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COYOTE EXPLOSIVES, ET AL.

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF LOS ANGELES

10 TWEETIE ROADRUNNER, et al.,

11 Plaintiff,

12 v.

13 COYOTE EXPLOSIVES, et al.,

14 Defendants.

No. BC208856

UNLIMITED JURISDICTION

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
COYOTE EXPLOSIVES'
DEMURRER TO COMPLAINT

Date: May 5, 2003
Time: 9:00 a.m.
Dept: 50

17 I. PRELIMINARY STATEMENT

18 In this action, plaintiff Tweetie Roadrunner (“Roadrunner”) seeks to recover unpaid
19 overtime wages from her employer, Coyote Explosives. (“Coyote” or the “Company”). However,
20 rather than simply seek to establish that she, as an individual, is entitled to overtime
21 compensation, she attempts to parlay her claim into a statewide class action for unpaid overtime,
22 unfair competition and common-law conversion on behalf of all “salaried store employees.”

23 As explained in more detail in the sections that follow, Coyote both generally and
24 specially demurs to Roadrunner’ complaint for two basic reasons:

25 (a) Claims for unpaid overtime cannot, as a matter of law, be adjudicated on a class
26 wide basis. Instead, applicable law requires that entitlement to overtime pay be evaluated on a
27 case-by-case, employee-by-employee basis. Accordingly, common questions of law or fact
28

1 cannot predominate, and the class action allegations contained in Roadrunner' complaint must be
2 stricken as inappropriate. E.g., *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460-61
3 (1974); *Brown v. Regents of University of California*, 151 Cal. App. 3d 982, 989 (1984).

4 (b) Roadrunner cannot use California Business & Professions Code Section 17200 et
5 seq. to recover back wages, and does not have standing under Section 17200 to seek restitution or
6 disgorgement of other types of unspecified "monies." See *Californians for Population*
7 *Stabilization v. Hewlett Packard Co.*, 58 Cal. App. 4th 273, 295 (1997) ("unpaid wages are
8 economic damages which are unavailable in a section 17200 action"); *Tippett v. Terich*, 37 Cal.
9 App. 4th 1517, 1536-37 (1995).

10 (c) Roadrunner cannot use California Business & Professions Code Section 17200 et
11 seq. to recover back wages, and does not have standing under Section 17200 to seek restitution or
12 disgorgement of other types of unspecified "monies." See *Californians for Population*
13 *Stabilization v. Hewlett Packard Co.*, 58 Cal. App. 4th 273, 295 (1997) ("unpaid wages are
14 economic damages which are unavailable in a section 17200 action"); *Tippett v. Terich*, 37 Cal.
15 App. 4th 1517, 1536-37 (1995).

16 Roadrunner cannot use California Business & Professions Code Section 17200 et seq. to
17 recover back wages, and does not have standing under Section 17200 to seek restitution or
18 disgorgement of other types of unspecified "monies." See *Californians for Population*
19 *Stabilization v. Hewlett Packard Co.*, 58 Cal. App. 4th 273, 295 (1997) ("unpaid wages are
20 economic damages which are unavailable in a section 17200 action"); *Tippett v. Terich*, 37 Cal.
21 App. 4th 1517, 1536-37 (1995).

22 Roadrunner cannot use California Business & Professions Code Section 17200 et seq. to
23 recover back wages, and does not have standing under Section 17200 to seek restitution or
24 disgorgement of other types of unspecified "monies." See *Californians for Population*
25 *Stabilization v. Hewlett Packard Co.*, 58 Cal. App. 4th 273, 295 (1997) ("unpaid wages are
26 economic damages which are unavailable in a section 17200 action"); *Tippett v. Terich*, 37 Cal.
27 App. 4th 1517, 1536-37 (1995).

1 (d) Roadrunner cannot use California Business & Professions Code Section 17200 et
2 seq. to recover back wages, and does not have standing under Section 17200 to seek restitution or
3 disgorgement of other types of unspecified “monies.” See *Californians for Population*
4 *Stabilization v. Hewlett Packard Co.*, 58 Cal. App. 4th 273, 295 (1997) (“unpaid wages are
5 economic damages which are unavailable in a section 17200 action”); *Tippett v. Terich*, 37 Cal.
6 App. 4th 1517, 1536-37 (1995).

7 For these reasons, as more fully set forth below, Coyote respectfully requests that its
8 demurrers to Roadrunner’ complaint be sustained without leave to amend.

