

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GERALD SMITH, SAMIR RADY, and)	Case No. 07-2104 SC
FLORENTINO FIGUEROA on behalf of)	
themselves and all others)	
similarly situated,)	ORDER DENYING
)	DEFENDANT'S MOTION
Plaintiffs,)	FOR PARTIAL SUMMARY
)	<u>JUDGMENT</u>
v.)	
)	
CARDINAL LOGISTICS MANAGEMENT)	
CORPORATION, a North Carolina)	
Corporation, and Does 1 through)	
100, inclusive,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

The present matter comes before the Court on the Motion for Partial Summary Judgment ("Motion"), filed by Defendant Cardinal Logistics Management Corporation ("Cardinal" or "Defendant"). Docket No. 91. Plaintiffs Gerald Smith, Samir Rady, and Florentino Figueroa (collectively "Plaintiffs") filed an Amended Opposition and Defendant submitted a Reply.¹ Docket Nos. 116, 120. For the following reasons, the Court DENIES the Motion.

¹ Plaintiffs originally filed an Opposition on February 27, 2009. See Docket No. 97. The Court subsequently issued an order granting Plaintiffs' request for a continuance, and permitting Plaintiffs to file an Amended Opposition. See Docket No. 100.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 Cardinal is a North Carolina corporation that provides, in
4 part, truck delivery services to The Home Depot in California.
5 Hostetler Decl. ¶¶ 2-4.² Cardinal hired Plaintiffs as independent
6 contractors. Mem. in Supp. of Mot. at 3. Plaintiffs assert they
7 were misclassified by Cardinal, and that they were really
8 employees. First Am. Compl. ("FAC"), Docket No. 25, ¶¶ 1-8.

9 As part of Cardinal's recruitment process, Cardinal provided
10 Plaintiffs with Worksheets that detailed a driver's estimated
11 gross revenue or earnings, estimated operating expenses or
12 equipment charges that would be deducted from gross revenue, and
13 estimated net revenue or earnings. See Merklein Decl. ¶¶ 6-11,
14 Ex. 1 ("Earnings Worksheet Class A Daycab"), Ex. 2 ("Earnings
15 Worksheet Reno, NV"), Ex. 3 ("Earnings Worksheet San Francisco,
16 CA").³ The estimated operating expenses included charges for
17 leasing a truck, maintenance, various forms of insurance, and
18 fuel. See Earnings Worksheet Class A Daycab; Earnings Worksheet
19 Reno, NV; Earnings Worksheet San Francisco, CA.

20 After Plaintiffs began performing transportation services,
21 Cardinal provided them with weekly Settlement Sheets detailing the
22 gross compensation earned, the deducted expense items, and the net

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25 ² Tom Hostetler, Chief Executive Officer of Cardinal, filed a
26 declaration in support of the Motion. Docket No. 92 ("Mem. in
27 Supp. of Mot.") Ex. A.

28 ³ Hayden Lance Merklein, Vice President of Driver Development
 and Contractor Compliance for Cardinal, filed a declaration in
 support of the Motion. Mem. in Supp. of Mot. Ex. B.

1 compensation paid to the driver. See Merklein Decl. ¶¶ 12, Ex. 7
2 ("Figueroa Settlement Sheet"), Ex. 8 ("Rady Settlement Sheet");
3 Ex. 9 ("Smith Settlement Sheet"). Each driver was also provided
4 with a Settlement Detail Summary at the end of the year detailing
5 gross revenue earned, expenses incurred, and net compensation
6 paid. See Merklein Decl. ¶¶ 18-20, Ex. 10 ("Figueroa Settlement
7 Sheet Detail Summary"), Ex. 11 ("Rady Settlement Detail Summary"),
8 Ex. 12 ("Smith Settlement Detail Summary"). The expenses
9 deductions were typically between forty and fifty percent of gross
10 earnings. See Mem. in Supp. of Mot. at 4-5; Merklein Decl. ¶¶ 9-
11 11.

12 Under Cardinal's compensation system, the primary category of
13 earnings was the rate paid per delivery. Card Decl.⁴ Ex. 1 ("Dep.
14 of Brian Farris") at 58:11-60:12; Figueroa Settlement Sheet; Rady
15 Settlement Sheet; Smith Settlement Sheet. Payments for deliveries
16 were identified on Plaintiffs' Settlement Sheets by labels such as
17 "Flatbed stops," "Full truckload," or "Difficult Stop." Dep. of
18 Brian Farris at 58:11-60:12; Figueroa Settlement Sheet; Rady
19 Settlement Sheet; Smith Settlement Sheet. Plaintiffs were also
20 paid for "Delay" time, for "Carry In," if they had to carry
21 flooring or drywall into a customer's home, and for "Out of Area"
22 miles. Dep. of Brian Farris at 62:15-64:16. If a driver worked a
23 full six-day week, he or she was paid "Exclusive Use" pay. Id. at
24 64:17-65:23. Drivers were also paid a "Fuel Surcharge" based on

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26 ⁴ Kim E. Card, co-counsel for Plaintiffs and the certified
27 class, filed a declaration in support of the Amended Opposition.
28 Docket No. 118.

