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9 **SUPERIOR COURT OF CALIFORNIA,**
10 **SANTA CLARA COUNTY**

11 **SHAHAB HAKIM, CARLOS HERNANDEZ,**
12 individually and on behalf of other members
13 of the general public similarly situated,

NO. CV 816332

FIRST AMENDED COMPLAINT

[CLASS ACTION]

14 Plaintiffs,

15 vs.

16 **BOSTON MARKET CORPORATION,**
17 and Does 1 thru 50, inclusive,

1. Violations of Labor Code
2. Violation of B&P § 17200

18 Defendants.
19 _____/

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21 **FIRST CAUSE OF ACTION**

22 COME NOW, Plaintiffs, individuals over the age of eighteen (18), and bring this
23 challenge to Defendant's lucrative, repressive and unlawful business practices on behalf of
24 themselves and a class of all others similarly situated and for a Cause of Action against
25 Defendants, BOSTON MARKET CORPORATION and DOES 1-50, inclusive, (hereinafter
26 Defendants) and each of them, allege as follows:
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1 approximately July 2000. With respect to Northern California, the allegations in this
2 Complaint are limited to all times after May 26, 2000, the closing date of GOLDEN
3 RESTAURANT OPERATIONS, INC.'s asset purchase of the Boston Market chain out of the
4 In Re: BCE West, L.P., bankruptcy proceedings in the United States Bankruptcy Court for the
5 District of Arizona (Case No. B98-12547-ECF-CGF through 98-12570-ECF-CGC). With
6 respect to Southern California, the allegations in this Complaint are limited to all times after
7 December 27, 2000, the closing date of BOSTON MARKET CORPORATION'S asset
8 purchase of the Boston Market chain out of the In Re: Boston West, L.L.C., bankruptcy
9 proceedings in the United States Bankruptcy Court for the Central District of California, Santa
10 Ana Division, (Case No. SA 98-25243-LR).
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13 **4.**

14 Plaintiffs are informed and believe and thereon allege that all times herein mentioned
15 Defendants and Does 1 through 50, are and were corporations, business entities, individuals
16 and partnerships, licensed to do business and actually doing business in the State of California,
17 Santa Clara County. Defendants own and operate an industry, business and establishment in
18 approximately 56 separate geographic locations within the State of California, including within
19 Santa Clara County, for the purpose of selling food. As such, and based upon all the facts and
20 circumstances incident to Defendants' business in California, Defendants are subject to
21 California Labor Code Section 1194, et seq., California Business and Professions Code Section
22 17200, et seq., (Unfair Practices Act) and the applicable wage order(s) issued by the Industrial
23 Welfare Commission.
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5.

Plaintiffs do not know the true names or capacities, whether individual, partner or corporate, of the Defendants sued herein as DOES 1 through 50, inclusive, and for that reason, said Defendants are sued under such fictitious names, and Plaintiffs pray leave to amend this complaint when the true names and capacities are known. Plaintiffs are informed and believe and thereon allege that each of said fictitious Defendants was responsible in some way for the matters alleged herein and proximately caused Plaintiffs and members of the general public and the class to be subject to the illegal employment practices, wrongs and injuries complained of herein.

6.

At all times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter alleged to have been done by the named Defendants; and furthermore, the Defendants, and each of them, were the agents, servants and employees of each of the other Defendants, as well as the agents of all Defendants, and at all times herein mentioned, were acting within the course and scope of said agency and employment.

7.

At all times herein mentioned, Defendants, and each of them, were members of, and engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

8.

At all times herein mentioned, the acts and omissions of various Defendants, and each of them, concurred and contributed to the various acts and omissions of each and all of the other Defendants in proximately causing the injuries and damages as herein alleged.

1 **9.**

2 At all times herein mentioned, Defendants, and each of them, ratified each and every act
3 or omission complained of herein. At all times herein mentioned, the Defendants, and each of
4 them, aided and abetted the acts and omissions of each and all of the other Defendants in
5 proximately causing the damages as herein alleged. Further, at all times mentioned herein, the
6 wage and hour related compensation policies of Defendants' restaurant locations in California
7 are and were dictated by, controlled by, and ratified by the Defendants herein and each of them.
8

9 **FACTUAL ALLEGATIONS**

10 **10.**

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12 Plaintiffs and all members of the class identified herein were regularly scheduled as a
13 matter of uniform company policy to work and in fact worked as salaried restaurant employees
14 in excess of eight hours per workday and/or in excess of forty hours per workweek without
15 receiving straight time or overtime compensation for such overtime hours worked in violation
16 of California Labor Code Section 1194 and the applicable California Industrial Welfare
17 Commission wage order(s). Plaintiffs and the other members of the class were improperly and
18 illegally mis-classified by Defendants as "exempt" employees when, in fact, they were "non-
19 exempt" employees according to California law. Plaintiffs and the other members of the class
20 have the right to be compensated by Defendants at the appropriate compensatory wage rate for
21 said work heretofore performed, consisting of the straight time rate plus the appropriate
22 overtime premium as mandated by California law.
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24

