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San Francisco County Superior Court

DEC 11 2009

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BY: *[Signature]*
County Clerk

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CASE MANAGEMENT CONFERENCE SET

MAY 14 2010 -9⁰⁰AM

7 Attorneys for Plaintiff **CORTNEY BALZAN**

IMAGED

~~DEPARTMENT 12~~

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN FRANCISCO**
10

DEC 11 2009

11 **CORTNEY G. BALZAN,**
12 Plaintiff,

NO. **CEC-89-495171**

13 vs.

**COMPLAINT SEEKING DAMAGES
FOR BREACH OF IMPLIED
COVENANT OF GOOD FAITH
AND FAIR DEALING AND FOR
FRAUD IN THE INDUCEMENT**

14 **MACY'S LOGISTICS AND OPERATIONS,**
15 a division of **MACY'S CORPORATE SERVICES**
16 **INC. formerly known as FEDERATED**
17 **LOGISTICS AND OPERATIONS, a division of**
18 **FEDERATED CORPORATE SERVICES, INC.,**
and **DOES 1 through 20, inclusive,**

DEMAND FOR JURY TRIAL

19 Defendants.
20

FIRST CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)

21 1. Plaintiff Cortney G. Balzan is and was at all times herein mentioned, a resident of the
22 State of California, and a world renowned gemologist and appraiser, known for his high standards of
23 excellence, honesty and integrity in the world of appraising and grading fine quality gems. The
24 plaintiff enjoys a sterling and impeccable reputation in his professional community and among other
25 things, has been and is a Master Gemologist Appraiser with the Accredited Gemologist Association
26 (AGA) as well as with the American Society of Appraisers. Plaintiff in fact started the American
27 Gemological Learning Center to pass on his trade and to assure the standards he had set and
28 established were met in the gemology community. He established the Allied Teaching Center with the

Complaint

1 Gemological Association and Gem Testing Laboratory of Great Britain, the oldest gemological
2 association in the world. Plaintiff has supervised and taught courses on appraising and grading
3 valuation sciences to students throughout the world and has been Regional Governor, Historian, Vice
4 President and two term International President of the Accredited Gemologists Association (AGA).
5 Plaintiff has coordinated many educational conferences throughout the United States on important
6 gemological/valuation topics and has worked with governmental agencies locally, regionally,
7 nationally, and internationally. Plaintiff has been many times named in the WHO'S WHO in the
8 U.S. Diamond Education World by Debeers U.S. Liason and is a dedicated teacher and master in the
9 gem and jewelry world.

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11 2. Defendant Macy's Logistics and Operations, is a division of Macy's Corporate
12 Services, Inc. formerly known as Federated Logistics and Operations, was a Division of Federated
13 Corporate Services, Inc. and the owner of Macy's retail stores with an office at Macy's West Fine
14 Jewelry Center, 170 O'Farrell Street, San Francisco, CA. 94102 [hereinafter "Macy's West"]. At all
15 times herein mentioned, Macy's West Fine Jewelry was the purveyor and retailer of jewelry that was
16 sold to the public and represented to be fine jewelry meeting the requirements of industry standards
17 with regard to the stones and gems that were sold. The territory encompassed by Macy's West
18 consists of the States of California, Hawaii, Nevada, Colorado, Arizona, Washington and Oregon.

19 3. The true names and capacities, whether individual, corporate, associate, or otherwise, of
20 defendants named herein as Does 1 through 20, inclusive, are unknown to plaintiff who therefore sues
21 said defendants by such fictitious names. Plaintiff prays leave to amend this complaint when their true
22 names and capacities become known.

23 4. At all times herein mentioned, each of the defendants, including the Doe defendants,
24 was the agent, servant, and employee of the other defendants and was acting at all times within the
25 scope of his/her agency and employment, and with the knowledge and consent of his/her employer.
26 Defendants, and each of them, at all times herein mentioned acted jointly and in concert and conspired
27 and agreed to do the things hereinafter specified; and each and all of the things hereinafter alleged to
28 have been done by defendants of any of them, were done as co-conspirators and thus, as agents for

1 each other, as well as in their respective individual capacities, to advance their own individual
2 interests.

