

1 Law Offices of Michael Heath
2 Michael Heath SBN 196747
3 Howard Olsen SBN 255888
4 3251 Steiner Street
5 San Francisco, CA 94123
6 Phone 415-931-4207
7 Fax 415-931-4117

8 Attorneys for Defendants

9
10 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO

11 UNLIMITED CIVIL DIVISION

12 IAN D'SA, MARIO DIAZ, JORGE)
13 VALDIVIA, and FRANCISCO ROMERO on) Case No: CGC-15-544578
14 behalf of themselves and all other similarly)
15 situated,) ANSWER TO FIRST AMENDED
16 Plaintiffs,) COMPLAINT BY DEFENDANTS AMBER
17 v.) INDIA CORPORATION, AMBER INDIA
18) COMMERCIAL, INC., VIJAY BIST, VIJAY
19) KUMAR AND AMBER INDIA ENTERPRISE,
20) INC
21 AMBER INDIA CORPORATION, AMBER)
22 INDIA COMMERCIAL, INC., AMBER INDIA)
23 ENTERPRISE, INC., VIJAY BIST, VIJAY)
24 KUMAR, and DOES 1-25,)
25 Defendants .

26
27 Defendants AMBER INDIA CORPORATION, AMBER INDIA COMMERCIAL, INC., and
28 AMBER INDIA ENTERPRISE, INC., VIJAY BIST and VIJAY KUMAR answer plaintiffs'
complaint as follows:

Defendants deny each and every, all and singular, generally and specifically, the allegations contained in the Complaint, and each and every part thereof. Defendants further deny that Plaintiffs have been damaged in the sums alleged, or in any sum or sums whatsoever.

1
2
3 **AFFIRMATIVE DEFENSES**

4 **FIRST AFFIRMATIVE DEFENSE**

5 The complaint fails to state facts sufficient to constitute a cause of action against these
6 answering Defendants.

7 **SECOND AFFIRMATIVE DEFENSE**

8 The comparative fault of Plaintiffs and others, and such conduct on the part of Plaintiffs and
9 others, proximately contributed to the damages, if any, suffered by Plaintiffs.

10 **THIRD AFFIRMATIVE DEFENSE**

11 Plaintiffs have failed to adequately mitigate their damages as alleged herein.

12 **FOURTH AFFIRMATIVE DEFENSE**

13 Plaintiffs' purported causes of action are barred in whole or in part by the doctrine of waiver.

14 **FIFTH AFFIRMATIVE DEFENSE**

15 Plaintiffs are guilty of laches in that they have inexcusably and unreasonably delayed the
16 filing of this action thereby causing substantial prejudice to Defendants.

17 **SIXTH AFFIRMATIVE DEFENSE**

18 Plaintiffs consented to any conduct complained of against any defendant. Plaintiffs' consent
19 which is both express and implied, bars any recovery herein.

20 **SEVENTH AFFIRMATIVE DEFENSE**

21 Plaintiffs' actions are barred by the applicable statute of limitations including, but not limited
22 to, California Code of Civil Procedure Sections 337, 338, 339, 340, and 342 and California Civil
23 Code Section 1783.

24 **EIGHTH AFFIRMATIVE DEFENSE**

25 These answering defendants allege that by reason of the acts, omissions, or conduct of
26 plaintiffs and/or agents, or by reason of their ratification of the acts, omissions, or conduct of others,
27
28

1 plaintiff is barred from any relief and/or the recovery of damages under the doctrine of waiver and/or
2 estoppel.

3 **NINTH AFFIRMATIVE DEFENSE**

4 Plaintiffs' purported causes of action are barred in whole or in part by Plaintiffs' own
5 improper conduct, acts and omissions and therefore they are equitably estopped from recovering on
6 their claims.

7 **TENTH AFFIRMATIVE DEFENSE**

8 Plaintiffs' purported causes of action are barred in whole or in part by the doctrine of unclean
9 hands.
10

11 **ELEVENTH AFFIRMATIVE DEFENSE**

12 Each of Plaintiffs' purported causes of action are barred because any actions and/or omissions
13 attributable to Defendants were, at all times, privileged or justified.