9 II. STATEMENT OF FACTS

10 A. The Parties.

11 According to Roadrunner’ complaint, Coyote sells “arts and crafts supplies” in
12 approximately “100 separate geographic locations within the State of California.” (Complaint 2.)
13 She alleges that the Company employs an unidentified number of “salaried store employees,”
14 including “store managers, assistant managers and managers-in-training.” (Complaint 1.)

15 Roadrunner alleges that she is a salaried Coyote employee. (Complaint 1, 12, 16.)

16 B. Roadrunner Claims That Coyote’s Managers, Assistant Managers And Managers-
17 In-Training Are, As A Class, Non-Exempt Employees Who Should Have Been, But Were Not,
18 Paid Premium Pay For Overtime Work.

19 Roadrunner purports to represent a class of “all former California based salaried
20 employees who worked overtime for defendants from April 1995 to the present, yet were not paid
21 overtime.” (Complaint 9.) She claims that each of these individuals worked in excess of eight
22 hours per day, or 40 hours per week during the past four years; that each of these salaried
23 employees was “improperly and illegally mis-classified . . . as ‘exempt’ managerial employees
24 when, in fact, they were ‘non-exempt’ non-managerial employees according to California law.”
25 (Complaint 8.) Accordingly, she believes that these individuals should have been, but were not,
26 paid overtime compensation for those hours they worked in excess of eight in a day or 40 in a
27 week. (E.g., Complaint 9(c).)

1 In attempting to bring her claims within the purview of Code of Civil Procedure Section
2 382, Roadrunner conspicuously ignores settled law that wage and hour cases can only be tried on
3 a case-by-case basis. Hence, she alleges, in boilerplate fashion, that questions fact and law
4 predominate over individual issues. But even a cursory review of Roadrunner' complaint
5 suggests that Section 382's commonality requirements cannot be met. For example, Roadrunner
6 conspicuously cannot allege the precise number of overtime hours worked by any of Coyote'
7 store managers, assistant store managers and managers-in-training. Instead, she can only allege
8 on information and belief, that these individuals are "non-exempt" because they "regularly
9 performed non-exempt work in excess of 50% of their workday and workweek." (E.g.,
10 Complaint 9(a), 9(c) & 11). Similarly, she alleges that Coyote' corporate policies allegedly
11 require class members to work these unidentified and unquantifiable non-exempt tasks (e.g.,
12 Complaint 9(b), 11, 15 & 16); that the class members' duties – whatever they may be – are
13 "virtually identical," and that any differences in their duties are "legally insignificant" (e.g.,
14 Complaint 9(c) & 11); and that Coyote did not pay the class members' wages, including "regular
15 time, overtime, vacation time" when their employment terminated (Complaint 9(d), 11, 15 & 17).

16 Much the same can be said of Roadrunner' attempt to identify predominant questions of
17 law. She fails to acknowledge that courts cannot determine whether employees legally are
18 entitled to overtime compensation in the absence of a case-by-case analysis of their job duties and
19 hours. Instead, she again alleges in boilerplate fashion that this Court is empowered to determine
20 on a class-wide basis whether salaried store employees are exempt or nonexempt; whether these
21 employees worked overtime hours for which overtime premium compensation and other
22 "compensatory damages" must be paid; whether Coyote' pay practices constitute unfair business
23 practices; and whether this Court can enjoin Coyote' allegedly unlawful pay practices.

24 (Complaint 11(1) – (vi).)

25 C. Each Of Roadrunner's Three Causes Of Action Are Dependent Upon Proof That
26 Coyote Unlawfully Classified Its Managers, Assistant Managers And Managers-In-Training As
27 "Exempt" Employees.

1 Roadrunner' complaint contains three causes of action. Her first cause of action is for
2 violation of California Labor Code Section 1194 ("Section 1194") and "applicable California
3 Industrial Welfare Commission wage orders," ("IWC Wage Order"). Roadrunner alleges that she
4 and all other class members were paid on a salaried basis; that they worked in excess of eight
5 hours in a day, or 40 hours in a week; and that Coyote thereby violated Section 1194 and the IWC
6 Wage Order by failing to compensate them for overtime hours worked. (Complaint 8-17.)

7 Roadrunner' second cause of action is for violation of California Business & Professions
8 Code Section 17200 et seq. ("Section 17200"). She incorporates all of the allegations of her first
9 cause of action (Complaint 18), and then claims that Coyote' alleged failure to pay overtime
10 "constitutes unfair competition and provides an unfair advantage over [the Company's]
11 competitors." She further claims that she, "and other similarly situated members of the general
12 public" are entitled to restitution and disgorgement of "all monies withheld, acquired and/or
13 converted by [Coyote]; and that a receiver should be appointed "as necessary." (Complaint 19
14 & 20.)

