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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION

17 GOPI VEDACHALAM and KANGANA
 18 BERI, on behalf of themselves and all
 others similarly situated,

19 Plaintiffs,

20 v.

21 TATA AMERICA INTERNATIONAL
 CORPORATION, a New York
 22 Corporation; TATA CONSULTANCY
 SERVICES, LTD, an Indian Corporation;
 23 and TATA SONS, LTD, an Indian
 Corporation,

24 Defendants.

CASE NO. C 06-0963 (CW)

**PLAINTIFFS' OPPOSITION TO MOTION
 FOR PARTIAL SUMMARY JUDGMENT**

Date: April 14, 2011
 Time: 2:00 p.m.
 Judge: Hon. Claudia Wilken
 Courtroom: 2

TABLE OF CONTENTS

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

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND	2
A. Tata’s Standard Deputation Agreements	2
B. Tata’s Tax Return Policy	3
C. Tata’s Standard Visa Applications.....	4
D. Plaintiff Beri’s Job Duties, Employment Contracts, Compensation, Tax Exemptions, And Vacation Pay	4
1. Job Duties.....	4
2. Employment Contracts.....	5
3. Tata’s Breaches of Ms. Beri’s Employment Contracts.....	6
4. Tata’s Manipulation of Ms. Beri’s Tax Exemptions.....	6
5. Vacation Pay	7
E. Plaintiff Vedachalam’s Employment Contracts, Compensation, And Tax Exemptions	8
1. Employment Contracts.....	8
2. Tata’s Breaches of Mr. Vedachalam’s Employment Contracts	9
3. Tata’s Manipulation of Mr. Vedachalam’s Tax Exemptions.....	10
Table 1: Summary of shortfalls between Tata’s promised U.S. pay and actual U.S. pay for Plaintiffs	11
III. LEGAL STANDARD.....	11
IV. ARGUMENT	12
A. A Genuine Dispute Of Material Facts Exists Regarding Whether Tata Paid The Amounts Promised In Plaintiffs’ Employment Contracts	12
1. Plaintiff Beri.....	12
2. Plaintiff Vedachalam.....	15
B. A Genuine Dispute Of Material Facts Exists Regarding Tata’s Unlawful Recoupment Of Plaintiffs’ Wages	18
1. Tata’s Practices Unlawfully Reduced Plaintiffs’ Standard Wages.....	18
2. Plaintiffs Did Not Voluntarily Allow Tata to Reduce Their Wages.....	24
C. A Genuine Dispute Of Material Facts Exists Regarding Whether Tata Paid Vacation Pay To Plaintiff Beri.....	25
D. A Genuine Dispute Of Material Facts Exists Regarding Whether Plaintiff Beri Fits Within California’s Narrow Administrative Exemption.	27
1. The Definition of “Primary Duty” Aids Plaintiffs	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

TABLE OF CONTENTS
(continued)

	Page
2. Neither Prong of the Administrative Exemption Can Be Satisfied.....	29
a. Tata Cannot Satisfy the First Prong of the Administrative Exemption Because Ms. Beri Did Not “Run the Business”	29
b. Tata Cannot Satisfy the Second Prong of the Administrative Exemption Because Ms. Beri Did Not Customarily “Exercise Discretion and Independent Judgment”.....	30
E. A Genuine Dispute Of Material Fact Exists Regarding Plaintiff Beri’s Waiting Time Penalties Claim	31
F. A Genuine Dispute Of Material Facts Exists Regarding Whether Tata Sons Is A Proper Defendant.....	32
V. CONCLUSION	32

TABLE OF AUTHORITIES

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

Page

CASES

Adoma v. University of Phoenix, Inc.,
270 F.R.D. 543 (E.D. Cal. 2010) 32

Allen v. Smith,
94 Cal. App. 4th 1270 (Cal. Ct. App. 2002) 12

American Nat’l Ins. Co. v. Continental Parking Corp.,
42 Cal. App. 3d 260 (Cal. Ct. App. 1974) 14

Appling v. State Farm Mut. Auto Ins. Co.,
340 F.3d 769 (9th Cir. 2003)..... 17

Avalos v. Baca,
No. CV-05-07602, 2006 WL 2294878 (C.D. Cal. Aug. 7, 2006)..... 11

Ball v. Johanns,
No. CIV. S-07-1190 LKK/DAD, 2008 WL 269069 (E.D. Cal. Jan. 29, 2008)..... 14

Beverly Hills Firemen’s Assn., Inc. v. City of Beverly Hills,
119 Cal. App. 3d 620 (Cal. Ct. App. 1981) 16

Bothell v. Phase Metrics, Inc.,
299 F.3d 1120 (9th Cir. 2002)..... 27, 28, 29, 30

Bratt v. County of Los Angeles,
912 F.2d 1066 (9th Cir. 1990)..... 28

Bustamante v. Intuit, Inc.,
141 Cal. App. 4th 1999 (Cal. Ct. App. 2006) 17

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)..... 11

City of Oakland v. Hassey,
163 Cal. App. 4th 1477 (Cal. Ct. App. 2008) 24

City of Saint Paul, Alaska v. Evans,
344 F.3d 1029 (9th Cir. 2003)..... 13

Clark v. Capital Credit & Collection Servs.,
460 F.3d 1162 (9th Cir. 2006)..... 12

Eicher v. Advanced Bus. Integrators, Inc.,
151 Cal. App. 4th 1363 (Cal. Ct. App. 2007) 27, 29