14 **TWELFTH AFFIRMATIVE DEFENSE**

15 Plaintiffs are not entitled to recover any punitive, double, or exemplary damages because
16 Plaintiffs have failed to plead and cannot prove facts sufficient to support allegations of oppression,
17 fraud and/or malice.

18 **THIRTEENTH AFFIRMATIVE DEFENSE**

19 Plaintiffs' complaint is barred because any alleged failure of Defendants to pay overtime was
20 not unlawful, unfair, or fraudulent. At all times relevant and material herein, the Plaintiffs to this
21 action either were either exempt employees or were paid any overtime to which they were entitled.

22 **FOURTEENTH AFFIRMATIVE DEFENSE**

23 Plaintiffs' complaint is barred because any alleged failure of Defendants to provide meal
24 and/or rest breaks was not unlawful, unfair, or fraudulent. At all times relevant and material herein,
25 the Plaintiffs to this action either were either exempt employees or were provided with all meal
26 and/or rest breaks to which they were entitled
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' have failed to exhaust all of their administrative remedies prior to bringing this action.

SIXTEENTH AFFIRMATIVE DEFENSE

None of the defendants, including but not limited to the individually named defendants VIJAY BIST and VIJAY KUMAR, caused any Labor Code violations to occur in the manner alleged in the complaint.

SEVENTEENTH AFFIRMATIVE DEFENSE


Common issues of law and/or fact do not exist in the manner alleged in the complaint, and thus class action treatment is not appropriate in litigating this matter.

EIGHTEENTH AFFIRMATIVE DEFENSE

These answering defendants presently have insufficient knowledge or information on which to form a belief as to whether it may have additional, but as yet unstated, affirmative defenses available, and accordingly, these answering defendants reserve the right to assert additional defenses in the event discovery indicates the same would be appropriate.

WHEREFORE, defendants, AMBER INDIA CORPORATION, AMBER INDIA COMMERCIAL, INC., AMBER INDIA ENTERPRISE, INC., VIJAY BIST and VIJAY KUMAR pray that Plaintiffs take nothing by this complaint, that Defendants be awarded their costs of suit, including reasonable attorney's fees; and for such other and further relief as the Court may deem proper.

Dated: 12-1-2015

By: 

Michael Heath
Attorney for Defendants

PROOF OF SERVICE

CASE NAME: D'SA v AMBER INDIA CORPORATION, et al.

CASE NO.: CGC-15-544578

I, the undersigned, declare that I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action. My address is 3251 Steiner Street, San Francisco, CA 94123.

On 12/01/2015, I served the following documents:

- 1.) ANSWER TO FIRST AMENDED COMPLAINT OF AMBER INDIA CORPORATION, AMBER INDIA COMMERCIAL, INC., and AMBER INDIA ENTERPRISE, INC.

on the party addressed as follows:

Richard Hoyer, David C. Lipps
Hoyer & Associates
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

- BY MAIL by placing a true copy of each document listed above in a sealed envelope addressed to the parties listed above and/or on the attachment hereto and placing it for collection in my office for deposit with the United States Postal Service. I am readily familiar with the regular business practices of my office and attest that envelopes so placed for collection are deposited on the same business day with the United States Postal Service.
- BY FACSIMILE on this date from the fax number (415) 931-4117 the document(s) listed above to the following fax number: (415) xxx-xxxx. The transmission was completed before 4:00 p.m. and was reported complete and without error. The transmitting fax machine complies with 28 U.S.C. §1746.
- BY CALIFORNIA OVERNIGHT by placing a true copy of each document listed above in a sealed envelope for delivery via CALIFORNIA OVERNIGHT to the addressee(s) listed above and/or on the attachment hereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on 12/01/2015, San Francisco, California.


