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MICHAEL PARRY

11  
12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14

15 NATIONAL SEATING & MOBILITY, INC.,

16 Plaintiff,

17 vs.

18 MICHAEL PARRY and DOES 1 through 20;  
19 inclusive,

20 Defendants.

21 MICHAEL PARRY, individually and on behalf  
of all others similarly situated,

22 Counter-Claimant,

23 vs.

24 NATIONAL SEATING & MOBILITY, INC.,

25 Counter-Claim Defendant.  
26

Case No. 3:10-cv-02782-JSW

**PLAINTIFF AND COUNTER-CLAIM  
DEFENDANT NATIONAL SEATING &  
MOBILITY'S AND DEFENDANT AND  
COUNTER-CLAIMANT MICHAEL  
PARRY'S JOINT CASE MANAGEMENT  
CONFERENCE STATEMENT and  
PROPOSED ORDER CONTINUING CASE**

MANAGEMENT  
Date: January 25, 2013  
Time: 1:30 p.m. CONFERENCE  
Courtroom: 11, 19<sup>th</sup> Floor  
Judge: The Hon. Jeffrey S. White

Action Filed: March 3, 2010

27  
28 Pursuant to Local Rule 16-9, and the Court's order, Plaintiff/Counterclaim Defendant

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JOINT CASE MANAGEMENT CONFERENCE STATEMENT AND PROPOSED ORDER  
3:10-cv-02782-JSW

1 NATIONAL SEATING & MOBILITY, INC. (“NSM”) and Defendant/Counter-Claimant MICHAEL  
2 PARRY (“Parry”) jointly submit this case management statement, and request that the Court adopt it  
3 as its Further Case Management Order in this case.

4 1. Jurisdiction and Service

5 Plaintiff NSM originally commenced the underlying action May 22, 2009, by filing a  
6 Complaint in California Superior Court for the County of Alameda. Parry did not dispute service. On  
7 June 26, 2009, Parry filed a cross-complaint against NSM. On May 24, 2010, Parry filed his first  
8 amended counter-claim as an individual and with class action allegations pursuant to Cal. Rule of Ct.,  
9 3.761(b). NSM then filed a Notice of Removal in July of 2010 to the United States District Court for  
10 the Northern District of California pursuant to 28 U.S.C. sections 1332 and 1446. On June 19, 2012,  
11 after receiving leave of court, Parry filed his Second Amended Counter-Complaint, which also  
12 includes both individual and class allegations.

13 2. Facts:

14 In 2001, Michael Parry was hired as a Rehabilitation Technological Supplier (“RTS”) working  
15 in the San Leandro, California office of NSM, a Tennessee corporation in the business of providing  
16 customized wheelchairs and adaptive seating systems for individuals. After working in several  
17 positions within NSM, Parry joined the Hayward Branch of NSM in October of 2006.

18 On March 20, 2007, he entered into an Employment Agreement and Compensation Schedule  
19 outlining the terms of his employment with NSM. The Compensation Schedule changed the manner  
20 of compensation from a purely commission basis to a base salary plus commission compensation plan.  
21 The Employment Agreement stated that Parry was paid twenty percent of his proportional share of the  
22 total branch “gross base office profits.” The term gross base office profits was defined as sales minus  
23 cost of goods, shipping charges, sales adjustments, allowances for bad debt and bad debt write off.

24 On March 31, 2009, Parry’s employment with NSM was terminated.

25 *In dispute are the following facts:*

26 *Cross Complaint – Parry’s individual claims*

27 Parry was terminated on or about March 31, 2009. The Employment Agreement that he signed  
28 with NSM in March 2007 required NSM to give Parry six months’ notice before involuntarily

1 terminating him. If this was not possible or feasible, then NSM could tender six months' pay in lieu of  
2 six months' notice.

3 *Cross Complaint – Parry's class action claims*

4 There are hundreds of individuals across the country who are currently, or who were formerly,  
5 employed by NSM in the RTS position. All of them are/were paid commissions on their sales based  
6 on a formula that calculated their share of the "gross base office profits."

7 Parry claims that NSM improperly reported profits in their commission calculations which  
8 reduced the gross base office profits. Parry further claims that NSM improperly reported profits to its  
9 employees in several ways, including, but not limited to, failing to report regular rebates NSM  
10 received from many manufacturers which greatly reduced the commissions received by RTS. These  
11 reductions should have increased the commissions paid to the class. Parry claims that NSM has  
12 refused to provide an accounting of the commission calculations for Parry and the class.

