San Francisco. The plaintiffs are current and former dancers at the theatre. Patrons of the theatre pay an entry fee and may purchase non-alcoholic beverages and snacks at the theatre. The theater has a variety of stages and showrooms which offer different performances by the dancers. The New York Live show consists of a striptease of two song length; the Green Door Room involves a stage performance by multiple dancers, after the first song, the dancers move to table areas and perform for patrons; the Ultra Room is a theme stage performance and features multiple performers for a minimum of two songs; and the Kopenhagen Lounge is a theme show with multiple performers on stage for two songs. When the dancers are not on stage, patrons may purchase lap dances or private performances from the dancers. Patrons are permitted to tip the dancers.

In 1998, as a result of settlement of a prior class action,[2] dancers at the O'Farrell Theatre were reclassified from independent contractor status to employees effective July 1, 1998. When the dancers became employees, defendant implemented a piece rate compensation system for its employee-dancers. The piece rate system remained in effect until April 23, 2003. Plaintiffs' claims with regard to the piece rate system are limited to this time period.

The Piece Rate System from July 1, 1998 until January 1, 2001

When the dancers were converted to employee status, defendant created a compensation formula based upon a piece rate system. Defendant contemplated the piece rate system would operate as follows: dancers were given a shift and stage performance times, dancers performing on the stage provided their

[2] *Vickery v. Cinema Seven, Inc.* San Francisco Superior Court Case No. 959610, filed March 24, 1994.

music selection to DJs. DJs announced the dancers and played the selected songs. Songs were generally 5-6 minutes in length. When the dancers were not on stage they were to interact with patrons and encourage patrons to purchase lap dances or private performances.

Dancers were to collect a set fee from patrons for a lap dance or private performance. Initially the dance fees were $20 for a lap dance and $40 for a private performance. Patrons paid cash. A lap dance was the duration of one song. A private performance was generally in a booth for the duration of two songs. At the end of their shifts, dancers went to the check out station where they reported dance fees, including the number and type of dances, as well as tips, and signed a Tips and Withholding Sheet.

The theatre set a dollar quota per shift purportedly derived from the number of dances performed per shift. The dance fees were split 50% to the theatre and 50% to the dancer up to amount of the quota. Dance fees above the quota were split 70% to the dancer and 30% to the theatre. If a dancer failed to turn in sufficient dance fees to cover minimum wage, the dancer would be paid minimum wage. The theater calculated withholding from the dancers' percentage share and paid the dancers.

The quotas varied at times (see Exhibits 1004 and 1005) but were always stated in dollar amounts rather than the number of dances. The quotas set by the theatre varied but were in the following range:

Date	Day Shift	Night Shift	Thurs, Fri, Sat Night Shifts
7/1/98 – 6/30/99	$240	$240	same
7/1/99 – 7/31/99	$240	$280	same
8/1/99 – 2/28/01	$240	$360	same
3/1/01 – 4/23/03	$240	$360	$400

The Piece Rate System from January 1, 2001 until April 23, 2003

Effective January 1, 2001 the Legislature amended Labor Code §350(e) which defines gratuity. The amendment added the following language to the statute: "Any amounts paid directly by a patron to a dancer employed by an employer subject to Industrial Welfare Commission Order No. 5 or 10 [which includes exotic dance clubs] shall be deemed a gratuity." To meet this change in the law and avoid confusion whether amounts paid to dancers were for a lap dance/private performance or tip, defendant implemented a dance chip system which it intended would operate in the following manner: patrons who wished to purchase a lap dance/private performance were required to purchase dance chips from the box

office or the snack bar; dancers were prohibited from purchasing chips and prohibited from selling chips to each other; and, at the end of shift, dancers were to report the number and type of dances performed and turn in chips representing the number of dances performed.

There was evidence that the chip system worked differently. According to Plaintiffs, the quotas were unreasonable and unrealistic. Plaintiffs testified that they were pressured into turning in the quota amount regardless of the number of dances performed. In order to turn in the quota amount during the cash period, dancers used their own money, including tips, to make up the difference to their quota. There was also evidence that dancers feared being fired if they failed to make quota. During the dance chip period, some dancers purchased chips from other dancers or gave money to patrons to purchase chips for them in order to have a sufficient number of chips to make the quota. Evidence also established that there were slow shifts when it was impossible to make quota and that the quota did not take into consideration the number of patrons.

Plaintiffs also testified that, on occasion, they negotiated with customers over the amount to be paid for a dance. Sometimes dancers would simply sit and talk with patrons rather than perform dances. One patron testified that he would talk with dancers and not purchase a dance performance. Thus, the quota failed to take into consideration other work responsibilities including the stage performance, time spent with customers in the hopes that the customer would purchase a dance performance, or time spent in the company of patrons who did not purchase dances. Customers sometimes paid tips with chips and sometimes with cash. Plaintiffs testified that the Tips and Withholding Sheets were not accurate, that dancers simply reported the dollar amount of the quota to the check-out clerk and the check-out clerk filled in the number of dances to match the quota.

On April 23, 2003 defendant discontinued the piece rate system.