1 fuel prices. Id. at 120:16-124:2; Figueroa Settlement Sheet; Rady
2 Settlement Sheet; Smith Settlement Sheet. The total for these
3 categories of compensation was shown on the Settlement Sheets as
4 "Taxable Earnings." See Figueroa Settlement Sheet; Rady
5 Settlement Sheet; Smith Settlement Sheet.

6 At the end of the Settlement Sheets, there are "Settlement
7 Deductions" that were deducted from drivers' taxable earnings.
8 The deductions include a "Tractor Lease" payment, deductions for
9 fuel that was purchased using a "Comdata" card provided by
10 Cardinal, and deductions for truck maintenance, occupational and
11 accident insurance, liability insurance, accounting services, and
12 insurance for forklifts, which was referred to as "Bobtail
13 Insurance." See Figueroa Settlement Sheet; Rady Settlement Sheet;
14 Smith Settlement Sheet; see also Dep. of Brian Farris at 92:24-
15 93:11, 99:9-102:12, 103:19-25. In addition to these weekly
16 deductions, money was sometimes deducted from Plaintiffs'
17 Settlement Sheets for uniforms, merchandise damage, and property
18 damage claims. Dep. of Brian Farris at 104:1-3, 109:22-110:20.

19 **B. Procedural Background**

20 Plaintiffs filed the present class-action lawsuit in
21 California State Superior Court. Notice of Removal, Docket No. 1,
22 Ex. A. Cardinal removed the case to this Court. Id. Plaintiffs
23 assert the following causes of action against Cardinal: (1)
24 failure to reimburse for employee expenses in violation of
25 California Labor Code section 2802; (2) unfair competition in
26 violation of California Business and Professions Code section
27 17200 et seq.; (3) unjust enrichment; (4) declaratory relief; (5)

1 request for an accounting; and (6) civil penalties pursuant to the
2 Private Attorneys General Act of 2004, California Labor Code
3 section 2698 et seq. Id. ¶¶ 54-87. The Court granted Plaintiffs'
4 Motion to Strike Defendant's Third-Party Complaint. Docket No.
5 77. The Court granted Plaintiffs' Motion for Class Certification.
6 Docket No. 83. Defendant now moves for partial summary judgment
7 on Plaintiffs' first cause of action, the Section 2802 claim.
8 Mem. in Supp. of Mot. at 1.

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10 **III. LEGAL STANDARD**

11 Entry of summary judgment is proper "if the pleadings, the
12 discovery and disclosure materials on file, and any affidavits
13 show that there is no genuine issue as to any material fact and
14 that the movant is entitled to judgment as a matter of law." Fed.
15 R. Civ. P. 56(c). Material facts are those that may affect the
16 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S.
17 242, 248 (1986). A dispute as to a material fact is "genuine" if
18 there is sufficient evidence for a reasonable jury to return a
19 verdict for the nonmoving party. Id. The court must not weigh
20 the evidence. Id. at 255. Rather, the nonmoving party's evidence
21 must be believed and "all justifiable inferences are to be drawn
22 in [the nonmovant's] favor." United Steelworkers of Am. v. Phelps
23 Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989) (en banc)
24 (quoting Anderson, 477 U.S. at 255).

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1 **IV. DISCUSSION**

2 **A. Employer's Duty to Reimburse Expenses**

3 California Labor Code Section 2802 provides that "[a]n
4 employer shall indemnify his or her employee for all necessary
5 expenditures or losses incurred by the employee in direct
6 consequence of the discharge of his or her duties" Cal.
7 Lab. Code § 2802(a). Necessary expenditures and losses include
8 "all reasonable costs." Id. § 2802(c). Any contract or agreement
9 made by an employee to waive this right to indemnification is null
10 and void. Id. § 2804.