13 3. Legal Issues:

14 *Complaint – NSM's claims against Parry*

15 NSM has claims for conversion and unjust enrichment against Parry. NSM contends that  
16 shortly after Parry was given notice of the termination, NSM offered him a Separation Agreement that  
17 provided for three bi-weekly severance payments of \$2,500.00 in exchange for Parry's full and final  
18 release of all claims relating to his employment with and separation from NSM. On March 31, April  
19 10, and April 24, 2009, as a result of mistake and inadvertence, NSM issued three separate checks in  
20 the amounts of \$2,500.00 each to Parry. The March 31 severance payment was mistakenly included in  
21 Parry's final payroll check. The April 10 and April 14 severance payments were mistakenly credited to  
22 Parry's bank account after his layoff, and Parry never signed the Separation Agreement. As a result,  
23 NSM mistakenly paid a total of \$7,500.00.

24 Further, when Parry was terminated (effective April 1, 2009), no "true-up" was conducted in  
25 accordance with the Commission Compensation Schedule signed by Parry to reconcile his amount of  
26 commission draws received against draws not paid, if any. Parry's last payroll check did not reflect the  
27 true-up reconciliation and consequently he was overpaid in the amount of \$1,011.94.

28 *Cross Complaint – Parry's individual claims*

1 Parry has two breach of contract claims from his employment contract that are based on  
2 general principles of contract law. Parry alleges that NSM failed to properly notify him before  
3 terminating his employment, which Parry alleges was without cause. Parry also alleges that NSM  
4 failed to pay him six (6) months salary in lieu of such notice of termination. Parry claims these  
5 failures were in violation of Cal. Labor Code §§ 201 and 202. Parry also claims waiting time penalties  
6 under Cal. Labor Code § 203. Parry brings these private actions as authorized by Cal. Labor Code §  
7 2699 (a), which permits an aggrieved employee to bring suit on the Labor Code violations alleged in  
8 his complaint.

9 *Cross Complaint – Parry’s class action claims*

10 Parry alleges a breach of contract claim against NSM on behalf of himself and all similarly  
11 situated NSM employees (current and former) for failure to properly calculate wages under their  
12 employment contracts. Parry and the plaintiff class also allege that NSM acted fraudulently by  
13 deliberately misrepresenting the true sale profits upon which their commissions were based. Parry  
14 also claims that NSM refused to provide an accounting to allow Parry and the plaintiff class to check  
15 the accuracy of NSM’s reporting. In connection with this, Parry and the plaintiff class also allege  
16 negligent misrepresentation because NSM neglected to report increased sales profits derived from  
17 manufacturer kickbacks. Based on the alleged fraud and negligent misrepresentation, Parry and the  
18 plaintiff class further allege that NSM acted in bad faith by deceiving Parry and the plaintiff class into  
19 believing that they earned less commissions than they should have under the terms of the  
20 Compensation Schedule, which justifies an award of punitive damages.

21 Parry and the plaintiff class further allege that NSM violated the Unfair Competition Law, Cal.  
22 Bus. & Prof. Code § 17200, by engaging in conduct that is unlawful, unfair, and fraudulent. Parry and  
23 the plaintiff class also seek an accounting from NSM as to the correct calculation of their commissions  
24 for the duration of the class period.

25 4. Motions:

26 *Prior Motions:*

- 27 • May 2010 - Parry filed a Motion for Leave to Amend his counter-claim, which was granted.
- 28 • July 2010 – NSM filed a Motion to Dismiss and/or Strike Portions Parry’s counter-claim. This

1 Motion was granted as to the first claim for breach of contract – reward/bonus, and denied as to  
2 the remainder of the Motion. Parry declined to bring a Motion for Leave to Amend this claim.

- 3 • December 2010 – NSM filed a Motion for Summary Judgment. NSM voluntarily withdrew its  
4 motion on January 19, 2011.
- 5 • May 2011 – Parry filed a Motion for Class Certification. Parry’s motion was denied without  
6 prejudice on October 12, 2011.
- 7 • December 2011 – Parry filed a renewed Motion for Class Certification, which was granted in  
8 part and denied in part.
- 9 • February 2012 – Parry filed a Motion for Leave to File Amended Pleading, which was granted.