25 **11.**

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27 This complaint is brought by Plaintiffs pursuant to California Code of Civil Procedure
28 Section 382 on behalf of a class. All claims alleged herein arise under California law for which

1 Plaintiffs seek relief authorized under California law. The class is comprised of, and defined
2 as: All current and former California based salaried non-exempt restaurant employees who
3 worked overtime for Defendants from time Defendants emerged from bankruptcy on or about
4 May 26, 2000 up to the time the class is certified, yet were not paid overtime. The members of
5 the class are so numerous that joinder of all members would be impractical, if not impossible.
6 The members of the class are readily ascertainable by a review of Defendants' records. Further,
7 the subject matter of this action both as to factual matters and as to matters of law, are such that
8 there are questions of law and fact common to the class which predominate over questions
9 affecting only individual members including, among other things, the following:
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12 a. Statistically, one hundred percent of the class members were paid on a salary
13 basis with no overtime compensation paid for work accomplished in excess of forty hours per
14 week, or eight hours per day. Plaintiffs are informed and believe and based thereon allege that
15 Defendants and each of them have failed to meet the requirements for establishing the
16 exemption because all class members (1) regularly spent more than 50% of their time
17 performing non-exempt work, (2) did not customarily and regularly exercise discretion and
18 independent judgment, (3) did not have the authority to hire or fire or make meaningful
19 recommendations regarding same, and, (4) did not customarily and regularly supervise at least
20 two employees or the equivalent. In primarily engaging in non-exempt work, Plaintiffs and the
21 class, at all times relevant, met the realistic expectations of Defendants and each of them. Thus,
22 Plaintiffs and the class members were not exempt from the overtime requirements of California
23 law for these reasons.
24
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26 b. Defendants have a uniform and consistent policy and practice concerning duties
27 and responsibilities of the class members which required that the class members both work
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1 overtime without pay and regularly spend more than 50% of their time performing non-exempt
2 tasks. Further, Defendants dispensed misinformation amongst the class members to the effect
3 that salaried restaurant employees are not entitled to overtime compensation under Defendants'
4 labor policies and practices and under California law.
5

6 c. Defendants have a uniform and consistent policy and practice concerning duties
7 and responsibilities of the class members such that members do not regularly and customarily
8 exercise discretion and independent judgment.

9 d. The duties and responsibilities of the salaried restaurant positions at Defendants'
10 restaurant locations were substantially similar from restaurant to restaurant, and, employee to
11 employee. Further, any variations in job activities between the different individuals in these
12 positions are legally insignificant to the issues presented by this action since the central facts
13 remain, to wit, these employees performed non-exempt work in excess of 50% of the time in
14 their workday, these employees did not regularly exercise discretion and independent
15 judgment, these employees' work routinely included work in excess of 40 hours per week
16 and/or 8 hours per day and they were not, and have never been, paid overtime compensation for
17 their work.
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21 **12.**

22 Plaintiffs and members of the class identified herein were discharged by Defendants or
23 voluntarily quit, and did not have a written contract for employment. The Defendants, in
24 violation of California Labor Code Sections 201 and 202, et seq., respectively, had a consistent
25 and uniform policy, practice and procedure of willfully failing to pay the earned and unpaid
26 wages of all such former employees. The Defendants have willfully failed to pay the earned
27 and unpaid wages of such individuals, including, but not limited to, straight time, overtime,
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1 vacation time, and other wages earned and remaining uncompensated according to amendment,
2 or proof. Plaintiffs and other members of the class did not secret or absent themselves from
3 Defendants nor refuse to accept the earned and unpaid wages from Defendants. Accordingly,
4 Defendants are liable for waiting time penalties for the unpaid wages pursuant to California
5 Labor Code Section 203.
6

7 **13.**

8 As a pattern and practice, in violation of the aforementioned labor laws and wage
9 orders, Defendants knowingly and intentionally did not maintain any records or furnish any
10 records to the class pertaining to when Plaintiffs and the members of the class began and ended
11 each work period, meal period, the total daily hours worked, and the total hours worked per pay
12 period and applicable rates of pay in violation of California Labor Code Sections 226 and 1174
13 thereby causing injury to the class. Accordingly, Defendants and each of them are liable for
14 civil penalties to Plaintiffs and the class pursuant to Labor Code sections 226 and 1174.5.
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17 **14.**