3 5. On or about 1983, and continuing through May of 2009, Macy's West would contract
4 with and retain the services of plaintiff to provide quality control and to appraise the fine jewelry that
5 was being purchased from various wholesalers throughout the United States and throughout the world.
6 Plaintiff was to provide an independent measure of quality control for the gems being sold by Macy's
7 West. Although plaintiff was advised he was an independent contractor and that all times, Macy's
8 West wanted only his unbiased and independent judgment, and that he was free to pursue other
9 business, in truth and in fact Macy's West created a laboratory for plaintiff at the Macy's Fine Jewelry
10 Center located at their O'Farrell Street location in San Francisco, California, where the majority of his
11 work as well as those retained by him was done. In addition, Macy's expected the plaintiff to be
12 available on short notice and at its beck and call, and those with whom the plaintiff worked, realized
13 that more than 90% of his time and business were spent at the behest of Macy's. Macy's West
14 assured the plaintiff, however, both orally and in writing that he would have exclusive control and
15 discretion over all his work, and that he was to provide Macy's West with only opinions and appraisals
16 that were truthful and unbiased as it was important to Macy's West that it in turn could provide
17 Macy's customers with fair and truthful appraisals and representations as to the stones that were being
18 purchased. In addition, on or about 1985 Macy's West expanded the plaintiff's services to include
19 repairs that were to be made to fine jewelry purchased by customers within the division.
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21 6. On or about February 22, 2006, in San Francisco, California, plaintiff entered into the
22 last of his independent contractor agreements with the defendant. In the contract Macy's recognized
23 and provided again that plaintiff was being retained for his unique skill and experience and that he was
24 to have exclusive control and discretion over the manner, means, details, and methods by which his
25 services were rendered. The contract also provided that the Plaintiff, as he had been doing for years,
26 was to perform his services at the Company's location on O'Farrel Street in San Francisco, and that he
27 was to make himself at all reasonable times and with reasonable frequency to not only perform his
28 services in a timely fashion but also to consult with the Company regarding his services. The

1 Agreement also provided, as in the past, that the plaintiff's services were being engaged to not only
2 appraise the gems being sold in the fine jewelry departments of Macy's West, but also to repair and
3 size any of the jewelry returned. And finally, the agreement provided that either party could terminate
4 the agreement upon thirty (30) days written notice. Notices to Macy's West were to be sent to its Fine
5 Jewelry Center at the O'Farrell Street address while notices to the plaintiff were to be sent to his small
6 office and laboratory around the corner from the Fine Jewelry Center on O'Farrell Street. A copy of
7 this final agreement between the parties is attached hereto, marked Exhibit "A" and incorporated
8 herein by this reference.

9 7. In every contract entered into in the State of California, there is an implied covenant of
10 good faith and fair dealing and specifically such a covenant was implied in that contract that the
11 plaintiff entered into with Macy's West. As part of this covenant, each party impliedly agreed not to
12 do anything to destroy or injure the rights of the other to receive the benefits of the contract. Thus,
13 each party had the duty not to prevent or hinder performance by the other party. In essence, the
14 covenant was implied as a supplement to the express contractual covenants, to prevent either plaintiff
15 or defendant from engaging in conduct which, while not technically transgressing the express
16 covenants, would frustrate the other party's rights to the benefits of the contract. The covenant of
17 good faith and fair dealing imposed obligations on the plaintiff and the defendant separate and apart
18 from those consensually agreed to; the obligations stemming from the implied covenant of good faith
19 and fair dealing were imposed by law as normative values of society.

20 8. In conjunction with the covenant of good faith and fair dealing, Macy's West at all
21 times knew of plaintiff's impeccable reputation in his field and it was for that very purpose that he was
22 hired. Further, Macy's West knew that if it ever did anything such as passing on and selling gems to
23 the general public that were not of the quality that they were represented to be, or that were in fact not
24 the gems that they were represented to be as disclosed by the plaintiff, that would put plaintiff's
25 reputation at risk and would defeat the purpose of the contract. Macy's West at all times herein
26 mentioned agreed to act fairly and in good faith toward the plaintiff and to do nothing which would
27 impugn his reputation or put into question the appraisal and repair services for which he had been
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1 retained. Macy's West expressly agreed that plaintiff was to work independently and impliedly agreed
2 that no harm would come plaintiff's way so long as he did his work in an honest manner and truthfully
3 appraised gems and consulted with and advised Macy's as to the necessary disclosures which would
4 have to be made in the representation of products that were to be sold.