11 In Gattuso v. Harte-Hanks Shoppers, Inc., the Supreme Court
12 of California considered whether Harte-Hanks Shopper, Inc., a
13 corporation that prepares and distributes advertising booklets and
14 leaflets, could satisfy its obligation to reimburse outside sales
15 representatives for their automobile expenses by paying them
16 higher base salaries and higher commission rates than it paid to
17 inside sales representatives. 42 Cal. 4th 554, 559-60 (2007).
18 The court noted that Section 2802 "is designed to prevent
19 employers from passing their operating expenses on to their
20 employees." Id. at 562. The Court held that an employer may
21 satisfy this statutory reimbursement obligation by paying an
22 increased salary or commission. Id. at 559.

23 The court endorsed three different ways employers can satisfy
24 the reimbursement obligation for work-required use of an
25 employee's automobile: the "actual expense method," the "mileage
26 reimbursement method," and the "lump-sum method." Id. at 568-571.
27 The court noted that providing the employee with a lump-sum

1 payment is the least onerous of the three methods because it does
2 not require detailed record keeping. Id. at 568-69. Under this
3 third alternative, an employer can combine wages and business
4 expense reimbursements in "a single enhanced employee compensation
5 payment," provided that there is "some method or formula to
6 identify the amount of the combined employee compensation payment
7 that is intended to provide expense reimbursement." Id. at 572-
8 73. Using that method, the employee should be able to determine
9 if the employer has discharged all of its legal obligations as to
10 both wages and business expense reimbursements. Id. at 573. The
11 court concluded that:

12 an employer may satisfy its statutory business
13 expense reimbursement obligation under section
14 2802 by paying employees enhanced compensation
15 in the form of increases in base salary or
16 commission rates, provided the employer
17 establishes some means to identify the portion
18 of overall compensation that is intended as
19 expense reimbursement, and provided also that
20 the amounts so identified are sufficient to
21 fully reimburse the employees for all expenses
22 actually and necessarily incurred.

23 Id. at 575.

24 **B. Cardinal's Compensation System and Section 2802**

25 Cardinal wants the Court to assume "for purposes of this
26 motion" that Plaintiffs are employees. Mem. in Supp. of Mot. at 1
27 n.1. Cardinal argues that even if Plaintiffs are employees,
28 summary judgment should be entered against Plaintiffs on their
Section 2802 claim because based on the Earnings Worksheets and
the Settlement Sheets, the drivers can identify the portion of
compensation attributable to expense reimbursement, and they have
been fully reimbursed for their necessary expenses. Id. at 1, 8-

1 12.

2 One problem for Cardinal's argument is that the amounts that
3 Cardinal claims are expense reimbursements appear on the Earnings
4 Worksheets and Settlement Statements as expense deductions. See
5 Earnings Worksheet Class A Daycab; Earnings Worksheet Reno, NV;
6 Earnings Worksheet San Francisco, CA; Figueroa Settlement Sheet;
7 Rady Settlement Sheet; Smith Settlement Sheet. Cardinal contends
8 that these deductions can be construed as reimbursements because
9 when it initially determined how much drivers would be compensated
10 for their services, it combined an estimate of what a driver would
11 earn in the geographic area -- a "Target 1099" -- and an estimate
12 of a driver's expenses. Mem. in Supp. of Mot. at 3-4; Farris
13 Decl. ¶¶ 4-5.⁵ In other words, in determining the drivers' rates
14 of compensation, Cardinal factored in their projected expenses.
15 See Dep. of Brian Farris at 108:20-109:21; Farris Decl. ¶ 5.
16 Hence, according to Cardinal, Plaintiffs' compensation structure
17 was specifically enhanced to pay them for their necessary and
18 reasonable expenses, and based on the Earnings Worksheets and the
19 Settlement Sheets, Plaintiffs can differentiate between wages and
20 expense reimbursements. Mem. in Supp. of Mot. at 10-11.

21 The Court finds that this compensation system does not
22 satisfy the test for expense reimbursement established by the
23 California Supreme Court in Gattuso. Under Cardinal's system,
24 there was no up-front, lump-sum payment that included a means of

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26 ⁵ Brian T. Farris, Vice-President of Mid-Atlantic Operations
27 for Cardinal, filed a declaration in support of Cardinal's Motion.
28 Mem. in Supp. of Mot. Ex. C.

1 identifying the amount being paid for labor performed and the
2 amount being paid as reimbursement for business expenses.
3 Instead, the Earnings Worksheets merely provided the drivers with
4 an estimate of rates per delivery and likely expenses. See
5 Earnings Worksheet Class A Daycab; Earnings Worksheet Reno, NV;
6 Earnings Worksheet San Francisco, CA. The only payment the
7 drivers received occurred after expenses had already been
8 deducted. See Figueroa Settlement Sheet; Rady Settlement Sheet;
9 Smith Settlement Sheet. Cardinal wants the Court to treat these
10 deductions as functionally equivalent to reimbursements. This
11 system of compensation is too far removed from what the California
12 Supreme Court had in mind. The Court will not treat it as
13 equivalent to the lump-sum payment method endorsed by the
14 California Supreme Court in Gattuso.