Costumes, Props, Hairstyling & Makeup - Claim Period at Issue July 1, 1998 to Present

Plaintiffs' claims for reimbursement of expenses for costumes, props, hairstyling and makeup cover the period July 1, 1998 to the present. Class representatives testified that the O'Farrell Theatre had a costume room but the dancers did not use the costumes provided because they were out-of-date, unkempt and unclean and did not offer sufficient variety. Dancers purchased costumes at stores catering to exotic dancers or through a costume vendor who brought costumes to the theatre for sale. The 1998

Performer Guidebook (Exhibit 1010) provided that New York Live costumes should be of the "show-girl" variety. The Ultra Room and Kopenhagen required theme costumes. There was evidence that other exotic dance clubs do not maintain specialty dance rooms requiring theme shows or "show-girl" type attire.

In 2005 the theatre implemented changes to the costume room. The costume room was renovated, new costumes were purchased and old costumes were purged. An inventory was created and a check out procedure instituted. Each dancer was provided with one bikini upon hire.

Plaintiffs testified that they obtained professional hairstyling and used professional makeup while working at the theatre. The theater's Performer Guidebook (Exhibit 1010) states that a dancer's hairstyling and make-up should be of a professional nature.

DISCUSSION

In Phase 1 of the trial, plaintiffs claim that defendant is liable for violation of California's Unfair Business Practices Act, Business & Professions Code §17200 et seq., as alleged in plaintiffs' Ninth Cause of Action. In particular, plaintiffs claim (1) that defendant's piece rate system violated §17200, et seq., and, (2) defendant's failure to reimburse its dancers for costumes, props, hairstyling and make-up violated §17200 et seq. Defendant claims plaintiffs' claims are barred by the equitable defenses of unclean hands and estoppel.

California's Unfair Business Practices Act, Bus. & Prof. Code §17200 et seq. ("UCL") prohibits "any unlawful, unfair or fraudulent business act or practice." Bus & Prof. Code §17200. The law is written in the disjunctive and establishes three separate prohibited categories of acts or practices. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180. Plaintiffs stipulated they were not making a claim under the fraudulent acts prong of the UCL. Therefore, the court will not address this prong. The unlawful and unfair prongs are analyzed separately below. For the reasons stated below, the Court finds that the defendant's piece rate system and its failure to reimburse

dancers for costumes and props violate the unlawful prong of §17200. Moreover, under the facts of this case, these practices also violate the unfairness prong of §17200.

PART I – The Unlawful Prong of §17200

A) Defendant Cinema 7's Piece Rate System Violated the *Unlawful* Prong of Bus. & Prof. Code §17200

The first category covered by the UCL is unlawful acts or practices. This category prohibits acts or practices that violate some statute, regulation or other similar legal directive. It essentially "borrows" violations of other laws and treats them as unlawful practices that the UCL makes actionable independent from whatever the violated law proscribes for its violation. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* at 180.

Here, plaintiffs offer three independent violations of law to support the "unlawful" prong of the UCL. First, plaintiffs claim defendant created a piece rate system that required plaintiffs to make a "payout" of an unlawful stage fee in violation of Labor Code §§ 221, 223, and 2802(a); second, plaintiffs claim they were required to pay some of their tips to defendant in violation of Labor Code §§350, 351 and 356; and third, plaintiffs claim the defendant failed to pay minimum wage in violation of Labor Code §§ 223, 1194(a) and 1197.

1. Defendant's Piece Rate System Violated Labor Code Sections 221 and 223, and Was Therefore Unlawful.

Plaintiffs contend that defendant's piece rate system is unlawful because it required the dancers to pay a stage fee. A piece rate system is defined by the California Department of Industrial Relations, Division of Labor Standards and Enforcement (hereafter "DLSE") as follows:

> 2.4.4 A wage is also defined as a specific sum or amount which is paid to an employee in exchange for a given time of service to an employer, or a fixed sum which is paid for a specified piece of work (e.g., "piecework").

2.5.1 Piece Rate Or "Piece Work". "Work paid for according to the number of units turned out." (American Heritage Dictionary definition.) Consequently, a piece rate must be based upon an ascertainable figure paid for completing a particular task or making a particular piece of goods. The 2002 Update of The DLSE Enforcement Policies and Interpretations Manual (Revised) March, 2006.

A piece rate system is defined in another DLSE publication as follows:

Piece rate or piecework is defined as work paid for according to a set rate per unit. *Webster's Collegiate Dictionary*. A piece rate must be based upon an ascertainable figure paid for completing a particular task or making a particular piece of goods. The piece rate earned must equal or exceed the State's minimum wage rate for all hours worked.
DLSE Information Sheet, "Wages," (DLSE-2005-W-1 Rev. 6/2005)

Thus, defendant's piece rate compensation system must compensate at least minimum wage and must be based upon an *ascertainable* figure paid for completing a *particular task*. In the 1998 Performer Guidebook (Exhibit 1010), the O'Farrell Theatre defined the "piecework" as a lap dance or private performance and stated it would set a standard fee for the lap dance/private performance (Paragraph 2-Compensation).

In this Proposed Statement of Decision, the court took into consideration various DLSE opinion letters. DLSE opinion letters are "not controlling on the courts," but constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Bell v. Farmers Insurance Exchange* (2000) 87 Cal.App.4th 805, 815. See also *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 and *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1.

Piece rate systems were impliedly approved for the exotic dance industry in the DLSE Opinion letter dated August 20, 1998. That Opinion Letter analyzes a piece rate system at a different dance theater. The DLSE notes "This system is a form of "piece rate" payment plan which [sic] legal as long as the dancers received all of the piece rate monies, i.e. the per centage [sic] agreed upon for all of the dances performed, and the dancers received at least minimum wage for each hour worked." Neither the Business and Professions Code nor the Labor Code prohibit a piece rate system in the exotic dance

industry. Nor do they prohibit a quota system in the exotic dance industry. However, defendant's piece rate and quota system as implemented were illegal.