Howard Olsen

1
2 Law Offices of Michael Heath
3 Michael Heath SBN 196747
4 Howard Olsen SBN 255888
5 3251 Steiner Street
6 San Francisco, CA 94123
7 Phone 415-931-4207
8 Fax 415-931-4117

9 Attorneys for Defendants

10 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL DIVISION

12 IAN D'SA, MARIO DIAZ, JORGE)
13 VALDIVIA, and FRANCISCO ROMERO on) Case No: CGC-15-544578
14 behalf of themselves and all other similarly)
15 situated,) ANSWER TO FIRST AMENDED
16 Plaintiffs,) COMPLAINT BY DEFENDANTS AMBER
17) INDIA CORPORATION, AMBER INDIA
18) COMMERCIAL, INC., VIJAY BIST, VIJAY
19 v.) KUMAR AND AMBER INDIA ENTERPRISE,
20) INC
21)
22 AMBER INDIA CORPORATION, AMBER)
23 INDIA COMMERCIAL, INC., AMBER INDIA)
24 ENTERPRISE, INC., VIJAY BIST, VIJAY)
25 KUMAR, and DOES 1-25,)
26 Defendants .

27
28
29 Defendants AMBER INDIA CORPORATION, AMBER INDIA COMMERCIAL, INC., and
30 AMBER INDIA ENTERPRISE, INC., VIJAY BIST and VIJAY KUMAR answer plaintiffs'
31 complaint as follows:

32 Defendants deny each and every, all and singular, generally and specifically, the allegations
33 contained in the Complaint, and each and every part thereof. Defendants further deny that Plaintiffs
34 have been damaged in the sums alleged, or in any sum or sums whatsoever.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state facts sufficient to constitute a cause of action against these answering Defendants.

SECOND AFFIRMATIVE DEFENSE

The comparative fault of Plaintiffs and others, and such conduct on the part of Plaintiffs and others, proximately contributed to the damages, if any, suffered by Plaintiffs.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have failed to adequately mitigate their damages as alleged herein.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' purported causes of action are barred in whole or in part by the doctrine of waiver.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs are guilty of laches in that they have inexcusably and unreasonably delayed the filing of this action thereby causing substantial prejudice to Defendants.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs consented to any conduct complained of against any defendant. Plaintiffs' consent which is both express and implied, bars any recovery herein.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' actions are barred by the applicable statute of limitations including, but not limited to, California Code of Civil Procedure Sections 337, 338, 339, 340, and 342 and California Civil Code Section 1783.

EIGHTH AFFIRMATIVE DEFENSE

These answering defendants allege that by reason of the acts, omissions, or conduct of plaintiffs and/or agents, or by reason of their ratification of the acts, omissions, or conduct of others,

1 plaintiff is barred from any relief and\or the recovery of damages under the doctrine of waiver and\or
2 estoppel.

3 **NINTH AFFIRMATIVE DEFENSE**

4 Plaintiffs' purported causes of action are barred in whole or in part by Plaintiffs' own
5 improper conduct, acts and omissions and therefore they are equitably estopped from recovering on
6 their claims.

7 **TENTH AFFIRMATIVE DEFENSE**

8 Plaintiffs' purported causes of action are barred in whole or in part by the doctrine of unclean
9 hands.
10

11 **ELEVENTH AFFIRMATIVE DEFENSE**

12 Each of Plaintiffs' purported causes of action are barred because any actions and/or omissions
13 attributable to Defendants were, at all times, privileged or justified.

14 **TWELFTH AFFIRMATIVE DEFENSE**

15 Plaintiffs are not entitled to recover any punitive, double, or exemplary damages because
16 Plaintiffs have failed to plead and cannot prove facts sufficient to support allegations of oppression,
17 fraud and/or malice.

18 **THIRTEENTH AFFIRMATIVE DEFENSE**

19 Plaintiffs' complaint is barred because any alleged failure of Defendants to pay overtime was
20 not unlawful, unfair, or fraudulent. At all times relevant and material herein, the Plaintiffs to this
21 action either were either exempt employees or were paid any overtime to which they were entitled.