15 Roadrunner' third cause of action is for common-law conversion. After incorporating all
16 prior allegations (Complaint 21), she claims that Coyote willfully, and without legal justification
17 interfered with her right to own and possess her wages. (Complaint 21-22.) She seeks to recover
18 these "converted" wages; "any and all profits whether direct or indirect the defendants acquired
19 by their conversion;" and punitive damages. (Complaint 23.)

20 III. ARGUMENT

21 A. The Complaint Fails To State A Cause of Action, And is Uncertain, Because
22 Roadrunner Cannot Pursue Her Overtime Wage Claims On A Class-Wide Basis.

23 1. Class Action Status Cannot Be Granted When Class Recovery Depends Upon
24 Proof Of Individual Claims.

25 Trial courts properly and routinely evaluate class allegations by demurrer, and sustain
26 demurrers "without leave to amend where it is clear that there is no reasonable possibility that the
27 plaintiffs could establish a community of interest among the potential class members and that
28 individual issues predominate over common questions of law and fact. *Silva v. Block*, 49 Cal.

1 App. 4th 345, 349 (1996). To establish the existence of a community of interest among class
2 members, the plaintiff must allege, among other things, that common questions of law or fact
3 predominate. *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981). However, this
4 commonality requirement cannot be satisfied if the ersatz class' recovery necessarily depends
5 upon proof of separate facts applicable to each class member. As explained in *Brown v. Regents*
6 *of University of California*, 151 Cal. App. 3d 982, 989 (1984):

7 “The ultimate question in every case of this type is whether, given an ascertainable class,
8 the issues which may be jointly tried, when compared with those requiring separate adjudication,
9 are so numerous or substantial that the maintenance of a class action would be advantageous to
10 the judicial process and to the litigants.’ [Citations.] If the ability of each member of the class to
11 recover clearly depends on a separate set of facts applicable only to him, then all of the policy
12 considerations which justify class actions equally compel the dismissal of such inappropriate
13 actions at the pleading stage.” (Emphasis added.)

14 (same).

15 2. Roadrunner’s Class Action Allegations Fail As A Matter Of Law Because
16 Entitlement To Overtime Compensation Can Only Be Determined On A Case-By-Case,
17 Employee-By-Employee Basis.

18 Under this standard, Roadrunner cannot pursue her claims on a class-wide basis. As noted
19 above, Roadrunner claims that Coyote owes her, and the class she represents, premium wages for
20 overtime hours worked over the past four years. However, entitlement to overtime wages cannot
21 be evaluated on an across-the-board basis. Under California’s various Wage Orders, an employee
22 is “exempt” from overtime if he or she:

23 “is engaged in work which is primarily intellectual, managerial or creative, and which
24 requires the exercise of discretion and independent judgment, and for which the remuneration is
25 not less than \$900.00 per month.”

26 Cal. Code Regs. tit. 8, § 11070(1)(A). To determine whether the employee’s work is
27 “primarily” intellectual, managerial or creative,” courts must determine whether “more than one-

1 half of the employee’s time” is devoted to these exempt functions. Cal. Code Regs., tit. 8, §
2 11070(1)(J).

3 Hence, it simply is not enough to allege in boilerplate legal conclusions that common
4 questions of law or fact predominate because “everybody does the same thing,” presumably
5 because Coyote’ employees hold the same or similar job titles, or work pursuant to the same
6 “corporate policies.” See, B & P Development Corp. v. City of Saratoga, 185 Cal. App. 3d 949,
7 952-953 (1986 (no credit is given on demurrer “to pleaded contentions or legal conclusions”).
8 Instead, the law requires – and Coyote’ due process rights demand – that this Court evaluate the
9 particular duties performed by each Coyote manager, assistant manager and manager-in-training.
10 This evaluation cannot be performed on a class-wide basis as a matter of law. Coyote’ demurrer
11 to Roadrunner’ class action allegations should be sustained without leave to amend accordingly.