Finnegan v. Schrader,
91 Cal. App. 4th 572 (Cal. Ct. App. 2001) 21

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>First National Mortg. Co. v. Federal Realty Inv. Trust,</i>	
4	631 F.3d 1058 (9th Cir. 2011).....	16, 17
5	<i>Gomez v. Lincare, Inc.,</i>	
6	173 Cal. App. 4th 508 (Cal. Ct. App. 2009)	31
7	<i>Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.,</i>	
8	896 F.2d 1542 (9th Cir. 1990).....	13
9	<i>Harris v. Manpower, Inc.,</i>	
10	2010 U.S. Dist. LEXIS 107199 (S.D. Cal. October 7, 2010)	26
11	<i>Heffelfinger v. Electronic Data Sys. Corp.,</i>	
12	580 F. Supp. 2d 933 (C.D. Cal. 2008)	29
13	<i>Hess v. Ford Motor Co.,</i>	
14	27 Cal. 4th 516 (2002)	14
15	<i>In re Annis,</i>	
16	232 F.3d 749 (10th Cir. 2000).....	23
17	<i>In re Estate of Gardner,</i>	
18	187 Cal. App. 4th 543 (Cal. Ct. App. 2010)	16
19	<i>In re Orndoff,</i>	
20	100 B.R. 516 (E.D. Cal. 1989).....	23
21	<i>Inamed Corp. v. Medmarc Cas. Ins. Co.,</i>	
22	258 F. Supp. 2d 1117 (S.D. Cal. 2002).....	14
23	<i>Insurance Co. of North America v. Bechtel,</i>	
24	36 Cal. App. 3d 310 (Cal. Ct. App. 1973)	13
25	<i>Kerr's Catering Service v. Dep't of Indus. Relations,</i>	
26	57 Cal. 2d 319 (1962)	19, 20, 24
27	<i>Koehl v. Verio,</i>	
28	142 Cal. App. 4th 1313 (Cal. Ct. App. 2006)	19, 24
	<i>Kokoszka v. Belford,</i>	
	417 U.S. 642 (1974).....	18, 22, 23
	<i>Lopez v. G.A.T. Airline Ground Support, Inc.,</i>	
	2010 U.S. Dist. LEXIS 73029 (S.D. Cal. July 19, 2010).....	26
	<i>Major League Baseball Props. v. Opening Day Prods., Inc.,</i>	
	385 F. Supp. 2d 256 (S.D.N.Y. 2005).....	17
	<i>Martin v. Alamo Cmty. College Dist.,</i>	
	353 F.3d 409 (5th Cir. 2003).....	11

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>Martin v. Indiana Michigan Power Co.</i> ,	
4	381 F.3d 574 (6th Cir. 2004).....	28, 29
5	<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> ,	
6	475 U.S. 574 (1986).....	11
7	<i>McLaughlin v. Liu</i> ,	
8	849 F.2d 1205 (9th Cir. 1988).....	11
9	<i>Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.</i> ,	
10	205 Cal. App. 3d 442 (Cal. Ct. App. 1988)	16
11	<i>Minnesota Mut. Life Ins. Co. v. Ensley</i> ,	
12	174 F.3d 977 (9th Cir. 1999).....	17
13	<i>Moreno Mutual Irrigation Co. v. Beaumont Irrigation Dist.</i> ,	
14	94 Cal. App. 2d 766 (Cal. Ct. App. 1949)	14
15	<i>Morey v. Vannucci</i> ,	
16	64 Cal. App. 4th 904 (Cal. Ct. App. 1998)	16
17	<i>Nordquist v. McGraw-Hill Broad. Co.</i> ,	
18	32 Cal. App. 4th 555 (Cal. Ct. App. 1995)	27
19	<i>Owen v. Macy's Inc.</i> ,	
20	175 Cal. App. 4th 462 (Cal. Ct. App. 2009)	25, 26
21	<i>Palo Alto Town & Country Village, Inc. v. Duetsche Lufthansa AG</i> ,	
22	No. C-00-4538 VRW, 2002 WL 1363868 (N.D. Cal. June 17, 2002).....	15
23	<i>Prachasaisoradej v. Ralph's Grocery Co.</i> ,	
24	42 Cal. 4th 217 (2007)	19, 21, 24
25	<i>Ramirez v. Yosemite Water Co., Inc.</i> ,	
26	20 Cal. 4th 785 (1999)	27
27	<i>Resolution Trust Corp. v. Midwest Federal Sav. Bank of Minot</i> ,	
28	36 F.3d 785 (9th Cir. 1993).....	13
	<i>Shaw v. Regents of Univ. of Cal.</i> ,	
	58 Cal. App. 4th 44 (Cal. Ct. App. 1997)	12
	<i>State Farm Mutual Automobile Ins. Co. v. Weir</i> ,	
	2004 WL 2988429 (Cal. Ct. App. Dec. 27, 2004)	17
	<i>Stewart v. Preston Pipeline Inc.</i> ,	
	134 Cal. App. 4th 1565 (Cal. Ct. App. 2005)	14
	<i>Stuart v. Radioshack Corp.</i> ,	
	259 F.R.D. 200 (N.D. Cal. 2009).....	11, 13

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

TABLE OF AUTHORITIES
(continued)

Page

Government Code
Section 12419.5..... 22

RULES

Federal Rule of Civil Procedure
Rule 30(b)(6)..... 4
Rule 56(c)..... 11

REGULATIONS

26 C.F.R.
§ 31.6051-1 23
§ 541.202(e) (2010)..... 30
§ 541.704 (2010)..... 30

IWC Wage Order No. 4-2001,
§ 1(A)(2)(a)-(f); 8 Cal. Code Regs. § 11040(1)(A)(2)(a)-(f) (2010) 28
§ 2(N); 8 Cal. Code Regs. § 11040(2)(N) (2010) 28

1 **I. INTRODUCTION**

2 Defendants Tata Consultancy Services, Ltd., and Tata Sons, Ltd. (collectively, “Tata”),
3 entered into employment agreements with Plaintiffs Kangana Beri and Gopi Vedachalam
4 (“Plaintiffs”) under which Tata agreed to pay them gross annual U.S. salaries and separate Indian
5 salaries. Tata breached these agreements by: (1) forcing Plaintiffs to pay back to Tata their
6 federal and state tax refunds; (2) reducing their U.S. pay by the amount of their Indian salaries;
7 and (3) failing to pay the gross U.S. salaries promised to Plaintiffs in the agreements. Tata’s
8 requirement that Plaintiffs surrender their tax refunds, its deduction of their Indian salaries, and
9 its failure to pay promised U.S. salaries give rise to Plaintiffs’ claims for breach of contract and
10 for unlawful recoupment of wages under California Labor Code § 221.