15 Furthermore, there are questions of fact as to whether the
16 rates of compensation were sufficient to fully reimburse drivers
17 for all necessary expenses. The testimony about how drivers'
18 expenses were taken into account when setting the rates of
19 compensation is less than clear. See Farris Dep. at 49:18-51:3;
20 81:5-83:12; 89:24-92:23. Cardinal's rates of compensation were
21 based in part on its need to provide a competitive bid to Home
22 Depot. See id. at 77:7-78:6; 86:24-88:23. Deductions were made
23 for expenses like property and merchandise damage, but these
24 expenses were not factored in when determining drivers' rates of
25 compensation. Opp'n at 20-21; Farris Dep. at 109:22-110:20. The
26 Court DENIES Cardinal's request for summary judgment in its favor
27 on Plaintiffs' Section 2802 claim.

1 Letter, the DLSE stated that "a condition of employment which
2 requires the employee or applicant to make a \$50,000.00 purchase
3 of a vehicle which advertises the name of the employer and further
4 requires that the vehicle be purchased from one vendor (or any
5 number of vendors) chosen by the employer is violative of
6 [section] 450."⁶ Id. at 23. The DLSE went on to state that "even
7 if the practice you describe were not prohibited by the terms of
8 [section] 450, the employer would be liable to the employee for
9 the costs incurred by the employee under [section] 2802." Id.

10 The Estrada court considered, and rejected, the argument that
11 the 1997 Opinion Letter clarified and superceded Bulletin 84-7.
12 Id. The court determined that a 2002 Update of the DLSE
13 Enforcement Policies and Interpretations Manual, IWC Order No. 9-
14 2001, other DLSE Opinion Letters, and a 2005 Commentary all
15 support the position that it is lawful for an employer to require
16 employees to provide their own vehicles as a condition of
17 employment, provided that the employer fully reimburses the
18 employees for the costs of operating or using those vehicles. Id.
19 at 23-25. The Estrada court affirmed the trial court's finding
20 that FedEx drivers were not entitled to reimbursement for expenses
21 relating to purchasing or leasing a vehicle for purposes of
22 performing pick up and delivery services. Id. at 21-22.

23 Here, prior to a determination that Cardinal's drivers are
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25 ⁶ Under California Labor Code Section 450, "[n]o employer . . .
26 . may compel or coerce any employee, or applicant for employment,
27 to patronize his or her employer, or any other person, in the
28 purchase of any thing of value." Cal. Lab. Code § 450(a).

1 employees, this Court is not willing to say, as a matter of law,
2 that Cardinal's drivers are not entitled to reimbursement of their
3 vehicle lease payments. Cardinal's drivers were required to lease
4 trucks from Cardinal, although by early 2008, Cardinal had stopped
5 leasing trucks to class members. Card Decl. Ex. 6 ("Dep. of Lance
6 Merklein") at 71:8-17, 174:1-178:10. The lease payments were
7 deducted from the drivers' paychecks. Dep. of Brian Farris at
8 93:8-11; Figueroa Settlement Sheet; Rady Settlement Sheet; Smith
9 Settlement Sheet; Merklein Decl. ¶ 21. These facts are similar to
10 those in Estrada, where the drivers were required to purchase or
11 lease trucks, and the drivers could obtain loans through FedEx's
12 business support program with repayment through pay deductions.
13 154 Cal. App. 4th at 7. If a jury finds that Cardinal's drivers
14 were in fact employees, then the Estrada decision provides strong
15 support for Cardinal's contention that class members are not
16 entitled to be reimbursed for their truck lease payments.

17 Nevertheless, prior to a determination that Cardinal's
18 drivers are employees, the Court is not willing to engage in
19 hypothetical speculation about whether the lease payments in this
20 case are or are not reimbursable. The better course is to proceed
21 to trial, where a fuller record will afford a more substantial
22 basis for decision. See, e.g. Anderson v. Hodel, 899 F.2d 766,
23 770-71 (9th Cir. 1990). The Court DENIES Cardinal's request for
24 summary judgment in its favor on the question of whether it is
25 required to reimburse Plaintiffs for the costs of leasing their
26 trucks.

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V. **CONCLUSION**

For the reasons stated herein, the Court DENIES Defendant's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

Dated: August 19, 2009



UNITED STATES DISTRICT JUDGE