5 9. It was with great dismay and alarm and growing consternation that plaintiff began to
6 discern during in 2007 and more so in 2008 and continuing through early 2009, that a great number of
7 gems that were arriving at the laboratory at Macy's West Fine Jewelry Center in San Francisco, were
8 not of the quality or even the gems that they were represented to be. Plaintiff either rejected many of
9 these stones to be sent back to the wholesaler/vendor or insisted that certain disclosures be made to the
10 buying public if they were retained by Macy's. To plaintiff's further dismay, plaintiff discovered with
11 increasing regularity, especially in 2008 and early 2009, that Macy's ignored his recommendations.
12 Plaintiff discovered the following, among other things:

- 13 • Gems that were represented to be natural "rubies" were in fact heavily glass filled and
14 often heavily lead glass treated. This created a disclosure problem if passed onto the
15 consumer, because the heavy content of lead in many of the "ruby" stones was in
16 violation of regulations in the United States for the content of lead in jewelry;
- 17 • Other rubies arriving from wholesalers were mixture of ruby and composite ruby which
18 in turn created a treatment and care issue in that a composite ruby could not be re-
19 polished or re-cut for restoration purposes, and thus, if passed onto a Macy's customer,
20 needed to be disclosed;
- 21 • Other rubies improperly indicated their source of origin, when in fact it appeared that
22 these stones were from a banned source;
- 23 • Stones were being passed as untreated "green amethyst" when in fact this stone is in
24 reality Praseolite (a heated form of quartz) while only purple amethyst is in fact real
25 amethyst, natural and therefore of a much higher value;
- 26 • Sapphires that arrived in plaintiff's lab were also fracture filled with glass;
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- Black sapphires were being passed off as black diamonds in the diamond jewelry department;
- Diamonds that were sent to the lab were not meeting the Macy’s West Quality Control guidelines. For instance, Macy’s policy, consistent with government weights and measure guidelines dictated diamonds purchased that for the solitaire department had to be shipped with the exact carat weight on each piece noted on the poly bag. A tolerance of .03 points on the negative side of the stated carat weight was acceptable unless previously agreed upon and stated on a purchase order. Plaintiff discovered that many alleged diamond solitaires sent to the laboratory were either unmarked or not meeting the carat weight as stated;
- Many diamonds were enhanced by laser drilling or filling of surface cavities and fractures with a hardened substance;
- Diamonds were irradiated or heated to induce color and then represented to be natural black diamonds.

10. Plaintiff warned the defendant that due to the quality of the merchandise that was arriving at the laboratory if any of these stones were accepted to be sold at Macy’s, the vendor had a duty to disclose the treatment and value of the stones compared to the traditionally enhanced or natural stones. In turn, plaintiff warned that Macy’s West had to disclose the treatment to the consumer and that it was Macy’s West responsibility to know what it was selling. Plaintiff warned that if Macy’s West knowingly continued to sell gemstones without proper disclosures, it was considered a fraud. Plaintiff reminded Macy’s West of its responsibilities as a seller per FTC requirements to clearly disclose to the buyer:

- Whether the gemstone was natural or not;
- All information pertinent to any enhancement process done to a natural gemstone when:
 - a. The treatment was not permanent and its effects are lost over time; or
 - b. The treatment created special care requirements for the gemstone to retain the benefit of treatment; or

1 c. The treatment had a significant effect on the value of the stone.

2 Plaintiff further explained to the defendant that a treatment would have a significant effect on
3 value, according to the FTC, whenever it was likely to affect a reasonable buyer's purchasing
4 decision. He advised the defendant that treatment must be disclosed whenever a buyer, without
5 disclosure of treatment, would believe that two seemingly identical gemstones, one treated and one
6 not, were identical or very comparable in value, when in fact, they were/are not.

7 11. During the same period of time that plaintiff noticed inferior stones and/or composites
8 were coming in from wholesalers and vendors for appraisal, he also was shocked to discover that
9 certain gems that were being returned for repair and/or sizing, were some of the very stones he had
10 rejected to be returned to the wholesaler/vendor and that they had in fact been passed onto the
11 unsuspecting public, with no disclosure as to the inaccuracy in their description and/or the content of
12 the stone that was purchased. In one instance, plaintiff discovered an irradiated green quartz had been
13 sold by Macy's as a green amethyst. In yet another instance, plaintiff discovered a cubic zirconia had
14 been passed off as a diamond. Plaintiff was aghast at these discoveries and voiced his dismay and
15 disapproval to many in the Macy's chain of command, insisting that corrections be made and full
16 disclosure accompany all gems and warned Macy's of the possibility of litigation if corrections were
17 not made.