11 Tata has moved for summary judgment on several claims asserted by the two Plaintiffs.
12 Tata’s arguments for summary judgment as to each claim fail.

13 First, there are genuine disputes of material fact regarding Ms. Beri and
14 Mr. Vedachalam’s breach of contract claims because their employment contracts and admissible
15 extrinsic evidence show that Tata failed to pay them the promised salary. Ms. Beri’s employment
16 contract explicitly specifies a U.S. salary of \$50,000, which she was not paid. While the U.S.
17 salary term in Mr. Vedachalam’s employment contract is blank, his visa applications — which
18 Tata signed under penalty of perjury and provided to the government and Tata’s employees to
19 inform them of their salary — constitute written, contemporaneous evidence of the agreed-upon
20 salary amount.

21 Second, summary adjudication of Plaintiffs’ Labor Code § 221 claim is unwarranted
22 because Tata improperly deducted Plaintiffs’ Indian salary from their U.S. salary amount. In
23 addition, Plaintiffs’ tax refund checks constitute wages that Tata over-withheld and then
24 unlawfully recouped from Plaintiffs. The evidence shows that Tata improperly changed
25 Plaintiffs’ federal and state tax exemptions without their knowledge, thus manipulating the
26 amount of money withheld from their paychecks.

27 Third, Ms. Beri has presented a genuine dispute of material fact regarding her vacation
28 pay claim because Tata failed to provide her with earned vacation pay.

1 Fourth, Ms. Beri has presented evidence that Tata improperly classified her as exempt and
 2 failed to provide her overtime pay for the overtime hours that she worked because the record
 3 shows that she did not spend more than fifty percent of her time on exempt activities.

4 Fifth, summary adjudication of Ms. Beri's waiting time penalties claim is unwarranted
 5 because the evidence indicates that, upon termination, Tata failed to pay her required U.S. salary,
 6 Indian salary, vacation pay, and overtime pay.

7 Sixth, Tata's arguments that Defendant Tata Sons, Ltd., did not employ Plaintiffs for some
 8 of the liability period are either premature or without merit.

9 Notably, Tata does not challenge Plaintiffs' California claims for itemized wage
 10 statements or violation of Section 17200 of California's Business and Professions Code.
 11 Regardless of this motion, therefore, Plaintiffs' Eighth and Ninth Claims for Relief — and this
 12 proposed class action — will continue. Even as to the claims that Tata is challenging, because
 13 Tata brings this motion against each Plaintiff *prior to* class certification, Tata's motion applies
 14 only to the named Plaintiffs and will not preclude any Class Member from asserting these claims
 15 or from seeking appointment as a class representative in this or any other action.

16 **II. FACTUAL BACKGROUND**

17 Plaintiffs and the proposed Class are non-U.S. citizen employees of Tata who were sent
 18 (or "deputed") from India to the United States to work in information technology jobs. Tata has
 19 used a standard deputation process that requires its deputed employees to sign form employment
 20 contracts before coming to the United States. Prior to their deputation, Tata obtains H1-B or L-1
 21 visas for employees that allow them to live and work in the United States provided that they
 22 remain employed by Tata. Once the deputation ends, Tata's employees typically return to India.

23 **A. Tata's Standard Deputation Agreements**

24 Tata has used a standard process to depute employees from India to the United States. In
 25 India, Tata presents form documents on a take-it-or-leave-it basis to employees, giving those
 26 employees no opportunity to negotiate their terms. *See* Declaration of Daniel M. Hutchinson in
 27 Support of Plaintiffs' Opposition to Motion for Partial Summary ("Hutchinson Decl."),¹ Ex. D at

28 ¹ All document and deposition citations are attached to the Hutchinson Decl. All documents are
Footnote continued on next page
 PLAINTIFFS' OPPOSITION TO MOTION FOR
 PARTIAL SUMMARY JUDGMENT
 CASE NO. C 06-0963 (CW)

1 191:1-192:10 (Deposition of Gopi Vedachalam (“Vedachalam Dep.”)) (“I just got a few minutes
2 to sign and get my tickets to grab the plane. This happens a few hours before the flight.”); *id.*,
3 Ex. A at 96:17-22 (Deposition of Kangana Beri (“Beri Dep.”)). Typically, employees are
4 required to report to the closest foreign deputation office to sign these documents either the day
5 before or the day of their flight to the U.S. and are not given time to read the paperwork they must
6 sign. *See* Vedachalam Dep. at 194:17-195:2 (“I never had the opportunity to go through this
7 document.”); Beri Dep. at 97:8-99:14, 131:5-132:12. These standard deputation agreements
8 (“DAs”) and deputation terms agreements (“DTAs”) regulate every aspect of Plaintiffs’
9 employment in the United States, including their compensation.

10 Contrary to Tata’s assertions, the evidence indicates that Tata did not provide an Overseas
11 Deputation Manual to Plaintiffs at the time of their deputation or at any time thereafter.
12 Vedachalam Dep. at 270:24-271:5; Beri Dep. at 94:9-96:5, 97:3-7, 195:2-13.

13 **B. Tata’s Tax Return Policy**

14 Tata admits that, until at least July 2005, it followed a uniform policy of requiring deputed
15 employees to endorse and return their federal and state tax refund checks to Tata. Hutchinson
16 Decl., Ex. E at 223:5-225:22 (Deposition of Ramakrishnan Venkataraman (“Venkataraman
17 Dep.”)). To ensure compliance with this policy, Tata required that Mr. Vedachalam sign a
18 standard power of attorney agreement that delegated to Tata the power to calculate and submit his
19 tax returns to the applicable state and federal tax authorities. Hutchinson Decl., Exs. 1-2. Tata
20 filed Mr. Vedachalam’s tax returns listing Tata’s corporate offices as the return address so that
21 *Tata* (not Mr. Vedachalam) would receive his tax refund checks. *Id.*, Exs. 17-18, 25-26, 33-34, &
22 39-40. Upon receipt of Mr. Vedachalam’s tax refund checks, Tata sent Mr. Vedachalam a
23 standardized “urgent memo” requiring him to sign and return the tax refund check to Tata. *Id.*,
24 Ex. 3. The tax refund checks enclosed with the urgent memo were each pre-stamped with a
25 designation that read: “Pay to the Order of . . . Tata Consultancy Services, Ltd.” *Id.*, Exs. 19-20,

26 _____
27 *Footnote continued from previous page*

28 attached collectively as Exhibits 1 through 52 in numerical order. All excerpts of deposition
transcripts are attached to the Hutchinson Decl. as Exhibits A through E, in alphabetical order by
name of deponent.