12 Of course, Roadrunner cannot rely upon her “information and belief” at trial in this
13 matter. Instead, she must offer evidence that the class members in fact devoted in excess of 50%
14 of their time to nonexempt functions. As explained above, this evidence must be offered on a
15 case-by-case basis. E.g., 29 C.F.R. § 541.201(b)(2); see Silva v. Block, 49 Cal. App. 4th at 352.
16 Those who do work in excess of this 50% yardstick may be entitled to overtime pay. However,
17 those who do not work in excess of this yardstick most assuredly are not entitled to overtime pay,
18 and should not be allowed a windfall recovery simply by virtue of boilerplate allegations that
19 contravene established wage and hour law. Coyote’ demurrer to Roadrunner’ class action
20 allegations must be sustained without leave to amend accordingly. See also, Kennedy v. Baxter
21 Healthcare Corp., 43 Cal. App. 4th 799, 808 n.4 (1996) (sustaining trial court’s demurrer to class
22 allegations where issues of fact and law peculiar to each putative class member preclude
23 reasonable possibility that plaintiffs could establish community of interest among potential class
24 members).

25 B. The Second Cause of Action Fails to State A Cause of Action For Unfair
26 Competition, And is Uncertain, Because Roadrunner Cannot Recover Damages For Unfair
27 Competition And Has Not Alleged Standing To Recover Any Other Form of Relief.

1 As noted above, Roadrunner claims in her second cause of action that Coyote' failure to
2 pay overtime constitutes an unfair business practice in violation of Business & Professions Code
3 Section 17200, which "provides an unfair advantage over defendants' [sic] competitors."
4 (Complaint 19.) That much of her claim is clear. However, things become considerably muddier
5 upon consideration of Roadrunner' prayer that she, "and other similarly situated members of the
6 general public" are entitled to restitution and disgorgement of "all monies withheld, acquired
7 and/or converted by [Coyote]; and that a receiver should be appointed "as necessary."
8 (Complaint 19.) It is unclear whether "monies withheld, acquired or converted" refers to the
9 overtime wages Coyote allegedly failed to pay its managers, or whether this phrase refers to some
10 other measure of damages. Accordingly, Coyote demurs to this cause of action for two related
11 reasons.

12 First, to the extent that Roadrunner seeks to use Section 17200 to recover unpaid wages,
13 her action is barred as a matter of law. As this court is well aware, Business & Professions Code
14 Section 17200 authorizes, among other things, actions for restitution or injunctive relief for
15 business practices that are found to be unlawful, unfair or fraudulent. Cal. Bus. & Prof. Code §
16 17200. Section 17200 does not authorize recovery of monetary damages by private litigants.
17 E.g., *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 774 (1989). It is
18 settled in California that "amounts recoverable as wrongfully withheld payments of salary . . . are
19 damages" within the meaning of Civil Code's damages provisions. E.g., *Olson v. Cory* 35 Cal.
20 3d 390, 402 (1983); *Sanders v. City of Los Angeles*, 3 Cal. 3d 252, 262-263 (1970). Hence,
21 Roadrunner cannot use Section 17200 to recover back wages for overtime payments allegedly
22 due, regardless of whether she purports to seek "damages" or "restitution" or "disgorgement."
23 See *Californians for Population Stabilization v. Hewlett Packard Co.*, 58 Cal. App. 4th 273, 295
24 (1997) ("unpaid wages are economic damages which are unavailable in a section 17200 action");
25 *Tippett v. Terich*, 37 Cal. App. 4th 1517, 1536-37 (1995). But see, *Cortez v. Purolator Air*
26 *Filtration Products Co.*, 64 Cal. App. 4th 882, review granted, 78 Cal. Rptr. 2d 702 (1998).

27 Second, to the extent that Roadrunner seeks to use Section 17200 to recover "monies"
28 arising from injuries allegedly sustained by "defendants' [sic] competitors," her complaint is

1 barred for lack of standing. As explained above, Roadrunner alleges that she was employed by
2 Coyote, and it is in this employee capacity that she purports to recover unpaid overtime on behalf
3 of other similarly situated employees. (Complaint 1, 9 12, 16.) Accordingly, Roadrunner clearly
4 was not in competition with Coyote, and does not have standing to seek disgorgement of any
5 other form of “monies” on behalf of the Company’s competitors, let alone the general public. See
6 Plotkin v. Tanner’s Vacuums, 53 Cal. App. 3d 454, 460 (1975)

7 IV. CONCLUSION

8 For all of the foregoing reasons, Coyote hereby requests that its demurrer be sustained
9 without leave to amend.

10 Dated: December _____, 2002

11 JOE BLACK
12 MORR & GRAND LLP

13 By: _____
14 Joe Black

15 Attorneys for Defendants
16 COYOTE EXPLOSIVES, ET AL.