10 *Anticipated Motions:*

- 11 • Potential Motion for Summary Judgment on behalf of NSM
- 12 • Potential Motion for Decertification on behalf of NSM
- 13 • Motions in Limine

14 5. Amendment of Pleadings:

15 None anticipated at this time.

16 6. Evidence Preservation:

17 NSM has document preservation programs in place.

18 7. Disclosures:

19 Both parties have made their initial disclosures.

20 8. Discovery

21 The parties previously stayed the matter with respect to discovery and any activity relating to  
22 class notification until after the third mediation session. Defendants have voluntarily produced  
23 documents relating to 243 present and former employees of NSM in hopes that this voluntary  
24 production of documents will substantially reduce the necessity of future discovery. The documents  
25 voluntarily produced include not only the original employment agreement as to the 243 present and  
26 past NSM employees, but any attachments and amendments thereto, as well as correspondence  
27 relating to the development of the agreement, where found. The quantity of documents is great, to say  
28 the least. Both parties have devoted considerable efforts to evaluate and analyze the data provided in

1 these voluminous documents, which has taken substantial time. The parties believe that the most  
2 recent developments in analysis have considerably aided the parties in framing their respective  
3 positions and related expectations.

4 9. Class Actions:

5 (1) *Specific paragraphs of FRCP 23:*

6 FRCP 23(a), FRCP 23(b)(3)

7 (2) *Class Description:*

8 All Rehab Technology Suppliers ("RTSs") employed by National Seating & Mobility, Inc.  
9 ("NSM"), for a period from February 5, 2004 until the present who signed an Employment  
10 Agreement with NSM that contains a Tennessee choice of law clause and which contains a  
11 "COMMISSION ON SALES" provision that defines "Gross Base Office Profits" as "sales  
12 minus cost of goods, shipping changes (sic), sales adjustments, allowance for bad debt and bad  
13 debt write off."

14 (3) *Facts showing party is entitled to maintain the action:*

15 This Court certified this class with respect to Parry's claims for breach of contract and breach  
16 of the implied covenant of good faith and fair dealing.

17 (4) *Date for Motion for Class Certification:*

18 An order has already been issued on Parry's renewed class certification motion.

19 (5) *Class Notice*

20 The parties have agreed to stay this matter with respect to discovery and class notification  
21 activity until after they have completed a second mediation session with mediator Michael Dickstein.  
22 This mediation will be completed no later than October 16, 2012.

23 10. Related Cases

24 There are no related cases.

25 11. Relief

26 In its Complaint, NSM prayed for judgment against Parry as follows:

- 27 a. Actual damages in the amount of \$8,511.94;  
28 b. Restitution and all other forms of equitable monetary relief;

- 1 c. Attorneys' fees and costs;  
2 d. Such other and further relief as this Court may deem just and proper.

3 In Parry's Second Amended Counter-Claim;

4 *Parry as an individual prayed for judgment against NSM as follows:*

- 5 a. For compensatory damages according to proof and prejudgment interest to the extent  
6 allowable by law;  
7 b. For exemplary and punitive damages according to proof;  
8 c. For "Waiting Time" Penalties, as defined and applicable under Cal. Lab. Code §§ 203,  
9 218;  
10 d. For the payment of Counter-Claimant's attorney fees, costs, and expenses incurred  
11 pursuant to all applicable provisions of California Law including, but not limited to,  
12 Cal. Lab. Code §§ 218.5, 1194, and Cal. Code of Civ. Proc. § 1021.5;  
13 e. For such other and further relief as the Court may deem proper.

14 *Parry and the class prayed for judgment against NSM as follows:*

- 15 a. An order declaring this action to be a class action and appointing the law firm of  
16 Kershaw, Cutter & Rationoff, LLP and the Law Offices of Mark P. Meuser as class  
17 counsel and certifying the class as alleged and requested herein;  
18 b. For compensatory damages according to proof at trial;  
19 c. For exemplary and punitive damages according to proof;  
20 d. For pre-judgment interest at the legal rate from and after January 11, 2009 at the legal  
21 rate (sic);  
22 e. For an Accounting, as requested in the Eleventh Cause of Action;  
23 f. For the payment of Counter-Claimant's attorneys fees, costs, and expenses incurred  
24 pursuant to all applicable provisions of California and Federal Law including, but not  
25 limited to, Cal. Lab. Code §§ 218.5, 1194, and Cal. Code of Civ. Proc. § 1021.5, and  
26 Fed. R. Civ. P. 23; and  
27 f. For such other and further relief as the court may deem proper.

28 ///

1 12. Settlement and ADR:

2 The parties attended a full-day mediation with Michael Dickstein on October 6, 2011, prior to  
3 the Court's ruling on Parry's Motion for Class Certification. The parties were unable to reach a  
4 mutually-agreeable settlement.