18 There are predominant common questions of law and fact and a community of interest
19 amongst Plaintiffs and the claims of the absent class members concerning whether Defendants'
20 regular business custom and practice of requiring substantial "overtime" work and not paying
21 for said work according to the overtime mandates of California law is, and at all times herein
22 mentioned was, in violation of California Labor Code Sections 1194, et seq., the Unfair
23 Practices Act and the applicable California Industrial Welfare Commission wage orders
24 applicable to Defendants' business. Defendants' employment policies and practices wrongfully
25 and illegally failed to compensate salaried restaurant employees for substantial overtime
26 compensation earned as required by California law.
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Plaintiffs' claims are typical of the claims of all members of the class. Plaintiffs, as representative parties, will fairly and adequately protect the interests of the class by vigorously pursuing this suit through attorneys who are skilled and experienced in handling civil litigation of this type.

16.

The California Labor Code and wage order provisions upon which Plaintiffs asserts these claims are broadly remedial in nature. These laws and labor standards serve an important public interest in establishing minimum working conditions and standards in California. These laws and labor standards protect the average working employee from exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting onerous terms and conditions of employment. The nature of this action and the format of laws available to Plaintiffs and members of the class identified herein make the class action format a particularly efficient and appropriate procedure to redress the wrongs alleged herein. If each employee were required to file an individual lawsuit, the corporate Defendants would necessarily gain an unconscionable advantage since they would be able to exploit and overwhelm the limited resources of each individual class member with their vastly superior financial and legal resources. Requiring each class member to pursue an individual remedy would also discourage the assertion of lawful claims by employees who would be disinclined to file an action against their current or former employer for real and justifiable fear of retaliation and permanent damage to their careers at subsequent employment.

1 **17.**

2 The prosecution of separate actions by the individual class members, even if possible,
3 would create a substantial risk of (1) inconsistent or varying adjudications with respect to
4 individual class members against the Defendants and which would establish potentially
5 incompatible standards of conduct for the Defendants, and/or (2) adjudications with respect to
6 individual class members which would, as a practical matter, be dispositive of the interests of
7 the other class members not parties to the adjudications or which would substantially impair or
8 impede the ability of the class members to protect their interests. Further, the claims of the
9 individual members of the class are not sufficiently large to warrant vigorous individual
10 prosecution considering all of the concomitant costs and expenses.
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12 **18.**

13 Such a pattern, practice and uniform administration of corporate policy regarding illegal
14 employee compensation, as described herein, is unlawful and creates an entitlement to recovery
15 by Plaintiffs and the class identified herein, in a civil action, for the unpaid balance of the full
16 amount of the straight time compensation and overtime premiums owing, including interest
17 thereon, penalties, reasonable attorneys fees, and costs of suit according to the mandate of
18 California Labor Code Section 1194, et seq.
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22 **19.**

23 Proof of a common business practice or factual pattern, of which the named Plaintiffs'
24 experience is representative, will establish the right of each member of the plaintiff class to
25 recovery on the causes of action alleged herein.
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1 **20.**

2 The plaintiff class is entitled in common to a specific fund with respect to the overtime
3 compensation monies illegally and unfairly retained by Defendants. The plaintiff class is
4 entitled in common to restitution and disgorgement of those funds being improperly withheld
5 by Defendants. This action is brought for the benefit of the entire class and will result in the
6 creation of a common fund.
7

8 WHEREFORE, Plaintiffs on their own behalf and on behalf of the members of the
9 class, pray for judgment as hereinafter set forth.
10

11 **SECOND CAUSE OF ACTION**

12 COME NOW, Plaintiffs, individually and on behalf of both the class and the general
13 public and as a second, separate and distinct cause of action against Defendants, and each of
14 them, allege as follows:
15

16 **21.**

17 Plaintiffs herein repeat and re-allege as though fully set forth at length each and every
18 paragraph of this Complaint, excepting those paragraphs which are inconsistent with this cause
19 of action for relief regarding Defendants' violations of California Business and Professions
20 Code 17200 et seq. (Unfair Practices Act).
21

22 **22.**

23 At all times herein mentioned Defendants, and each of them, acting as the employer,
24 individually or through officers, directors, agents or employees of another have (1) required or
25 caused Plaintiffs and the class to work for longer hours than those fixed or under conditions
26 prohibited by Industrial Welfare Commission wage orders applicable to Defendants' business,
27 (2) paid or caused to be paid to Plaintiffs and the class less than the minimum fixed by an
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1 Industrial Welfare Commission order applicable to Defendants' business, and (3) violated,
2 refused, or neglected to comply with any provision of Part 4, Chapter 1 of the Labor Code
3 beginning at section 1171 or any order or ruling of the Industrial Welfare Commission. As a
4 result of the foregoing and the acts complained of herein, Defendants, and each of them, are
5 guilty of violating California Labor Code Section 1199. In addition to the other violations of
6 the law set forth in the First Cause of Action, Defendants' violation of California Labor Code
7 Section 1199 serves as a further basis for Defendants' liability under California Business &
8 Professions Code section 17200, et seq.