Plaintiffs contend that defendant's piece rate system was invalid for several reasons. Plaintiffs claim there was no set duration for a lap dance because the songs varied in length. This argument, however, was not borne out by the evidence. Songs were generally 5-6 minutes. Paragraph 2 of the Performer Guidebook (Exhibit 1010) states "The duration of a Private Dance Performance is to be one song." Plaintiffs also claimed there was no set definition of a lap dance. The court was not persuaded by this argument. All of the dancers performed lap dances and knew what they were, albeit each performer's dance was no doubt distinct.

Plaintiffs' other arguments, however, have merit. The theatre told dancers to charge and collect $20 for a lap dance and $40 for private performance. In practice, however, plaintiffs contend there was no set price for private dances and dancers sometimes negotiated the amount. Thus, when a customer paid for a dance, the line between the cost of the dance and the dancer's tip was blurred. Further, the defendant's signage for patrons regarding the piece rate system was confusing and misleading. One sign stated "LAP DANCES Duration of one Song/Suggested Minimum $20 - PRIVATE PERFORMANCES duration of Two Songs/Suggested Minimum $40. (Exhibit 1004.) Another sign stated "Tipping Permitted." (Exhibit 5050) Because the amount was "suggested" the patrons could assume there was no fixed price. Defendant argues the dancers were told to charge $20 or $40 and what the patron thought was irrelevant. However, a dancer seeking to make a dollar amount of quota could negotiate a lower price and receive a tip. Thus, the dance price was not always fixed nor ascertainable.

More troubling, however, was the dancers' quota and check-out process. The Court was persuaded that at the end of shift dancers felt compelled to report a dollar amount that equaled their quota for their shift. This was particularly evident when the quota changed from $280 to $360. On August 31, 1999 the dancers were reporting $280 in dance performances and the next day, September 1, 1999, the

dancers reported $360. A review of Exhibit 1016 for these and other days makes it abundantly clear that dancers were simply reporting the required quota. Occasionally a dancer would write a note on her Tips and Withholding Sheet to the effect that she would make up the quota the next night or other similar language.

The conclusion from the documentary exhibits is either that dancers were making substantially more than the quota and only reporting the quota or that dancers were using their own money to make up any shortfall. A mere perusal of the records demonstrates that Cinema 7 management knew or should have known this was occurring and tolerated the dancers' failure to report amounts over the quota and/or the dancers' making up any shortfall with their own money. Exhibit 1016 demonstrates that day after day dancers reported exactly the required quota. Management received daily quota reports and sub quota reports. Plaintiffs testified that during the chip period they openly purchased chips from each other and had patrons purchase chips from the snack bar at the end of the evening.

The testimony from Ms. Idalis supports the plaintiffs' claims that plaintiffs reported quota regardless of the number of dances performed. Ms. Idalis kept contemporaneous records of the number of dances performed. (Exhibit 1036) A comparison of her record of dances performed and of the amounts reported on her Tip and Withholding Sheets (Exhibit 1037) demonstrates that the number of dances performed does not match the amount reported. Ms. Idalis testified she reported the amount turned in at end of shift, generally the quota, and the check out clerk filled in the number of dances to match the amount. [3] Similarly, another plaintiff, Ms. R. Taylor, kept contemporaneous records of the number of dances performed (Exhibit 1043). A comparison of her records and theatre's Tip and Withholding Sheets (Exhibit 1040) reveals that she also reported the quota but the number of dances filled in on the form is more than she performed.[4]

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[3]For example Ms. Idalis recorded 2 dances in the Kopenhagen Room on 1/26/99 yet reported the $240 quota at checkout; on 5/19/00 she recorded one Ultra Room dance and wrote "bad day" in her calendar but reported the $360 quota at checkout.

[4] For example Ms. R. Taylor recorded 5 dances on 7/2/99, yet reported $220, and 11 dances were filled in

Dancers referred to the check-out as "pay-out" and testified that they simply told the check-out clerk how much they were paying and the check-out clerk filled in the number of dances to match the payout. In support of this, the dancers point out several Tip and Withholding Sheets which record "half" dances so that the number of dances matches the amount reported. E.g. Exhibit 1014 (January 5, 1999). It is not plausible that a patron requested, or a dancer agreed, to perform a half dance.

Further support that the dancers were simply reporting the required quota is found in Exhibit 1016. On May 24, 2000 defendant began utilizing a time clock to keep track of the time the employee-dancers checked in and checked out. Suddenly the dancers' shifts differed from the usual eight hour shift previously reported. Instead, dancers clocked out at 7-1/2 hours or other times. If the total amount turned in was the quota but the dancers did not work a full eight hour shift, then the number of dances and quota were adjusted.[5] Despite the change in clocking in and out, dancers continued to report the quota set by management.

The August 20, 1998 DLSE Opinion Letter referred to above examines several hypotheticals in a piece rate compensation system for exotic dancers. It makes the following conclusions:

1. Where the dancer and patron negotiate a price for a dance, the piece rate payment plan is legal as long as dancers receive the percentage agreed upon for all of the dances and at least minimum wage.

2. If a quota required the dancer to turn in a flat amount per shift but the dancer owed the club the difference between the amount turned in and the quota amount, the system is illegal.