1 27-28, 35-36, & 41-42.

2 If an employee wanted to file his or her own taxes, Tata required the employee to pay the
3 prospective amount of any tax refund to Tata. Venkataraman Dep. 239:10-13. Tata did not
4 provide the employee with his or her W-2 form, as required by law, but instead refused to provide
5 the W-2 form unless the employee paid Tata an amount equal to the anticipated federal and state
6 tax refunds. Hutchinson Decl., Ex. 10. Thus, when Ms. Beri requested her W-2 for 2003 in order
7 to file her own taxes, Tata's Employee Tax department directed her to write a check to Tata for
8 the amount Tata expected her federal and state tax refunds to be. *Id.* Ms. Beri paid this amount,
9 and only then received her W-2 form. *Id.*

10 **C. Tata's Standard Visa Applications**

11 Tata obtains a visa for each deputed employee. Hutchinson Decl., Ex. B at 176:2-180:21
12 (Deposition of Ashok Mukherjee ("Mukherjee Dep.")). On each visa petition, Tata provides a
13 U.S. salary and "certif[ies] under penalty of perjury under the laws of the United States of
14 America that this petition and the evidence submitted with it are true and correct." Hutchinson
15 Decl., Ex. 21. Tata's Federal Rule of Civil Procedure 30(b)(6) designee on Tata's policies and
16 practices for compensation and the completion of visa applications testified that Tata provides
17 employees' salary information on their visa documents "because we want the employee to know
18 what salary you get." Mukherjee Dep. at 181:12-21.

19 **D. Plaintiff Beri's Job Duties, Employment Contracts, Compensation, Tax**
20 **Exemptions, And Vacation Pay**

21 **1. Job Duties**

22 Ms. Beri began working for Tata in the United States on April 4, 2003. Beri Dep. at
23 122:17-25, 121:1-6. She regularly worked nine to ten hours per day. *Id.* at 216:1-3. Ms. Beri's
24 primary job duty was to support Tata's clients' technological infrastructure by following the
25 instructions of others. *Id.* at 42:2-5; 44:19-45:5. Her work was primarily routine, lower-level
26 support work. *Id.* at 225:14-25. For example, Ms. Beri testified that while working for Tata at
27 Experian, she did not design the project or do project requirement analysis. Beri Dep. at 36:10-
28 37:7. Rather, she performed testing, meaning, "[y]ou run the code and see if it gives the desired

1 output.” *Id.* at 40:16-42:1. Ms. Beri further explained that she did not determine what the
2 “desired output” was; instead, she simply “match[ed] it with [the client’s] requirements. If it
3 matches with requirement, that’s the desired output.” *Id.* at 42:2-5. If the requirement did not
4 match, she told her supervisor and the developer, and they handled it from there. *Id.* at 42:6-19.
5 Towards the end of her assignment at Experian (one of Tata’s clients), some of the developers
6 left, and Ms. Beri was asked to help maintain the code. *Id.* at 43:25-44:15. She did so based on
7 instructions from her supervisors and the requirements they gave her. *Id.* at 44:19-45:5.

8 Ms. Beri was a support worker who helped keep the systems running by carrying out
9 assigned maintenance tasks; she was never the developer, designer, or architect of a project. *See*
10 *id.* at 48:5-17. Those higher-level roles were performed by others, such as the database architect,
11 the project manager, the testing manager, and the requirements gatherer. *Id.* at 47:17-48:17. Tata
12 points to Ms. Beri’s Tata resume as evidence that she did perform design and programming, but
13 Ms. Beri clarified that her Tata resume was not necessarily an accurate reflection of her actual job
14 duties – some of the duties listed on that resume she actually performed, others not. *Id.* at 36:10-
15 51:2. Regardless, Ms. Beri testified that she did not perform design or programming duties more
16 than 50% of the time, and her resume does not contradict that testimony. *Id.* at 225:14-25;
17 Hutchinson Decl., Ex. 4.

18 2. Employment Contracts

19 On April 4, 2003, Ms. Beri signed an employment contract (the DA and DTA) that
20 provided the terms and conditions for her employment with Tata in the United States.
21 Hutchinson Decl., Exs. 6 & 7. The salary provisions that governed her deputation set out three
22 discrete components: (1) an initial relocation allowance, (2) an Indian salary, and (3) a U.S.
23 salary. *Id.*, Ex. 6 at 384, Ex. 7 at TCS 373. Regarding the U.S. salary, the DTA unambiguously
24 stated:

25 Compensation in the United States. In addition to the compensation and benefits
26 you currently receive and will continue to receive in India while on deputation,
27 you shall receive additional compensation in the United States in the gross amount
of \$50,000.

28 *Id.*, Ex. 7 at TCS 373. At the time she signed her DA and DTA, Ms. Beri understood that she

1 would be paid \$50,000 in U.S. salary in addition to her Indian salary. Beri Dep. at 126:12-
2 127:12, 127:19-128:5 (“It was very clearly mentioned that the compensation would be \$50,000 in
3 addition, over and above the Indian salary.”).

4 Ms. Beri’s signed employment contracts do not contain any provision permitting Tata to
5 collect the expected amount of her income tax refunds or to deduct the amount of her Indian
6 salary from her U.S. compensation.