5 The parties completed a second mediation session on October 16, 2012 with mediator Michael  
6 Dickstein. While the parties were unable to resolve the matter in this mediation session, differences  
7 were substantially narrowed. Following that mediation session, Defendants voluntarily produced  
8 documentation relating to the employment agreements of 243 of its present and former RTSs, covering  
9 the entire class period. Defendant also voluntarily produced documentation concerning a "profile  
10 payback program" that NSM initiated in 2007 in order to return portions of the manufacturers rebates  
11 to RTS employees who qualified under the program. The additional information provided by  
12 Defendants has allowed both parties to engage in extensive review and analysis, including assessment  
13 of the importance of these documents in both the context of litigation and prospective settlement. The  
14 parties have engaged in discussions and are actively coordinating to find a mutually agreeable date for  
15 a further mediation with mediator Michael Dickstein.

16 Michael Dickstein is a nationally recognized mediator who specializes in employment class  
17 actions. The parties have found his skills and expertise constructive in progressing toward what the  
18 parties hope will be a resolution of the matter without need for trial. Unfortunately, Mr. Dickstein's  
19 availability is limited due to his own practice which requires extensive travel. There are four separate  
20 groups of participants on the defense side of the mediation and class counsel himself has a very active  
21 practice. Despite the best efforts by all sides, it has proved daunting to schedule a third mediation  
22 session given the conflicts that arise from so many participants with such active practices. However,  
23 the parties have recently been able to agree upon February 22, 2013 for the third mediation session.

24 13. Consent to Magistrate Judge for All Purposes:

25 Parry filed a declination to proceed before a magistrate at the time the case was removed to  
26 Federal Court. NSM agrees that, given the potential complexity of this matter, the parties may be  
27 better served by proceeding before a District Court Judge.

28 ///



1 14. Other References:

2 The parties are not yet in a position to determine whether this matter is suitable for binding  
3 arbitration.

4 15. Narrowing of Issues:

5 NSM's Motion to Dismiss was heard by this Court in July 2010, and the Motion resulted in the  
6 dismissal of Parry's individual first claim for breach of contract-reward/bonus. NSM anticipates it  
7 will file a Motion for Partial Summary Judgment in an attempt to further narrow the claims of the  
8 class. In addition, NSM is giving serious consideration to bringing a motion to decertify the class.

9 The parties can reasonably stipulate to the facts in the undisputed portion of item number 1  
10 above.

11 Given the current status of the matter, it is premature to anticipate the bifurcation of the issues,  
12 claims or defenses at this time.

13 16. Expedited Schedule:

14 It is unlikely that this matter will be eligible for an expedited schedule.

15 17. Scheduling:

16 Prior to completion of the upcoming mediation, it is premature for the parties to set a schedule  
17 for designation of experts, discovery cutoff, hearing of dispositive motions, or pretrial conference and  
18 trial.

19 18. Trial:

20 The parties estimate that trial in this matter will take approximately three weeks.

21 19. Disclosure of Non-party Interested Entities or Persons:

22 This is premature given the current status of this matter.  
23

24 I, Victoria L. Tallman, hereby attest pursuant to General Order 45(X)(B) that concurrence in  
25 the filing of this document has been obtained from each of the other signatories, or from the single  
26 signatory (in the case, e.g., of a declaration) which shall serve in lieu of their signature(s) on the

27 ///

28 ///

1 document.

2 Dated: January 18, 2013

Respectfully submitted,

3 WILSON, ELSER, MOSKOWITZ, EDELMAN  
4 & DICKER, LLP

5 By: /s/Ronald S. Bushner  
6 Victoria L. Tallman  
7 Ronald S. Bushner  
8 *Attorneys for Plaintiff/Counter-Claim Defendant*

9 Dated: January 18, 2013

Respectfully submitted,

10 KERSHAW CUTTER & RATINOFF, LLP

11 By: /s/ C. Brooks Cutter  
12 C. Brooks Cutter  
13 John R. Parker, Jr.  
14 *Attorneys for Defendant/Counter-Claimant*

15 Dated: January 18, 2013

Respectfully submitted,

16 By: /s/ Mark P. Meuser  
17 Mark P. Meuser  
18 *Attorneys for Defendant/Counter-Claimant*

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**CASE MANAGEMENT ORDER**

The parties have agreed to stay this matter with respect to class notification activity until after they have completed a third mediation session with mediator Michael Dickstein on February 22, 2013.

As such, the Court orders this matter stayed until March 15, 2013. A further case management conference will be scheduled for ~~March 15, 2013 or whatever other date is convenient for the court.~~ March 22, 2013 at 1:30 p.m.

An updated Joint Case Management Statement shall be filed no later than one week prior to the further case management conference.

IT IS SO ORDERED:

Dated: January 22, 2013

By:   
THE HON. JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE