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LWDA #

RECEIVED 0045

AUG 19 2004

State of California
Labor & Workforce Development Agency

August 17, 2004

LABOR WORK FORCE DEVELOPMENT
AGENCY
801 K Street, #2101
Sacramento, CA 95814

Torey J. Favarote
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
888 West 6th St., Suite 1200
Los Angeles, CA 90017

Re: 2699 Penalties

Gentlemen:

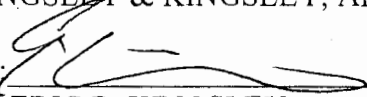
This office represents David Mouw and a proposed class of employees for violation of Labor Code Sections 201, 202, 203, 204, 212, 226.7 and 512 by BJ GAMING LLC. Specifically, the defendant violated the law by failing to allow employees to take thirty (30) minute uninterrupted meal breaks when they worked over five (5) hours in a shift. No additional pay/wages were paid for foregoing their breaks. This was done on a regular basis.

Enclosed please find a copy of our proposed First Amended Complaint which retains our three original claims and also includes a claim for §2699. These facts and violations of law are hereby incorporated by reference.

In addition, defendants failed to issue wages on demand, but rather they were issued from an out of state bank. All of the checks to the employees were not payable on demand due to this feature. As such, Labor Code §212 has been violated for the duration of the class period and continuing.

Please advise by certified mail within thirty (30) days of the post mark on this letter if the LWDA intends to proceed with these claims or if plaintiff should add them in a §2699 claim as provided here.

Very truly yours,
KINGSLEY & KINGSLEY, APC

By: 
ERIC B. KINGSLEY

EBK/jh
encl.

CERTIFIED, RETURN RECEIPT REQUESTED

LWFDA - #7004 0750 0000 1711 9750

Favarote - #7004 0750 0000 1711 9767

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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES-CENTRAL

DAVID MOUW on behalf of	)	CASE NO.: BC 307249
himself and all others	)	
similarly situated,	)	FIRST AMENDED CLASS ACTION
	)	COMPLAINT FOR:
	)	
Plaintiffs,	)	1. Failure to Allow Meal Breaks
	)	Pursuant to Labor Code
	)	\$226.7
vs.	)	2. Failure to Allow Rest Breaks
	)	Pursuant to Labor Code
	)	\$226.7
BJ GAMING LLC; and	)	3. Penalties Pursuant to Labor
DOES 1 to 50, Inclusive,	)	Code \$203
	)	4. Penalties Pursuant Labor
	)	Code \$2699
Defendants.	)	5. Violation of Business &
	)	Professions Code \$17200
	)	

Plaintiff DAVID MOUW on behalf of himself and all others similarly situated, complain of defendants, and each of them, and for causes of action alleges:

I

INTRODUCTION

1. This is a Class Action, pursuant to Code of Civil Procedure Section 382, on behalf of plaintiff and all "PROPOSITION

PLAYER EMPLOYEES" employed by, or formerly employed by BJ GAMING LLC and any subsidiaries or affiliated companies doing business as "BJ's Gaming" (hereinafter referred to as "BJ's" or "Defendants"), within the State of California.

2. From at least October 1, 2000 and continuing to the present, defendants have had a consistent policy of failing to provide BJ's Non-Exempt Employees within the State of California, including plaintiff, rest periods of at least ten (10) minutes per four (4) hours worked or major fraction thereof and failing to pay such employees one (1) hour of pay at the employees regular rate of compensation for each workday that the rest period is not provided, as required by California state wage and hour laws.

3. From at least October 1, 2000 and continuing to the present, defendants have had a consistent policy of requiring BJ's Non-Exempt Employees within the State of California, including plaintiff, to work at least five (5) hours without a meal period and failing to pay such employees one (1) hour of pay at the employees regular rate of compensation for each workday that the meal period is not provided or provided after five (5) hours, as required by California state wage and hour laws.

4. Plaintiff, on behalf of himself and all Class Members, pursuant to Business & Professions Code Sections 17200-17208, also seek injunctive relief, restitution, and disgorgement of all benefits defendants enjoyed from their failure to pay rest and meal period compensation.