7 **3. Tata’s Breaches of Ms. Beri’s Employment Contracts**

8 As set forth in Table 1 (below on page 11), based on a \$50,000 annual U.S. salary,
9 Ms. Beri’s prorated 2003 pay for working nine months that year should have been \$37,500 (that
10 is, 9/12 of \$50,000). However, Tata allocated a **gross** salary of only \$33,179.54 to Ms. Beri that
11 year. Beri Dep. at 149:2-23; Hutchinson Decl., Ex. 8. Tata also deducted from this amount
12 \$3,605 in Indian salary and required Ms. Beri to pay \$2,440 in wages back to Tata to receive her
13 W-2 form. *Id.*, Ex. 9 & 10. Thus, in 2003, Tata paid Ms. Beri \$27,134.54 in U.S. salary, which is
14 \$10,365.46 less than the \$37,500 she should have been paid under the terms of her DTA.

15 Ms. Beri worked for Tata through September 2004. Beri Dep., 27:23-28:2. Tata allocated
16 to Ms. Beri a gross salary of \$31,219.41 for 2004. Hutchinson Decl., Ex. 11. Tata also deducted
17 from this amount \$4,996 in Indian salary. *Id.*, Ex. 12. Thus, Tata paid Ms. Beri \$26,223.41 in
18 U.S. salary in 2004, which is \$11,276.59 less than the \$37,500 promised to her.

19 **4. Tata’s Manipulation of Ms. Beri’s Tax Exemptions**

20 Ms. Beri was married in April 2002. Beri Dep., 120:15-20. However, Tata listed her as
21 “SINGLE” and reported her state and federal tax exemptions as “1” on her 2003 W-2.
22 Hutchinson Decl., Ex. 8. Even after Ms. Beri corrected this error, Tata changed her federal tax
23 exemptions from 2 to 1, and changed her taxable status from married back to single on Ms. Beri’s
24 September 2004 Earnings Statement. *Id.*, Ex. 13. The underreporting of Ms. Beri’s tax
25 exemptions and the reporting of her marital status as “single” increased the amount of her wages
26 that Tata withheld from her pay. *See* Hutchinson Decl., Ex. 49 (IRS Publication 919) (“How do I
27 adjust my tax withholding? . . . Decrease the number of allowances you claim.”); *Id.*, Ex. 50 (IRS
28 Publication 15 (“Employer’s Tax Guide) at 42, 44 (showing amount of tax withholding for single

1 persons greater than for married persons whose wages are the same); *Id.*, Ex. 51 (Form W-4
 2 indicating that employee may report status as “Single,” “Married,” or “Married *but withhold at*
 3 *higher Single rate*”) (emphasis added).²

4 **5. Vacation Pay**

5 Tata’s vacation policy from 2002 to July 2005 stated that every employee who completed
 6 twelve months of continuous overseas deputation would be eligible for four weeks of vacation in
 7 India, provided that the employee was assigned to go back on deputation for another twelve
 8 months thereafter. Hutchinson Decl., Ex. C at 178:6-183:7 (Deposition of Uma Sivasubramini
 9 (“Sivasubramini Dep.”)). The policy itself was silent as to the amount of pay employees would
 10 receive during vacation.³ Pursuant to this policy, all employees had to report back to their Indian
 11 home office in order to use their paid vacation. *Id.* at 191:23-198:15.

12 Ms. Beri did not take any vacation days while working for Tata in the U.S. Beri Dep. at
 13 17:5-6. When her assignment at Tata client Experian⁴ ended in September 2004, Ms. Beri did not
 14 report back to her home office, because she understood that she was to be assigned to another
 15 project in the U.S. soon. *Id.* at 137:20-138:17. She returned to India in October 2004 to visit
 16 family while she waited for her next deputation, but she was not paid during this time. *Id.* at
 17 174:10-12. Ms. Beri contacted Tata repeatedly asking for a new deputation, but after almost a
 18 year of no response from Tata, she gave up and concluded that she was no longer a Tata
 19 employee. *Id.* at 139:2-7.

20 Ms. Beri never received any payment for her unused vacation. According to Tata, this is
 21 because she was classified as “absconding” and therefore her earned salary and vacation pay were
 22 held in a company account. Defendants’ Motion for Partial Summary Judgment, Dkt. No. 150

23
 24 ² These publications can be found on the IRS’s website at
 25 http://www.irs.gov/publications/p919/ar02.html#en_US_2011_publink1000233675 (last visited
 26 March 10, 2011), and <http://www.irs.gov/publications/p15/ar01.html> (last visited March 10,
 2011). In Publication 15, the IRS explains that a taxpayer can increase the amount of his or her
 tax withholding by decreasing the number of exemptions on his or her W-4 and decrease the
 amount of withholding by increasing the number of exemptions on the W-4. *Id.*

27 ³ Tata’s witness testified that Tata’s practice was to pay only the employee’s Indian salary during
 vacation. Sivasubramini Dep. at 178:6-183:7.

28 ⁴ Ms. Beri’s work for Experian is sometimes referred to in her deposition as the J.Jill project.
 J.Jill and Experian refer to the same deputation project.

1 (hereinafter “Defs.’ Motion”) at 12. Tata asserts that it has commenced a “full and final
2 settlement process” to pay Ms. Beri her earned salary and accrued vacation pay, *id.*, but Ms. Beri
3 testified that she never received her accrued vacation pay (though she did receive the money from
4 her retirement fund (“provident fund”)). Beri Dep. at 212:1-13.⁵

5 **E. Plaintiff Vedachalam’s Employment Contracts, Compensation, And Tax**
6 **Exemptions**

7 **1. Employment Contracts**

8 In 2000 and 2001, Mr. Vedachalam signed employment contracts with Tata that provided
9 the terms and conditions for his employment in the United States, including “pay and benefits in
10 India and the country of deputation.” Hutchinson Decl., Ex. 14 at TCS 92; Ex. 15 at TCS 116.
11 Each contract specified that Mr. Vedachalam would continue to receive the same pay and benefits
12 in India, but did not specify a U.S. salary. *Id.*, Ex. 14 at TCS 92-93; Ex. 15 at TCS 116.

13 On May 14, 2002, Tata submitted a visa petition for Mr. Vedachalam setting forth a salary
14 of \$56,058. Hutchinson Decl., Ex. 21 at TCS 1684. Tata signed the visa petition and “certif[ied]
15 under penalty of perjury under the laws of the United States of America that this petition and the
16 evidence submitted with it are true and correct.” *Id.* at TCS 1685. This salary term constitutes
17 written, contemporaneous evidence of the amount Tata agreed to pay Mr. Vedachalam.