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on the Withholding Sheet; on 1/6/06 she recorded 4 dances yet reported the $360 quota at checkout.

[5] Defendant's statistical expert testified that 56.14% of the dancers reported over quota (Exhibit 5162). However, the court gives no weight to his testimony. His figures are based in part upon the time period after the time clock was instituted. When dancers clocked in for less than an 8 hour shift the quota was "adjusted" for the number of hours worked. Nevertheless the dancers continued to report the quota set by management. The expert concluded these dancers were turning in "over" quota. In fact the evidence reveals they were simply reporting the quota set by management for an eight hour shift regardless of the time worked.

3. If a dancer was required to pay the difference between the amount collected and the quota or face suspension or termination, the system is illegal.

4. If the cashier adjusted the work hours to lower the quota to appear that the dancer made quota, the system is illegal.

5. If the cashier stated the dancer turned in the quota but in fact the dancer made up the quota from her gratuities, the system is illegal.

Plaintiffs claim that the scenarios described in 2 and 5 occurred here, i.e. they negotiated dance fees but turned in gratuities to make quota, they owed the theatre the difference between the amount turned in and the quota and they were required to make up the difference in the quota from their gratuities.

Plaintiffs also claim that the scenario described in 3 above also occurred. Here, the dancers were at-will employees. Upon termination they were not given reasons why their employment was terminated. But, dancers who failed to make quota were placed on a "low quota" report (Exhibit 1017 and 1018) and were told that they may not be cut out for this type of work and should look for work elsewhere. Defendant's witnesses testified that dancers were not terminated "solely" for reporting below quota. While there is insufficient evidence for this court to conclude that dancers were fired solely for low quota reports, there is persuasive evidence that dancers were under such pressure to meet the quota, were afraid to complain to management, and were sufficiently fearful of failing to meet quota that at times they made up the difference between dance fees and the quota with their own money.

Plaintiffs claim that defendant violated Labor Code sections 221 and 223.

Labor Code §221 provides:

> It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

Labor Code § 223 provides:

> Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract

Applying these provisions to the case at hand, the Court concludes that defendant's piece rate system violates Labor Code §§221 and 223.[6] The evidence is that dancers reported the quota amount set by the theatre, and that the theatre filled in the number of dances in conformity with the total amount reported by the dancer. Dancers made up any difference in the amount collected for dances and the quota with their own money. There is sufficient evidence that the theatre knew of this. Thus, the defendant's piece rate system took money from dancers to meet the quota set by the theatre.[7]

2. Labor Code Sections 2802 and 2802(a) as Amended Do Not Provide a Basis for Relief for Plaintiffs' Claim of an Invalid Piece Rate System.

Plaintiffs claim defendant's practices also violate Labor Code section 2802 or 2802(a) as amended. Neither provides a basis for relief for plaintiffs under the facts of this case.

Prior to 2000 Labor Code 2802 provided:

> An employer shall indemnify his employee for all that the employee necessarily expends or losses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.

Labor Code 2802 was amended effective 2000 to read:

> (a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

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[6] Plaintiffs' opening brief also references Labor Code section 224 which addresses authorized deductions from an employee's earnings. However, that section is not applicable to the facts of this case.

[7] How much money the theatre took from dancers is an issue not resolved in this phase of the case. On some days some dancers earned more than the quota amount but only reported the quota amount. Defendant called a dancer as a witness, Ms. Day (not a class member), who testified that she felt it was her job to earn the quota each shift and to report the quota to the theatre. She testified she did not feel obligated to report amounts over the quota. In Phase 3 of this trial plaintiffs will be required to prove how much of the quota was paid by dancers from their tips or out of pocket. Defendants will have the burden to prove their claim of offset for failure to report amounts over the quota.

These sections are directed to those situations where an employee is required to incur costs in the discharge of her duties and do not apply to the plaintiffs' claim of an invalid piece rate system where, as here, dancers are sometimes required to pay a portion of their earnings back to the employer.

3. Defendant's Piece Rate System Unlawfully Took Plaintiffs Tips in Violation of Labor Code Section 350 and 351.

Labor Code §§350 and 351 make it illegal for an employer to retain an employee's tips or to require an employee to pay a portion of the worker's tips to the employer. Plaintiffs claim is twofold: one, that dancers were required to make up the difference in the quota with their tips; and two, that all monies paid by patrons during the cash period were tips which defendant unlawfully took. As set forth above, sufficient evidence was adduced such that the court concludes that a portion of dancers' tips were used at the end of a shift to meet the quota set by defendant.

Labor Code §350 subsection (e) provides:

> "Gratuity" includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron.

In 2000 the Legislature passed AB 2509 which amended Labor Code §350(e) effective January 1, 2001. The statute as amended reads:

> (e) "Gratuity includes any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron. *Any amounts paid directly by a patron to a dancer employed by an employer subject to Industrial Welfare Commission Order No. 5 or 10 shall be deemed a gratuity.* [Italics added.]

In a June 22, 2001 DLSE Opinion Letter, the Chief Counsel for the DLSE states that the amendment to 350(e) came about because "Over the past seven or eight years the State Labor Commissioner's office has received substantial numbers of complaints from dancers about being forced to pay "stage fees" to their employers in order to be granted the "privilege" of working. These "stage fees," often in the amount several hundred dollars per shift were taken from the amounts that customers paid to

dancers for their services." The author concludes that in light of this history, the Legislature added the language italicized above to Labor Code section 350(e).