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II

PARTIES

A. Plaintiffs

5. Venue as to each defendant is proper in this judicial district, pursuant to Code of Civil Procedure §395. Defendants are engaged in business ventures in Los Angeles County, California. The unlawful acts alleged herein have a direct effect on plaintiff and those similarly situated within the State of California and within Los Angeles County. Defendants employ numerous Class Members in Los Angeles County.

6. Plaintiff DAVID MOUW is a resident of San Diego County, California. At all relevant times herein, each has been employed by defendants as an hourly employee, and have been employed by BJ's in a non-exempt capacity through the date of his separation from employment.

7. As an hourly employee, plaintiff was regularly required to:

(1) Work without being provided a minimum ten (10) minute rest period for every four (4) hours or major fraction thereof worked and not being compensated one (1) hour of pay at his regular rate of compensation for each workday that a rest period was not provided; and,

(2) Work in excess of five (5) hours per day without being provided a meal period and not being compensated one (1) hour of pay at the regular rate of compensation for each workday that a meal period was not provided or provided after five (5) hours, all in violation of California labor laws, regulations, and Industrial Welfare Commission Wage Orders;

8. Defendants willfully failed to provide rest and meal periods or compensate them for missing or taking a late meal period, at the termination of their employment with defendants.

B. Defendants

9. Defendant BJ GAMING LCC, a California Corporation Limited Liability Company, is engaged in the ownership and operation of the gaming business in California and Nevada. Defendants employed plaintiff and similarly situated persons as hourly employees within California.

10. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants sued herein as DOES 1 through 50, inclusive, are currently unknown to plaintiff, who therefore sues defendants by such fictitious names under Code of Civil Procedure §474. Plaintiff is informed and believes, and based thereon alleges, that each of the defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the defendants designated hereinafter as DOES when such identities become known.

11. Plaintiff is informed and believes, and based thereon alleges, that each defendant acted in all respects pertinent to this action as the agent of the other defendants, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each defendant are legally attributable to the other defendants.

III

FACTUAL BACKGROUND

12. BJ's hires hourly employees who work in card casinos throughout California. These employees work in non-exempt positions and have not been provided rest periods for work periods of four (4) hours or major fractions thereof, or meal periods for work days in excess of five (5) hours and/or ten (10) hours and were not compensated one (1) hours wages in lieu thereof.

13. Plaintiff is informed and believes, and based thereon alleges, defendants currently employ, and during the relevant period have employed, over 100 employees in the State of California.

14. BJ's Non-Exempt Employees are, and at all times pertinent hereto, have been non-exempt employees within the meaning of the California Labor Code, and the implementing rules and regulations of the IWC California Wage Orders.

15. Plaintiff and the members of the Plaintiff Class were regularly required to work in excess of four (4) hours without being provided a rest period and were regularly required to work in excess of five (5) and/or ten (10) hours per day, without being provided meal periods, as mandated under the California Labor Code, and the implementing rules and regulations of the IWC California Wage Orders.

16. Defendants did not fully compensate plaintiff or the Plaintiff Class for failure to timely provide rest periods and meal periods.

17. Defendants' requirement that plaintiff and the class work through or take late meal and rest periods without paying legal compensation for failure to provide timely rest or meal periods was willful and deliberate.

18. Defendants willfully failed to provide rest and meal

periods during which former BJ's employees were required to work, and willfully failed to pay one (1) hours wages in lieu of rest and meal periods, when each such employee quit or was discharged.

19. Defendants have failed to comply with Industrial Welfare Commission ("IWC") Wage Order 7-2000, 7-2001 by failing to maintain time records showing when the employee begins and ends each work period, meal periods, split shift intervals and total daily hours worked by itemizing in wage statements all deductions from payment of wages and accurately reporting total hours worked by plaintiff and the members of the proposed class.

20. Defendants' failure to retain accurate records of work periods worked by BJ's Non-Exempt Employees, including plaintiff and members of the Plaintiff Class, was willful and deliberate, was a continuous breach of defendants fiduciary duty owed to plaintiff and members of the Plaintiff Class and was designed to serve its policy of unlawfully denying compensation to persons employed in such positions.

IV

CLASS ACTION ALLEGATIONS

21. Plaintiff brings this action on behalf of himself and all others similarly situated as a class action pursuant to §382 of the Code of Civil Procedure. Plaintiff seeks to represent a Class composed of and defined as follows:

All persons who are employed or have been employed by Defendants in the State of California who, since October 1, 2000, have worked as hourly employees and have not been provided a rest period for every four hours or major fraction thereof worked per day, and/or not been provided a first and/or second meal period for each day in which such non-exempt employee worked in excess of five hours and/or

for each day in which such non-exempt employee worked in excess of ten hours, and was not provided compensation of one hours pay for each day on which such rest period and/or meal period was not provided.

22. Plaintiff reserves the right under Rule 1855(b), California Rules of Court, to amend or modify the class description with greater specificity or further division into subclasses or limitation to particular issues.

23. This action has been brought and may properly be maintained as a class action under the provisions of §382 of the Code of Civil Procedure because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

A. Numerosity

24. The potential members of the Class as defined are so numerous that joinder of all the members of the Class is impracticable. While the precise number of Class Members has not been determined at this time, plaintiff is informed and believes that defendants currently employ, and during the relevant time periods employed over 100 hourly employees in the State of California.

25. Defendants' employment records would provide information as to the number and location of all Class Members. Joinder of all members of the proposed Class is not practicable.

B. Commonality

26. There are questions of law and fact common to the Class that predominate over any questions affecting only individual Class Members. These common questions of law and fact include, without

limitation:

(1) Whether defendants violated Labor Code §226.7 and Wage Order 7-2000, 7-2001 or other applicable IWC Wage Orders by failing to provide daily rest periods to hourly employees for every four (4) hours or major fraction thereof worked and failing to compensate said employees one (1) hours wages in lieu of rest periods;

(2) Whether defendants violated Labor Code §226.7 and §512, IWC Wage Order 7-2000 or 7-2001 or other applicable IWC Wage Orders by failing to timely provide meal periods to hourly employees on days they worked in excess of five (5) hours and failing to compensate said employees one (1) hours wages in lieu of meal periods;

(3) Whether defendants violated Labor Code §226.7 and §512, Wage Order 7-2000, 7-2001 or other applicable IWC Wage Orders, by failing to provide timely second meal periods to Non-Exempt Employees on days they worked in excess of ten (10) hours;

(4) Whether defendants violated §§201-203 of the Labor Code by failing to pay compensation for denied rest periods and meal periods due and owing at the time that any Class Member's employment with defendants terminated;

(5) Whether defendants violated §17200 et seq. of the Business & Professions Code by failing to provide rest and meal periods without compensating hourly employees one (1) hours pay for every day such periods were not provided, failing to pay wages and compensation for denied rest and meal period compensation due and owing at the time a Class Member's employment with defendants terminated;

(6) Whether plaintiff and the Members of the Plaintiff Class are entitled to equitable relief pursuant to Business & Professions Code Section 17200, et. seq.

C. Typicality

27. The claims of the named plaintiff is typical of the claims of the Class. Plaintiff and all members of the Class sustained injuries and damages arising out of and caused by defendants' common course of conduct in violation of laws, regulations that have the force and effect of law and statutes as alleged herein.

D. Adequacy of Representation

28. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class. Counsel who represents plaintiff is competent and experienced in litigating large employment class actions.

E. Superiority of Class Action

29. A class action is superior to other available means for the fair and efficient adjudication of this controversy. Individual joinder of all Class Members is not practicable, and questions of law and fact common to the Class predominate over any questions affecting only individual members of the Class. Each member of the Class has been damaged and is entitled to recovery by reason of defendants' illegal policy and/or practice of denying plaintiff and Class Members timely rest and meal periods without legal compensation, and requiring employees to work in excess of ten (10) hours per day without second meal periods.

30. Class action treatment will allow those similarly situated persons to litigate their claims in the manner that is most efficient and economical for the parties and the judicial system.

Plaintiff is unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

V

FIRST CAUSE OF ACTION

FAILURE TO ALLOW MEAL BREAKS PURSUANT TO LABOR CODE §226.7

(Against All Defendants)

31. Plaintiff incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 30.

32. Labor Code §226.7 requires an employer to pay an additional hour of compensation for each meal period the employer fails to provide. Employees are entitled to a meal period of a least thirty (30) minutes per five (5) hour work period. Plaintiff and the class consistently worked over five (5) hour shifts. Pursuant to the Code, plaintiff and the class are entitled to a meal period of not less than thirty (30) minutes prior to exceeding five (5) hours of employment.

33. Defendants failed to provide plaintiff and others with timely meal breaks of not less than thirty (30) minutes as required by the Labor Code during the relevant class period.

34. Pursuant to Labor Code §226.7, plaintiff is entitled to damages in an amount equal to one (1) hour of wages per missed meal break, in a sum to be proven at trial.

35. Pursuant to Labor Code §218.5 plaintiff requests that the court award reasonable attorney's fees and costs incurred by him in this action.

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VI

SECOND CAUSE OF ACTION

FAILURE TO ALLOW REST BREAKS PURSUANT TO LABOR CODE §226.7

(Against All Defendants)

36. Plaintiff realleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 35.

37. Labor Code §226.7 requires an employer to pay an additional hour (1) of compensation for each rest period the employer fails to provide. Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked. Plaintiff and the class consistently worked over four (4) hours per shift with no rest breaks.

38. Defendants failed to provide plaintiff and others with rest breaks of not less than ten (10) minutes as required by the Labor Code during the relevant class period.

39. Pursuant to Labor Code §226.7, plaintiff is entitled to damages in an amount equal to one (1) hour of wages per missed rest break, in a sum to be proven at trial.

VII

THIRD CAUSE OF ACTION

WAITING TIME PENALTIES UNDER LABOR CODE §203

(Against All Defendants)

40. Plaintiff realleges and incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 39.

41. Numerous members of the class including plaintiff are no longer employed by defendants. They were either fired or quit defendants employ.

42. The defendant's failure to pay wages, as alleged above was

willful in that defendants and each of them knew wages to be due but failed to pay them, thus entitling plaintiff and the class to penalties under Labor Code §203, which provides that an employee's wages shall continue as a penalty until paid for a period of up to thirty (30) days from the time they were due.

43. Defendants have failed to pay plaintiff and others a sum certain at the time of their termination or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter. Pursuant to the provisions of Labor Code §203, plaintiff is entitled to a penalty in the amount of plaintiff's and others daily wage multiplied by thirty (30) days.

VIII

FOURTH CAUSE OF ACTION

PENALTIES PURSUANT TO LABOR CODE §2699

44. Plaintiff incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 43.

45. As a result of the acts alleged above, plaintiffs seek penalties under Labor Code §§2698 and 2699 because defendants's violation of Labor Code §§204, 212 and 512 which call for civil penalties under Labor Code §§210, 225.5, and 558 respectively.

46. For each such violation, plaintiffs and the proposed class are entitled to penalties in an amount to be shown at the time of trial subject to the following formula:

- a. For \$50 for the initial violation per employee per pay period for all violations from one year prior to the filing of this complaint until December 31, 2003, and for Labor Code §512/558 violations from one year prior to the filing of this complaint until

the present.

- b. For \$100 for each subsequent violation per employee per pay period for all violations from one year prior to the filing of this complaint until December 31, 2003 and for Labor Code §512/558 violations from one year prior to the filing of this complaint to the present.
- c. For \$100 for the initial violation per employee per pay period for all violations except Labor Code §558 violations from January 1, 2004 until the present.
- d. For \$200 for each subsequent violation per employee per pay period for all violations except Labor Code §558 violations from January 1, 2004 until the present.

47. These penalties will be allocated 50% to the State of California's general fund, 25% to the Labor Commissioners Office and 25% to the affected employees.