18 12. Instead of heeding plaintiff's warning and commending him for doing the task he was
19 contracted to do, and for looking out for the best interests of Macy's and ultimately, its customers,
20 Macy's West through the winter and spring months of 2009, steadily began to decrease those gems
21 sent to the plaintiff for appraisal and began to look to other avenues and organizations to send its
22 repairs. Ultimately, when Macy's West learned of plaintiff's concerns and rising protests, instead of
23 remedying the problem so as to not impugn plaintiff's reputation and allow plaintiff to do his assigned
24 tasks in an honest and independent manner, but more importantly, so as to not defraud the public, on
25 or about May 6, 2009, Macy's West terminated plaintiff's contract for quality control and appraisals
26 effective June 30, 2009. When plaintiff continued to protest and to voice his concern over the poor
27 quality and lack of disclosure with regard to those gems that were still being sent to him for repair
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1 and/or sizing, Macy's West terminated his contract for repair services effective December 4, 2009.
2 Although this function continues to exist on the West Coast, plaintiff was effectively excluded from
3 bidding and the contract went to another less qualified repair facility. Moreover, Macy's violated its
4 own rules with regard to its stated reverse auction process in excluding plaintiff from the bidding
5 process.

6 13. Defendant Macy's West by and through its conduct performed its contract with the
7 plaintiff in a manner that was unfaithful to the purpose of the contract. The justified expectations of
8 the plaintiff that he could do his job in an unfettered, honest, and forthright fashion were thus denied.
9 The defendant Macy's West actions in this matter fell outside the reasonable expectations of the
10 plaintiff as to both what he was charged to do and how he could best accomplish that result for which
11 he was to be compensated.

12 14. As a result of the defendant Macy's West' breach of that implied covenant of good faith
13 and fair dealing the plaintiff has been damaged in an amount in excess of \$500,000/year. Although the
14 precise amount cannot yet be alleged, plaintiff prays leave to amend this complaint when the true
15 amount is ascertained.

16 WHEREFORE, plaintiff prays judgment as hereinafter alleged:

17 **SECOND CAUSE OF ACTION**
18 **(Fraud in the Inducement)**

19 15. Plaintiff realleges and incorporates by this reference paragraphs 1 through 12 of the
20 First Cause of Action as though fully set forth herein.

21 16. At all times herein mentioned, the defendant Macy's West knew that the bulk of
22 plaintiff's business, indeed over 90% was generated as a result of plaintiff's work for the defendant.
23 Defendant knew that plaintiff, given his impeccable reputation, skill, and expertise, had other business
24 opportunities but to induce him to commit his work almost exclusively to Macy's concerns, not only
25 advised him that Macy's would provide a full laboratory for his use exclusively on Macy's premises,
26 but also assured that he would have unfettered discretion as to how he would perform his work and
27 that there would be no repercussions if he performed his work honestly and faithfully, offering only his
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1 best judgment with regard to his appraisals and good counsel when it was sought. The defendant also
2 represented to him that it was his reputation and skill which were of great value to Macy's and that
3 Macy's would do nothing which would put that reputation in any way, shape or form in disrepute.

4 17. In order to induce plaintiff to give up other business opportunities that were available to
5 him, although no specific amount of work was guaranteed per his contract, Macy's West also advised
6 plaintiff that his availability was needed on an on-call basis for consulting and that a large volume of
7 work would be provided for which he would be fully responsible and for which it was expected that
8 the work would be completed in a timely manner. Accordingly, plaintiff was told that he should
9 expect to devote such effort and resources to complete his tasks by the dates specified by the
10 defendant. Defendant assured the plaintiff however, that it would not interfere with his good judgment
11 or the manner, means, details and methods by which he achieved the results to fulfill the proffered
12 contractual terms and that no action taken by it would cause his reputation and/or skills to be called
13 into question.

14 18. Based on these representations and the volume of work that plaintiff knew to be
15 available prior to signing the Agreement in February of 2006, and based on the defendant's
16 representations that the plaintiff would have wide latitude and discretion in which to complete those
17 tasks to be undertaken by him, and having no reason to suspect that the inducements which lead him
18 to enter into the contractual relationship were untrue, plaintiff undertook working for Macy's, to the
19 practical exclusive of all others, and continued to do so until his relationship with Macy's was abruptly
20 terminated in May of 2009 and again, in December of 2009.

21 19. The representations made by the defendant which induced the plaintiff to give up other
22 lucrative employment and entered into the agreement were false in that defendant never intended to
23 give to plaintiff that discretion as referenced above, but intended to enlarge its profits and reduce its
24 costs by putting out into the public inferior quality gems while at the same time representing to the
25 public that these stones and gems had passed independent Quality Control. The defendant,
26 unbeknownst to plaintiff, intended to use his reputation but ignore his advice and skill, passing off
27 gems as genuine and unflawed, which in fact there were serious flaws.
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