The June 22, 2001 DLSE Opinion Letter concludes that the amendment to 350(e) "expanded the definition of a gratuity for dancers." The Letter gives the hypothetical of a patron at a dance theatre who gives $30 to a dancer, consisting of $20 for the dance fee (which may have been pre-set by the employer) plus $10 as an additional amount for the dancer's services. Under the amendment, the Letter concludes, the dancer is entitled to keep the entire $30.

In light of the amendment and the DLSE Opinion Letter, plaintiffs claim that all monies paid to dancers from patrons were tips and therefore the piece rate system was an unlawful taking of the dancers tips. Plaintiffs contend that the amendment to 350(e) merely *clarified* existing law and argue that the definition of gratuity was not *expanded* by the amendment. The court rejects plaintiffs' reasoning as a basis for recovery in this case.

Former Labor Code §350(e) provided that a gratuity is money paid "over and above the actual amount due such business for services rendered." Defendant's piece rate system provided that the dance sold to the patron had a price. The dance constitutes a service rendered by the dancer for a price. Any amount paid over that dance price is a tip. The problem here is that the amount paid by the customer for the dance and any amounts rendered as a tip became blurred because of the manner in which the piece rate system and quota were established and implemented. During the chip period, when patrons purchased a dance or private performance with a chip, the price was set. Amounts paid over the purchase price of the dance or private performance constitute tips whether paid in cash or chips.

There is sufficient evidence before the Court to conclude that a portion of the dancers' tips as well as out-of-pocket money were paid by the dancers to meet the quota. (See for example footnote 3 and 4.) Some dancers paid a portion of their tips (whether in cash or chips) to meet quota. However, the Court rejects plaintiffs' argument that all of the dance fees during the cash (?) piece rate system were tips.

Labor Code §351 provides in relevant part:

> No employer or agent shall collect, take, or receive any gratuity or a part thereof, paid given to or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. Every such gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.

Labor Code §351 was amended in 2000 to provide in pertinent part:

> No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for.

As shown above, defendant's piece rate system violates Labor Code section 351 because the employer took a portion of the dancers' gratuities when dancers utilized their gratuities to make their quota.

4. Defendant's Piece Rate System Did Not Violate Minimum Wage Laws set forth in Labor Code Sections 223, 1194(a) and 1197.

Plaintiffs claim that defendant's piece rate system violated the minimum wage laws set forth in Labor Code sections 223, 1194(a) and 1197.

Labor Code §223 provides:

> Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.

Labor Code §1194(a) provides:

> Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation including interest thereon, reasonable attorney's fees, and costs of suit.

Labor Code Section 1197 provides:

> The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.

Under defendant's piece rate system, its employees were guaranteed minimum wage. Thus, if a dancer failed to turn in sufficient dance fees to meet minimum wage for her shift, the theater was required to, and did, make up the difference to guarantee the dancer received at least minimum wage for the shift. There was evidence dancers who did not make quota were paid at least minimum wage. As set forth above, the court rejects plaintiffs' argument that all amounts paid to dancers were tips. To the extent an argument exists that because a dancer made up the difference to the quota with her own money and thus was not paid at least minimum wage, there is insufficient evidence to lead the court to make that finding. Accordingly the court finds that defendant did not violate Labor Code sections 223, 1194(a) and 1197.

B) Whether Defendant Violated the Unlawful Prong of Bus. & Prof. Code §17200 Because It Failed to Reimburse Dancers for Costumes, Props, Hairstyling and Makeup.

Two questions are before the court. First, whether the attire worn by dancers is a uniform, and if so, whether defendant is required to provide and maintain the uniforms. Second, whether defendant violated Bus. & Prof. Code § 17200 by failing to reimburse for hairstyling and makeup.

1. Defendant's Failure to Reimburse Dancers for Costumes and Props violated Bus. & Prof. Code §17200.

Plaintiffs contend that defendant violated the law because it required dancers to wear specific attire for work at the Mitchell Brothers O'Farrell Theatre but failed to reimburse dancers for the attire. Section 9(A) of California's Industrial Wage Commission Orders states "When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term 'uniform' includes wearing apparel and accessories of distinctive design or color."

Several DLSE Opinions Letters discuss an employer's responsibility for uniforms. The most recent DLSE opinion letter on the subject of uniforms is February 16, 1994 [Opinion Letter 1994.02.16-1 (1994)]. It addressed workers required to wear clothing that did not have metal so that the workers could pass through metal detectors. The employer noted that sweatpants and other attire would not be exclusive to the workplace but would have common personal utility. The DLSE Letter Opinion states ". . . the question is not whether the particular wearing apparel or accessory has some value outside the employment but whether the wearing apparel is required by the employer as a condition of employment."

Another DLSE opinion letter dated February 13, 1991 [Opinion Letter 1991.02.13 (1991)] discusses whether an employer is required to reimburse for pastel color nurses' uniforms. The Letter Opinion states:

> [A]ny uniform (regardless of color) which is required to be worn by an individual in an occupation which would not generally wear that *particular* uniform, must be paid for by the employer.
>
> If the pastel uniform were freely chosen by a nurse or other health care professional in an occupation which generally wears a white uniform, it is the opinion of the Division that it need not be paid for by the employer because the employer would not have been required to pay for the standard white uniform. . . . Such would not be the case of course, if the choice of wearing a standard white uniform were not available. [Emphasis added.]