22 **FOURTEENTH AFFIRMATIVE DEFENSE**

23 Plaintiffs' complaint is barred because any alleged failure of Defendants to provide meal
24 and/or rest breaks was not unlawful, unfair, or fraudulent. At all times relevant and material herein,
25 the Plaintiffs to this action either were either exempt employees or were provided with all meal
26 and/or rest breaks to which they were entitled
27
28

1
2 **FIFTEENTH AFFIRMATIVE DEFENSE**

3 Plaintiffs' have failed to exhaust all of their administrative remedies prior to bringing this
4 action.

5 **SIXTEENTH AFFIRMATIVE DEFENSE**

6 None of the defendants, including but not limited to the individually named defendants
7 VIJAY BIST and VIJAY KUMAR, caused any Labor Code violations to occur in the manner alleged
8 in the complaint.
9

10 **SEVENTEENTH AFFIRMATIVE DEFENSE**

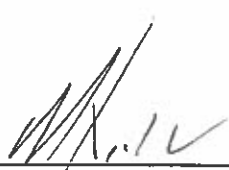
11 Common issues of law and/or fact do not exist in the manner alleged in the complaint, and
12 thus class action treatment is not appropriate in litigating this matter.

13 **EIGHTEENTH AFFIRMATIVE DEFENSE**

14 These answering defendants presently have insufficient knowledge or information on which
15 to form a belief as to whether it may have additional, but as yet unstated, affirmative defenses
16 available, and accordingly, these answering defendants reserve the right to assert additional defenses
17 in the event discovery indicates the same would be appropriate.
18

19 WHEREFORE, defendants, AMBER INDIA CORPORATION, AMBER INDIA
20 COMMERCIAL, INC., AMBER INDIA ENTERPRISE, INC., VIJAY BIST and VIJAY KUMAR
21 pray that Plaintiffs take nothing by this complaint, that Defendants be awarded their costs of suit,
22 including reasonable attorney's fees; and for such other and further relief as the Court may deem
23 proper.
24

25 Dated: 12-1-2015

26 By: 
27 Michael Heath
28 Attorney for Defendants

PROOF OF SERVICE

CASE NAME: D'SA v AMBER INDIA CORPORATION, et al.

CASE NO.: CGC-15-544578

I, the undersigned, declare that I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action. My address is 3251 Steiner Street, San Francisco, CA 94123.

On 12/01/2015, I served the following documents:

- 1.) ANSWER TO FIRST AMENDED COMPLAINT OF AMBER INDIA CORPORATION, AMBER INDIA COMMERCIAL, INC., and AMBER INDIA ENTERPRISE, INC.

on the party addressed as follows:

Richard Hoyer, David C. Lipps
Hoyer & Associates
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

- BY MAIL by placing a true copy of each document listed above in a sealed envelope addressed to the parties listed above and/or on the attachment hereto and placing it for collection in my office for deposit with the United States Postal Service. I am readily familiar with the regular business practices of my office and attest that envelopes so placed for collection are deposited on the same business day with the United States Postal Service.
- BY FACSIMILE on this date from the fax number (415) 931-4117 the document(s) listed above to the following fax number: (415) xxx-xxxx. The transmission was completed before 4:00 p.m. and was reported complete and without error. The transmitting fax machine complies with 28 U.S.C. §1746.
- BY CALIFORNIA OVERNIGHT by placing a true copy of each document listed above in a sealed envelope for delivery via CALIFORNIA OVERNIGHT to the addressee(s) listed above and/or on the attachment hereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on 12/01/2015, San Francisco, California.