11 **23.**

12 Defendants, and each of them, have engaged in unfair business practices in California
13 by practicing, employing and utilizing the employment practices as outlined herein, to wit, by
14 requiring their salaried restaurant employees to perform the labor services without overtime
15 compensation. Defendants' utilization of such unfair business practices constitutes unfair
16 competition and provides an unfair advantage over Defendants' competitors. Plaintiffs, and
17 other similarly situated members of the general public, seek full restitution and disgorgement of
18 monies, as necessary and according to proof, to restore any and all monies withheld, acquired
19 and/or converted by the Defendants by means of the unfair practices complained of herein.
20 Plaintiffs seek, on their own behalf and on behalf of the general public, the appointment of a
21 receiver, as necessary.

24 **24.**

25 Plaintiffs are informed and believe and on that basis allege that at all times herein
26 mentioned Defendants have engaged in unlawful, deceptive and unfair business practices, as
27 proscribed by California Business and Professions Code Section 17200 et seq., including those
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1 set forth in Paragraphs 10 through 13, inclusive, thereby depriving Plaintiffs and other
2 members of the general public the minimum working condition standards and conditions due to
3 them under the California labor laws and Industrial Welfare Commission wage orders as
4 specifically described herein.
5

6 **25.**

7 Plaintiffs, and all persons similarly situated, are further entitled to and do seek a both a
8 declaration that the above-described business practices are unfair, unlawful and/or fraudulent
9 and injunctive relief restraining Defendants from engaging in any of such business practices in
10 the future. Such misconduct by Defendants, unless and until enjoined and restrained by order
11 of this Court, will cause great and irreparable injury to all members of the class in that the
12 Defendants will continue to violate California law, represented by labor statutes and IWC wage
13 orders, unless specifically ordered to comply with same. This expectation of future violations
14 will require current and future employees to repeatedly and continuously seek legal redress in
15 order to gain compensation to which they are entitled under California law. Plaintiffs have no
16 other adequate remedy at law to insure future compliance with the California labor laws and
17 wage orders alleged to have been violated herein.
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20 WHEREFORE, Plaintiffs on their own behalf and on behalf of the members of the class
21 and the general public, pray for judgment as follows:
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- 23 1. For an order certifying the proposed class;
- 24 2. Upon the First Cause of Action, for consequential damages according to proof
25 as set forth in California Labor Code Section 1194, et seq. (and the applicable California
26 Industrial Welfare Commission wage orders) related to overtime wages due and owing;
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1 3. Upon the First Cause of Action, for waiting time penalties according to proof
2 pursuant to California Labor Code Section 203;

3 4. Upon the First Cause of Action, for civil penalties according to proof pursuant to
4 California Labor Code Sections 226 and 1174.5;

5 5. Upon the Second Cause of Action, that Defendants be ordered to show cause
6 why they should not be enjoined and ordered to comply with the applicable California
7 Industrial Welfare Commission wage orders related to payment of overtime compensation and
8 record keeping for Defendants' salaried restaurant employees who are primarily engaged in
9 non-exempt work and work more than 40 hours per week or 8 hours per day; and for an order
10 enjoining and restraining Defendants and their agents, servants and employees related thereto;

11 6. Upon the Second Cause of Action, for a declaratory judgment and a decree
12 adjudging and decreeing that Plaintiffs and the members of the class have regularly worked
13 compensable overtime; further, that the work performed by Plaintiffs and the members of the
14 class is subject to overtime compensation requirements and/or is in excess of 40 hours per week
15 and/or 8 hours a day, and that Plaintiffs and the members of the class are entitled to overtime
16 compensation for said work;

17 7. Upon the Second Cause of Action, for restitution to Plaintiffs and other similarly
18 effected members of the general public (and disgorgement from Defendants) of all funds
19 unlawfully acquired by Defendants by means of any acts or practices declared by this Court to
20 be violative of the mandate established by California Business and Professions Code section
21 17200 et seq.;

22 8. Upon the Second Cause of Action, for the appointment of a receiver to receive,
23 manage and distribute any and all funds disgorged from Defendants determined to have been
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