An earlier DLSE opinion letter dated September 18, 1990 [Opinion Letter 1990.09.18 (1990)] addressed restaurant workers required to wear colorful floral shirts and rugby-style shorts of any color. The letter noted that most restaurants would look "askance" at waiters or waitresses who came to work in "tropical attire" which included floral shirts and rugby pants. The letter noted:

> The definition and [DLSE] enforcement policy is sufficiently flexible to allow the employer to specify basic wardrobe items which are usual and generally usable in the occupation, such as white shirts, dark pants and black shoes and belts, all of unspecified design, without requiring the employer to furnish such items. If a required black or white uniform or accessory does not meet the test of being generally usable in the occupation the employee may not be required to pay for it." [Emphasis in original.]

The 1998 O'Farrell Theatre's Performer Guidebook (Exhibit 1010) Paragraph 15 provides:

> Performers will provide their own costumes for the New York Live, Kopenhagen and Ultra Room. The Ultra Room and Kopenhagen require costumes that suit the theme that has be [sic] chosen by the performer and pre-approved by management. . . . New York Live costumes should be of the "show-girl" variety, unless a specific theme is trying to be achieved. Street wear, bathing suits, shorts and tops, etc. are not enough to be considered a

> costume. Performers are required to have sufficient costumes so that they do not always appear on stage in the same ones. . . . In regards to all of the shows, if the O'Farrell Theatre produces a "theme" show that requires a specific costume, the costumes will be provided by the Theatre for the performers who are chosen for that show.

The 1999 Performer Guidebook (Exhibit 1011) Paragraph 23 provides:

> The O'Farrell theatre will provide all performers with a standard costume for performing and audience participation. This costume will be provided when you are hired. Cleaning and care of the costume are the performer's responsibility. The Theatre maintains specialty costumes and accessories for use by performs during their shows. These props and costumes may be checked out by the performer from the costume room and must be returned by the performer no later than the end of her shift. Performers may also provide their own costumes. In regards to all of the shows, if the O'Farrell theatre produces a "theme" show that requires a specific costume, the costumes will provided [sic] by the Theatre for the performers who are chosen for that show.

As previously noted, dancers' performances and attire varied depending upon the room (Kopenhagen – theme show, Ultra Room – theme show). Plaintiffs testified the theme shows required that several dancers adopt a theme with similar costumes and props (e.g. police or nurse attire) and that the New York Live required "show-girl" type attire. There was evidence that other exotic dance clubs did not maintain specialty dance rooms requiring theme shows or "show-girl variety" type attire. There was no evidence that the dancers used props purchased for performances at the O'Farrell Theatre at other exotic dance clubs. Thus, these particular items were required by defendant, did not have utility outside of defendant's theatre, and defendant was required to pay for the specialty attire and props.

Dancers used their own money to purchase costumes for their shifts, stage performances, and the specialty shows. As noted above, The Performer Guidebook (Exhibit 1010) Paragraph 15 prohibited the dancers from wearing such items as bathing suits, shorts and tops. The Guidebook also required the dancers to have sufficient costumes so that they did not always appear on stage in the same ones.

Applying the IWC Order 9(A) and the DLSE interpretive rulings to this case, it is clear that to the extent the O'Farrell Theatre required dancers to wear specific attire or apparel of distinctive design as a condition of their employment, the attire falls under the penumbra of uniforms. However, this rule does not apply to all attire worn by dancers. Some dancers who purchased attire for wear at the O'Farrell Theatre also used the same attire at other dance clubs. Defendant argues that the test to be applied is

whether the costume is generally useable in an exotic dancers' occupation, i.e. whether the employee could use the attire at another dance club. Defendant is correct. The test is not whether the apparel has some value outside employment but whether the attire may be used in other employment. By analogy, an employer is not required to provide nurse's uniforms even though a nurse's standard white uniform is not attire that would generally be worn outside of employment.

However, the analysis does not end here. The DLSE Opinion Letter 1990.09.18 makes a distinction between apparel which is "usual and generally usable" in the occupation and that which is distinct to a particular employer. To the extent dancers' costumes were usable at other dance clubs, the defendant is not required to reimburse the class and has not violated the law. However, defendant required its dancers to provide "show-girl" variety costumes for the New York Live performances. In addition, defendant required theme costumes for the Kopenhagen and Ultra Rooms which required approval by management. There was no testimony that these costumes could be worn at other clubs.

Defendant claims that it maintained a costume room with costumes and props for the dancers to use. However, the 1998 Performer's Guidebook stated dancers were to provide their own costumes. Class representatives testified that they did not use the costumes provided because they were out-of-date, unkempt and unclean.

Defendant's claim that it provided adequate costumes for the dancers prior to the recent renovation of the costume room was not supported by the evidence. Beginning in 2005, Meta Mitchell made improvements to the costume room but these changes do not address the time period covered by this case and do not relieve the defendant of its duty to provide adequate costumes and accessories required by the O'Farrell Theatre for the dancers under IWC Wage Order 9(A) and Labor Code 2802.

Accordingly, the Court finds that defendant violated the unlawful prong of Bus. & Prof. Code §17200 et seq. with regard to provision of costumes and props to its employees. Any damages flowing from the violation remains to be determined in a subsequent phase of trial.