Howard Olsen

1 Law Offices of Michael Heath
Michael Heath SBN 196747
2 Howard Olsen SBN 255888
3251 Steiner Street
3 San Francisco, CA 94123
Phone 415-931-4207
4 Fax 415-931-4117

5 Attorney for Defendants

6
7
8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO
9 UNLIMITED CIVIL DIVISION


10
11 IAN D'SA, MARIO DIAZ, JORGE)
VALDIVIA, and FRANCISCO ROMERO on) Case No: CGC-15-544578
12 behalf of themselves and all other similarly)
situated,)
13) NOTICE OF ENTRY OF ORDER
Plaintiffs,)
14 v.)
15)
16 AMBER INDIA CORPORATION, AMBER)
INDIA COMMERCIAL, INC., AMBER INDIA)
17 ENTERPRISE, INC., VIJAY BIST, VIJAY)
KUMAR, and DOES 1-25,
18 Defendants.

19 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE THAT The Hon. Judge Ernest H. Goldsmith has signed the attached order.
21

22 DATED: 11/30/15

LAW OFFICES OF MICHAEL HEATH

23
24 
25 _____
Howard Olsen
Attorney for Defendants
26
27
28

1 Defendants' demurrer to the entire complaint on the basis that Plaintiffs have failed to plead
2 facts to support their class action claims is denied. Whenever there is a reasonable possibility that the
3 plaintiffs can plead a prima facie community of interest among class members, the preferred course is
4 to defer decision on the propriety of the class action until an evidentiary hearing has been held on the
5 appropriateness of class litigation. (See Canon U.S.A., Inc. v. Superior Court (1998) 68 Cal.App.4th
6 1) Plaintiffs have met their initial burden by pleading that Defendants have adopted a policy of
7 denying bussers and servers meal and rest breaks, failing to pay bussers and servers' compensation
8 for missed breaks, and manipulating bussers and servers' time records by deleting overtime hours in
9 order to avoid paying their employees' due wages. (First Amended Complaint paragraphs 11-19.)

10
11 Defendants' demurrer to the entire complaint, as it pertains to Defendant Kumar and
12 Defendant Bist individually, is sustained in part and denied in part. The demurrer to the entire
13 complaint, as it pertains to Defendant Kumar and Defendant Bist individually, is sustained as to all
14 causes of action, except the twelfth cause of action. Individuals cannot be held liable for failure to
15 pay wages merely on the basis of their status as corporate officers. (Reynolds v. Bement (2005) 36
16 Cal.4th 1075, 1086-1087.) Section 558 of the Labor Code does, however, allow for such individuals
17 to be held personally liable if they "cause" Labor Code violations to occur. (Helm v. Alderwoods
18 Grp. Inc. (2009) 696 F.Supp.2d 1057, 1074.) Here, Plaintiffs have alleged facts that Defendants
19 Kumar and Bist caused the labor violation to occur. (First Amended Complaint paragraphs 4.). Thus,
20 Defendants' demurrer to the twelfth cause of action, as it pertains to Defendant Kumar and Defendant
21 Bist individually, is denied. All Defendants shall file answers within 5 days of notice of entry of this
22 order.
23

24
25 Dated: NOV 24 2015

26
27 **ERNEST H. GOLDSMITH**
28 Judge of the Superior Court of California

APPROVED AS TO FORM:

Dated: November 17, 2015


David Lipps, attorney for Plaintiffs

PROOF OF SERVICE

CASE NAME: D'SA v AMBER INDIA CORPORATION, et al.

CASE NO.: CGC-15-544578

I, the undersigned, declare that I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action. My address is 3251 Steiner Street, San Francisco, CA 94123.

On 11/30/2015, I served the following documents:


NOTICE OF ENTRY OF ORDER

on the party addressed as follows:

Richard Hoyer, David C. Lipps
Hoyer & Associates
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

- BY MAIL** by placing a true copy of each document listed above in a sealed envelope addressed to the parties listed above and/or on the attachment hereto and placing it for collection in my office for deposit with the United States Postal Service. I am readily familiar with the regular business practices of my office and attest that envelopes so placed for collection are deposited on the same business day with the United States Postal Service.
- BY CALIFORNIA OVERNIGHT** by placing a true copy of each document listed above in a sealed envelope for delivery via CALIFORNIA OVERNIGHT to the addressee(s) listed above and/or on the attachment hereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on 11/30/2015, San Francisco, California.


Howard Olsen