18 On May 27, 2002, Mr. Vedachalam again signed an employment contract that provided
19 the terms and conditions for his employment with Tata in the United States. Hutchinson Decl.,
20 Ex. 22. The salary “provisions [that] shall govern your deputation” included: (1) an initial
21 relocation allowance, (2) an Indian salary, and (3) a U.S. salary. *Id.* at TCS 129. Regarding the
22 U.S. salary, the DTA stated:

23 Compensation in the United States. In addition to the compensation and benefits
24 you currently receive and will continue to receive in India while on deputation,
25 you shall receive additional compensation in the United States in the gross amount
of \$_____.

26 *Id.* On June 2, 2003, TCS submitted a visa petition for Mr. Vedachalam setting forth a salary of

27 ⁵ In addition, Tata did not initiate this settlement until June 2007 — over a year after this lawsuit
28 was initiated and three years after the end of Beri’s employment with Tata. Sivasubramini Dep.
at 295:5-14.

1 \$74,000. Hutchinson Decl., Ex. 29 at TCS 1590. Tata again signed the visa petition under
2 penalty of perjury, certifying that the petition was true and correct. *Id.*

3 On September 30, 2003, Mr. Vedachalam signed another employment contract with Tata
4 that provided the terms and conditions for his employment in the United States. Hutchinson
5 Decl., Ex. 30. The salary provisions that governed his deputation were identical to those in the
6 2002 DTA, including an initial relocation allowance, an Indian salary, and a U.S. salary. *Id.* at
7 TCS 182. The 2003 DTA contained the identical “Compensation in the United States” paragraph,
8 providing once again that, in addition to the Indian salary, Mr. Vedachalam “shall receive
9 additional compensation in the United States in the gross amount of \$_____.” *Id.* On April 20,
10 2005, TCS again submitted a visa petition for Mr. Vedachalam, signed under penalty of perjury,
11 setting forth a salary of \$74,000. *Id.*, Ex. 43.

12 Mr. Vedachalam’s signed employment contracts do not contain any provision permitting
13 Tata to collect his income tax refunds or deduct the amount of his Indian salary from his U.S.
14 compensation. *See id.*, Exs. 14, 15, 22, 30.

15 **2. Tata’s Breaches of Mr. Vedachalam’s Employment Contracts**

16 As set forth in Table 1 (below on page 11), in or around September 2004, Tata forced
17 Mr. Vedachalam to sign over his 2001 federal and state tax refunds to Tata in the amount of
18 \$4,439.80. Hutchinson Decl., Ex. 19 (\$1,846.25) & 20 (\$2,593.55).

19 Although, as noted above, Tata promised in 2002 to pay Mr. Vedachalam \$56,058
20 annually in U.S. compensation as indicated in his visa petition (Hutchinson Decl., Ex. 21 at TCS
21 1684), Tata paid Mr. Vedachalam only \$36,126.34, based on the following calculation: an
22 allocation of \$52,341.36 (*see id.*, Ex. 23); minus a deduction of \$10,860.85 for Indian salary (*Id.*,
23 Ex. 24); minus \$4,858.08 and \$496.09 in recouped federal and state tax refunds, respectively. *Id.*,
24 Exs. 27-28. Thus, in 2002, Tata paid Mr. Vedachalam \$19,931.66 less than it promised him.

25 In 2003, Tata promised to pay Mr. Vedachalam \$60,629.52 annually in U.S.
26 compensation as indicated in his visa petitions (*i.e.*, a salary of \$56,058 from January 1 to
27 September 29, 2003, and a salary of \$74,000 from September 30, 2003 to December 31, 2003).
28 Hutchinson Decl., Ex. 21 at TCS 1684, Ex. 29 at TCS 1590. However, Tata only paid

1 Mr. Vedachalam \$50,841.83, based on the following calculation: an allocation of \$76,888.79
2 (*see id.*, Ex. 31); minus a deduction of \$15,438.51 for Indian salary (*Id.*, Ex. 32); minus \$8,076
3 and \$2,532.45 in recouped federal and state tax refunds, respectively. *Id.*, Exs. 34-35. Thus, in
4 2003, Tata paid Mr. Vedachalam \$9,787.69 less than it promised him.

5 In 2004, Tata once again paid Mr. Vedachalam less than it promised him, as indicated in
6 his visa petition. Although it promised to pay Mr. Vedachalam \$74,000 annually in U.S.
7 compensation (*id.*, Ex. 29 at TCS 1590), Tata paid Mr. Vedachalam only \$40,829.38, based on
8 the following calculation: an allocation of \$63,182 (*see id.*, Ex. 37); minus a deduction of
9 \$16,938.62 for Indian salary (*Id.*, Ex. 38); minus \$4,028 and \$1,386 in recouped federal and state
10 tax refunds, respectively. *Id.*, Exs. 41-42. Thus, in 2004, Tata paid Mr. Vedachalam \$33,170.62
11 less than it promised him.

12 Similarly, in 2005, Tata promised to pay Mr. Vedachalam \$37,000 for January 1, 2005
13 through June 30, 2005 as indicated in his visa petitions (*i.e.*, a salary of \$74,000 from January 1,
14 2005 to June 30, 2005). Hutchinson Decl., Ex. 29 at TCS 1590, Ex. 43. However, Tata paid Mr.
15 Vedachalam only \$21,506.33, based on the following calculation: an allocation of \$29,544.61
16 (*i.e.*, 1/2 of 2005 W-2 income) (*see id.*, Ex. 44); minus a deduction of \$8,038.28 for Indian salary
17 (*Id.*, Ex. 45). Thus, in 2005, Tata paid Mr. Vedachalam \$15,493.67 less than it promised him.