2. Defendant Did Not Violate Bus. & Prof. Code §17200 by Failing to Reimburse for Hairstyling and Makeup.

Plaintiffs contend that the O'Farrell Theatre required dancers, as a condition of employment, to maintain professional hairstyling and makeup. Paragraph 17 of the Performer Guidebook (Exhibit 1010) provides in part "As with costumes, quality make-up and hairstyling are an important part of a performer's success at the O'Farrell Theatre. Performers are expected to appear in the shows with hair and make-up of a professional nature." Plaintiffs testified that they routinely sought professional haircuts. Plaintiffs also testified that they purchased stage-type or theatre performance type makeup for their performances although this makeup was often purchased at department stores such as Nordstroms.

The Court finds that the statements in the Guidebook Theatre were to encourage dancers to appear professional and groomed in their performances. There was no testimony that particular hairstyles, other than one routinely wears, were required, nor that the dancers arranged for particular hairstyles. They were encouraged to be well-groomed. Extreme hairstyles were discouraged because they would be a distraction in the shows. (Paragraph 17, Exhibit 1010.)

The court finds that defendant's statements in the Guidebook regarding hairstyling and makeup are not the type of expense which an employer is required by law to pay for or reimburse and that defendant's business practice of requiring professional hairstyling and makeup does not violate the law and therefore does not violate Bus. & Prof. Code §17200, et seq.

PART II – The Unfair Prong of Bus. & Prof. Code §17200

Acts or practices which are unfair are also prohibited by the UCL. Rather than defining specified practices as "unfair," the UCL's broad statutory language was intentionally framed to allow courts to deal with the "innumerable new schemes which the fertility of man's invention would contrive." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra* 20 Cal4th at 181 citing *American Philatelic Soc. V. Claibourne* (1935) 3 Cal.2d 689, 698. Nonetheless, the scope of what is an "unfair" business practice under the UCL is not limitless. When determining whether the challenged conduct is unfair within the meaning of the UCL, "courts may not apply purely subjective notions of fairness" or

"impose their own notions of the day as to what is fair or unfair." *Id.* At 180. Instead, standards of interpretation of "unfair" under the UCL have been developed.

In *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, the Court discussed the test for determining whether a business practice is unfair under the UCL:

> No clear test to determine what constitutes an unfair business practice has been established in California. One court has said that an unfair business practice is one that 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers...'[citation omitted], and another court has stated that to determine whether a business practice is unfair, courts must 'weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim...'[citation omitted]. The California Supreme Court criticized these tests as being 'too amorphous and provid[ing] too little guidance to courts and businesses,' but declined to formulate a test for consumer actions ...[citation to *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* 20 Cal.4th at 185].
>
> *Id.* at 1170.

Whether *Cel-Tech's* criticism of the two "amorphous" tests means that they should not be applied has been a topic of discussion in cases after *Cel-Tech.* In *Walker*, the Court analyzed both of the pre-*Cel-Tech* tests and determined that under either, the business practice before it was fair. Accordingly, the Court stated that it did not have to decide which of the two tests applied.

In *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, the Court stated that the claimed unfairness "must be tethered to some legislatively declared policy," but also went on to hold that "unfairness" is an equitable concept that necessarily involves a balancing the utility of the conduct with its harm. *Id.* at 1166-67.

In *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, the Court discussed whether *Cel-Tech* had somehow rejected the two tests recognized in *Walker.* The *Progressive* Court looked at the language of *Cel-Tech*, which expressly stated it was not setting forth a new test for "unfair" in consumer cases, and also noted that the Supreme Court has not articulated a different test in six years since its criticism in *Cel-Tech.* Thus, *Progressive* decided that the appropriate test to apply would be the balancing test, which it declined to do because the case was still in the demurrer stage. *Id.* at 285-87.

As explained below, under either of the two tests recognized in *Walker*, there are independently sufficient grounds to conclude the defendant's piece rate system constitutes an unfair business practice.

Under the test that a claim of unfairness must be tethered to a legislatively declared policy, defendant's practice violates Labor Code sections 221, 223, 350(e), 351 and 356. Applying the alternative test of unfairness which weighs the utility of the Defendant's practice against the gravity of the harm, the defendant's piece rate system constitutes unfair business practices.

A) Defendant's Piece Rate System Violates the Two Tests Set Forth in Walker and Therefore is Unfair under §17200 et seq.

Applying the two tests set forth in *Walker*, the Court finds defendant's piece rate system violates the unfairness prong of §17200. The first test under *Walker* determines whether the challenged practice is unfair because it is so closely tethered to a legislative policy. Clearly, here the answer is yes because the piece rate system violates Labor Code sections 221, 223, 350(e), 351 and 356.

Under the alternative test balancing the utility of defendant's conduct against the gravity of the harm, the answer is also yes. The piece rate system was designed to reward dancers and motivate them to meet quota. In practice, however, the piece rate system required some dancers to meet the established quota by paying a portion of their own money or their tips towards it. Some dancers used their own money to purchased chips from other dancers in order to meet the quota. Thus, the utility of the system, encouraging productive use of time, is outweighed by the harm to dancers expending their own money to meet quota.

B) Whether Defendant's Failure to Reimburse Plaintiffs for Costumes, Props, Hairstyling or Makeup Is Unfair Under §17200 et seq.

1. Defendant's Failure to Reimburse Plaintiffs For Costumes and Props Violates the Two Tests Set Forth in *Walker*.

Applying the two tests set forth in *Walker*, there are independently sufficient grounds for the court to conclude that defendant's failure to reimburse plaintiffs for the cost of costumes and props violates the unfairness prong of §17200. Under the first test set forth in *Walker,* requiring employees to purchase and maintain costumes which are not generally useable in the occupation violates the legislative policy set forth in IWC Order 9(A) which requires the employer to provide and maintain uniforms.