IX

UNFAIR COMPETITION PURSUANT TO BUSINESS

AND PROFESSIONS CODE §17200

(Against All Defendants)

48. Plaintiff incorporates by reference as if fully set forth herein, the allegations of paragraphs 1 through 43.

49. This is a Representative Private Attorney General Action and Class Action for Unfair Business Practices. DAVID MOUW on his own behalf and on behalf of the general public, and on behalf of others similarly situated, brings this claim pursuant to Business & Professions Code §17200, et seq. The conduct of all defendants

as alleged in this Complaint has been and continues to be unfair, unlawful, and harmful to plaintiff, the general public, and the plaintiff class. Plaintiff seeks to enforce important rights affecting the public interest within the meaning of Code of Civil Procedure §1021.5.

50. Plaintiff is a "person" within the meaning of Business & Professions Code §17204, and therefore has standing to bring this cause of action for injunctive relief, restitution, and other appropriate equitable relief.

51. Business & Profession Code §17200, et seq. prohibits unlawful and unfair business practices.

52. Wage and hour laws express fundamental public policies. Providing employees with meal and/or rest breaks is a fundamental public policy of this State and of the United States. Labor Code §90.5(a) articulates the public policies of this State to enforce vigorously minimum labor standards, to ensure that employees are not required or permitted to work under substandard and unlawful conditions, and to protect law-abiding employers and their employees from competitors who lower their costs by failing to comply with minimum labor standards.

53. Defendants have violated statutes and public policies. Through the conduct alleged in this Complaint, defendants, and each of them, have acted contrary to these public policies, have violated specific provisions of the Labor Code, and have engaged in other unlawful and unfair business practices in violation of Business & Profession Code §17200, et seq., depriving plaintiff, and all persons similarly situated, and all interested persons of rights, benefits, and privileges guarantees to all employees under law.

54. Defendants' conduct, as alleged hereinabove, constitutes unfair competition in violation of §17200 of the Business & Professions Code.

55. Defendants by engaging in the conduct herein alleged, by not providing proper breaks, either knew or in the exercise of reasonable care should have known that the conduct was unlawful. As such it is a violation of §17200 of the Business & Professions Code.

56. As a proximate result of the above mentioned acts of defendants, plaintiff and others similarly situated have been damaged in a sum as may be proven.

57. Unless restrained by this Court, defendants will continue to engage in the unlawful conduct as alleged above. Pursuant to Business & Professions Code this Court should make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment, by defendants, their agents or employees, of any unlawful or deceptive practice prohibited by the Business & Professions Code, and/or, including but not limited to, disgorgement of profits which may be necessary to restore plaintiff and the class members to the money defendants have unlawfully failed to pay.

RELIEF REQUESTED

WHEREFORE, plaintiff prays for the following relief:

1. For compensatory damages in the amount of plaintiff's and each class members' hourly wage for each meal period missed or taken late from October 1, 2000 to the present as may be proven.

2. For compensatory damages in the amount of plaintiff's and each class members' hourly wage for each shift where rest period(s)

were missed from October 1, 2000 to the present as may be proven.

3. For penalties pursuant to Labor Code §203 for all employees who quit or were fired equal to their daily wage times thirty (30) days;

4. For penalties pursuant to labor Code §2699 as alleged above;

5. An award of prejudgment and post judgment interest;

6. An order enjoining defendant and its agents, servants, and employees, and all persons acting under, in concert with, or for it from providing plaintiff with proper meal and rest breaks pursuant to Labor Code §512 and IWC 7-2001.

7. For restitution for unfair competition pursuant to Business & Professions Code §17200, including disgorgement or profits, in an amount as may be proven;

8. An award providing for payment of costs of suit;

9. An award of attorneys' fees; and

10. Such other and further relief as this Court may deem proper and just.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial of his claims by jury to the extent authorized by law.

Dated: August ___, 2004

KINGSLEY & KINGSLEY, APC

By: _____

ERIC B. KINGSLEY
ATTORNEY FOR PLAINTIFF