18 **3. Tata's Manipulation of Mr. Vedachalam's Tax Exemptions**

19 In March 2001, Mr. Vedachalam signed an IRS W-4 form indicating that three tax
20 exemptions applied to him—for his wife, his child, and himself. *See* Hutchinson Decl., Ex. 2 at
21 TCS 226. Tata nonetheless listed his marital status as “SINGLE” in 2002 and 2003, and his
22 exemptions as “1” for purposes of his tax withholding in 2001, 2002, and 2003. *Id.*, Exs. 16, 23,
23 31. As with Ms. Beri, this reduction in Mr. Vedachalam's exemptions increased the amount of
24 his wages that Tata withheld from his take home pay. *See id.*, Ex. 49. However, Tata prepared
25 and filed tax returns that listed Mr. Vedachalam's his marital status as “MARRIED” and his
26 exemptions as “3” in 2001, 2002, and 2003, thereby resulting in a higher tax refunds for Tata.
27 *See id.*, Exs. 17-18, 25-26, 33-34.
28

Table 1: Summary of shortfalls between Tata's promised U.S. pay and actual U.S. pay for Plaintiffs

	Promised U.S. Salary	Actual				Total Allocation After Deductions	Shortfall
		Allocation on W-2	Deduction for Indian Salary	Federal Tax	State Tax		
Beri							
2003	\$37,500	\$33,179.54	\$2,764.24	\$1,962	\$478	\$27,975.30	\$9,524.70
2004	\$37,500	\$31,219.41	\$5,898.53	--	--	\$25,320.88	\$12,179.12
Ved							
2001	--	--	--	\$1,846.25	\$2,593.55	--	\$4,439.80
2002	\$56,058	\$52,341.36	\$10,860.85	\$4,858.08	\$496.09	\$36,126.34	\$19,931.66
2003	\$60,629.52	\$76,888.79	\$15,438.51	\$8,076	\$2,532.45	\$50,841.83	\$9,787.69
2004	\$74,000	\$63,182	\$16,938.62	\$4,028	\$1,386	\$40,829.38	\$33,170.62
2005	\$37,000	\$29,544.61	\$8,038.28	--	--	\$21,506.33	\$15,493.67

III. LEGAL STANDARD

Summary judgment must be denied unless the evidence demonstrates there is “no genuine dispute as to any material fact” and that the defendant is “entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “Because summary judgment is a ‘drastic device’ cutting off a party’s right to present its case to a jury, the moving party bears a ‘heavy burden’ of demonstrating the absence of any triable issue of material fact.” *Avalos v. Baca*, No. CV-05-07602, 2006 WL 2294878, at *1 (C.D. Cal. Aug. 7, 2006) (citation omitted). The Court must construe the evidence in the light most favorable to the plaintiff, resolving all inferences in the plaintiff’s favor. *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988). In determining summary judgment, a court cannot weigh evidence or make credibility determinations. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986); *Conn v. City of Reno*, 591 F.3d 1081, 1094 (9th Cir. 2010) (reiterating no weighing of evidence or truth determinations, only determinations of whether there is genuine dispute for trial).

“If the defendant is moving for summary judgment based on an affirmative defense for which it has the burden of proof, the defendant ‘must establish beyond peradventure *all* of the essential elements of the . . . defense to warrant judgment in [its] favor.’” *Stuart v. Radioshack Corp.*, 259 F.R.D. 200, 202 (N.D. Cal. 2009) (quoting *Martin v. Alamo Cmty. College Dist.*, 353 F.3d 409, 412 (5th Cir. 2003)) (emphasis in original); *see also Clark v. Capital Credit &*

1 *Collection Servs.*, 460 F.3d 1162, 1177 (9th Cir. 2006) (holding that a defendant bears the burden
2 of proof at summary judgment with respect to an affirmative defense).

3 **IV. ARGUMENT**

4 **A. A Genuine Dispute Of Material Facts Exists Regarding Whether Tata Paid**
5 **The Amounts Promised In Plaintiffs' Employment Contracts**

6 Plaintiffs Beri and Vedachalam assert breach of contract claims based on Tata's failure to
7 pay them promised wages and Tata's recoupment of their previously earned wages. Summary
8 judgment for Tata is inappropriate as to both Plaintiffs.⁶

9 **1. Plaintiff Beri**

10 Under California law, "the language of the contract is to govern its interpretation." Cal.
11 Civ. Code § 1638. Thus, where the plain terms of a contract are clear, the parties' intent is
12 irrelevant. *Allen v. Smith*, 94 Cal. App. 4th 1270, 1277 (Cal. Ct. App. 2002) (contracts are
13 "governed by objective manifestations, not the subjective intent of any individual involved");
14 *Winet v. Price*, 4 Cal. App. 4th 1159 (Cal. Ct. App. 1992) ("It is the outward expression of the
15 agreement, rather than a party's unexpressed intention, which the court will enforce."); *Shaw v.*
16 *Regents of Univ. of Cal.*, 58 Cal. App. 4th 44 (Cal. Ct. App. 1997) ("The true intent of the
17 contracting party is irrelevant if it remains unexpressed."). Here, the unambiguous terms of
18 Beri's employment contract require Tata to pay her three distinct amounts: (1) a gross U.S. salary
19 of \$50,000, (2) an Indian salary, and (3) an initial stipend for relocation expenses. Hutchinson
20 Decl., Ex. 7 at TCS 373. As summarized in Table 1, above, Ms. Beri's evidence demonstrates
21 that Tata paid her less than it promised her in 2003 and 2004. Viewing this evidence in the light
22 most favorable to the Plaintiff, Tata breached its employment agreement with Ms. Beri by paying
23 less than it promised to pay her.

24 In the face of this evidence, Tata argues that the explicit terms of Ms. Beri's employment
25 contract cannot be enforced due to a purported "mutual mistake." Contracting parties seeking to
26 avoid enforcement of the plain terms of a contract face a high burden. First, application of the

27 ⁶ As described in Plaintiffs' First Amended Complaint and as will be demonstrated in Plaintiffs'
28 class certification motion, Tata's failure to pay promised wages and recoupment of employees'
tax refund checks are company-wide policies that similarly affect the proposed Class.