Moreover, applying the *Walker*'s balancing test, the Court finds that any utility value of defendant's practices is outweighed by the harm to plaintiffs. There was testimony at trial that the O'Farrell Theatre is one of the best exotic clubs for dancers to work. Defendant prided itself on maintaining high standards for its dancers with regard to costumes and appearance. To achieve this, Defendant required the employees to have "show-girl" type costumes for New York Live performances as well as theme costumes for Ultra Room and the Kopenhagen Rooms. Therefore, one could argue that plaintiffs benefited from being employed at O'Farrell Theatre that maintained high standards for its dancers.

However, the utility of the practice cannot survive when balanced against the gravity of the harm, i.e., requiring employees to pay for uniforms out of their own pocket. Evidence of cost was not admitted in Phase 1 because trial of damages is reserved for subsequent phases. Nevertheless, there was testimony that dancers were required to purchase costumes at specialty shops or from vendors permitted to sell costumes at the theatre. This required an expense to the dancers for the ability to work at the theater. This gravity of the harm to plaintiffs outweighs any argument that may be made about the benefit of being employed by O'Farrell Theatre.

2. Defendant's Failure to Reimburse Plaintiffs For Hairstyling and Makeup Does Not Violate Either of the Two Tests Set Forth in *Walker*.

Defendant's policy requiring dancers to appear in shows with hair and make-up of a professional nature does not violate either of the unfairness tests set forth in *Walker*. Nothing in the defendant's expectation required such an outlay of expense which offends public policy or was substantially injurious to dancers. Dancers were expected to look professional. Weighing the gravity of the harm to the dancers against the utility of the defendant's conduct results in the same conclusion.

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PART III – Defendant's Affirmative Defenses

A) Plaintiffs Barred Are Not Barred by the Equitable Defenses of Estoppel or Unclean Hands?

Under section 17203, when a defendant engages or has engaged in unfair competition "[t]he court may make such orders or judgments, . . . to prevent the use or employment by any person of any practice which constitutes unfair competition, . . . or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

Thus, in a UCL action plaintiffs are entitled to equitable remedies such as injunction, restitution or disgorgement of profits. In response to plaintiffs' claims, defendant asserts that plaintiffs are barred equitable estoppel and unclean hands. Plaintiffs argue that these defenses are not available to defeat a claim under the UCL.

In *Cortez v. Purolator Air Filtration Products Company* (2000) 23 Cal.4th 163 the Supreme Court addressed the availability of equitable defenses in the context of a claim under Bus. & Prof. Code §17200 et seq. *Cortez* involved a claim for failure to pay overtime wages. The court first concluded that unlawfully withheld wages may be recovered as restitution in a UCL action. The court then went on to address equitable defenses and stated "We agree that equitable defenses may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct. It does not follow, however, that equitable considerations may not guide the court's discretion in fashioning the equitable remedies authorized by section 17203." *Id.* at p. 179. (Emphasis added.)

Defendant contends that the doctrine of unclean hands bars plaintiffs' recovery. However, under *Cortez*, at least in a UCL action, unclean hands may not "wholly defeat" plaintiffs' claims. Instead, this Court may take into consideration principles of equitable estoppel and unclean hands in fashioning any remedy to be applied. "Therefore, what would otherwise be equitable defenses may be considered by

the court when the court exercises its discretion over which, if any, remedies authorized by section 17203 should be awarded." *Id.* at p. 180.

Cortez notes that section 17203 does not mandate either restitution or injunctive relief but instead gives the court broad discretion to prevent a practice which constitutes unfair competition or as may be necessary to restore money or property. (Citing *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254 at p. 1267.) Thus, consideration of equitable estoppel and unclean hands at this stage is premature and should be reserved for a future phase of this trial.

CONCLUSION

In this Proposed Statement of Decision, the Court has addressed the objections and controverted issues specified by the parties which are material to its decision. This Proposed Statement of Decision shall be the Statement of Decision unless within fifteen days either party files objections. (California Rules of Court, Rule 3.1590(f).) Any party filing objections is directed to deliver a file-endorsed courtesy copy to Department 504 on the day of filing.

DATED: June 1, 2007

Mary E. Wiss
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

VIENNA HALL, et al.,

Plaintiff(s)
vs.

CINEMA 7, INC., et al.,

Defendant(s)

Case Number: CGC-02-409105

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Clark Banayad, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On June 1, 2007, I served the attached **PROPOSED STATEMENT OF DECISION – PHASE 1 TRIAL** filed on June 1, 2007, by placing a copy thereof in a sealed envelope, addressed as follows:

James A. Quadra, Esq.
MOSCONE EMBLIDGE & QUADRA
220 Montgomery Street, Suite 2100
San Francisco, CA 94104

Donna Marie Rutter, Esq.
CURIALE DELLAVERSON HIRSCHFEL, et al.
727 Sansome Street
San Francisco, CA 94111

Thomas Edward Duckworth, Esq.
DUCKWORTH & PETERS
235 Montgomery Street, Suite 1010
San Francisco, CA 94104

Mark J. Meyers, Esq.
16168 Beach Boulevard
Suite 140
Huntington Beach, CA 92647

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: June 1, 2007

GORDON PARK-LI, Clerk

By: Clark Banayad
Clark Banayad, Deputy Clerk