1 mutual mistake doctrine requires clear and convincing evidence of the alleged mistake. *Sully-*
 2 *Jones Contractors, Inc. v. American Safety Indemnity Co.*, No. 08-cv-1976 BEN, 2010 WL
 3 3153980 at *2 (S.D. Cal. Aug. 9, 2010). Second, mutual mistake has been recognized under
 4 limited circumstances solely as an affirmative defense. *See Resolution Trust Corp. v. Midwest*
 5 *Federal Sav. Bank of Minot*, 36 F.3d 785, 791 (9th Cir. 1993).⁷ As such, Tata must establish
 6 “beyond peradventure” all of the essential elements of mutual mistake. *See Stuart*, 259 F.R.D. at
 7 202. Tata has not met this high burden. Rather, Tata’s sole evidentiary support for this purported
 8 mutual mistake is an assertion from its own representative at deposition, seven years after the
 9 employment contract was executed, that Tata did not intend to pay Ms. Beri the amount contained
 10 in the clear and unambiguous salary term promised in her employment contract. Tata has failed
 11 to show through uncontested, clear, and convincing evidence that the purported mistake was
 12 either mutual or a mistake.

13 First, Ms. Beri did not share Tata’s purported belief that Tata promised to pay her less
 14 than \$50,000 in U.S. salary. Rather, Ms. Beri testified that she expected to receive \$50,000 in
 15 U.S. compensation, plus her Indian salary. Beri Dep. at 122:21-25, 126:12-127:12, 127:19-128:5.
 16 Tata has also presented no evidence that Ms. Beri intended, at the time the contract was executed,
 17 to receive a U.S. salary of less than \$50,000. Defs.’ Motion at 17-19 (citing none). Thus, no
 18 mutual mistake occurred. *See, e.g., Insurance Co. of North America v. Bechtel*, 36 Cal. App. 3d
 19 310, 317 (Cal. Ct. App. 1973) (“There was not a mutual mistake permitting rescission of the
 20 policy and certificate of insurance because those documents correctly recorded the understanding

21 ⁷ Tata can only assert mutual mistake as an affirmative defense because any claim for reformation
 22 due to mutual mistake is time-barred. *See City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029,
 23 1035-36 (9th Cir. 2003) (“[T]ime-barred claims masquerading as defenses [are] subject to the
 24 statute of limitations bar.”). California Code of Civil Procedure § 338(d) provides for a three-
 25 year statute of limitations for a cause of action premised upon mistake. *Hal Roach Studios, Inc. v.*
 26 *Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1547 (9th Cir. 1990). The statute of limitations
 27 under Section 338(d) begins to run when the aggrieved party discovers, or should discover, the
 28 existence of the cause of action. *Id.* Tata and Ms. Beri executed an employment contract for
 \$50,000 annual U.S. salary on April 4, 2003. Tata learned that Ms. Beri sought payment on her
 full promised salary by no later than June 5, 2006, upon the filing of the First Amended
 Complaint (Dkt. No. 24). Tata did not raise the affirmative defense of mutual mistake in its
 initial Answer, filed on February 18, 2010. Instead, Tata raised this affirmative defense for the
 first time on August 30, 2010. First Amended Answer to First Amended Class Action Complaint
 (Dkt. No. 141). Tata, therefore, waited over four years to raise this defense.

1 of one party to the contract, the employee.”).

2 Second, there is insufficient evidence that Tata was mistaken. In the absence of fraud,
3 overreaching, or excusable neglect, it is well established that one who signs an instrument may
4 not avoid the impact of its terms on the ground of ignorance of its terms at the time of signing.
5 *Stewart v. Preston Pipeline Inc.*, 134 Cal. App. 4th 1565, 1588 (Cal. Ct. App. 2005). A party’s
6 failure to conform a contract to known facts cannot form the basis of a mistake. *Taylor v. Taylor*,
7 66 Cal. App. 2d 390, 398 (Cal. Ct. App. 1944) (“A complainant will be denied relief in equity
8 where his only showing is his own inexcusable neglect or when he has failed to make inquiry or
9 had within his reach the true state of facts.”); *Moreno Mutual Irrigation Co. v. Beaumont*
10 *Irrigation Dist.*, 94 Cal. App. 2d 766, 782 (Cal. Ct. App. 1949) (“[Parties] may not avoid a
11 contract on the basis of mistake where it appears that ignorance of the facts was the result of
12 carelessness, indifference, or inattention.”).⁸ And it is elementary that a party cannot simply
13 change its mind once it has signed a contract and provide less than promised as fulfillment of its
14 obligations. Here, Tata had all the information necessary to detect this purported mistake —
15 relating to one of the most critical terms of the document — prior to executing the employment
16 contract. Tata’s failure to conform form employment contracts it drafted to its purported
17 intention does not constitute a mistake.

18 Tata’s cited cases are inapposite and merely illustrate the proper application of the mutual
19 mistake rule when, unlike here, (a) an acknowledged mistake occurred that (b) was mutual.
20 *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 521-22, 526 (2002) (accident victim and insurer entered
21 into an overly broad release that arguably released claims against a third-party car manufacturer,
22 and mutually decided to clarify it); *see also Inamed Corp. v. Medmarc Cas. Ins. Co.*, 258 F. Supp.
23 2d 1117, 1123 (S.D. Cal. 2002) (distinguishing *Hess* on this ground and denying summary
24 judgment because conflicting extrinsic evidence existed). Likewise, in *Palo Alto Town &*

25 ⁸ *See also Ball v. Johanns*, No. CIV. S-07-1190 LKK/DAD, 2008 WL 269069, at *5 (E.D. Cal.
26 Jan. 29, 2008) (“A mistake in judgment alone is not a basis for avoiding a contract or
27 transaction.”); *Wal-Noon Corp v. Hill*, 119 Cal. App. 3d 605, 652 (Cal. Ct. App. 1975) (“Failure
28 to make reasonable inquiry to ascertain or effort to understand the meaning and content of the
contract upon which one relies constitutes neglect of a legal duty such as will preclude recovery
for unilateral mistake of fact.”); *American Nat’l Ins. Co. v. Continental Parking Corp.*, 42 Cal.
App. 3d 260, 267 (Cal. Ct. App. 1974) (similar).

1 *Country Village, Inc. v. Duetsche Lufthansa AG*, No. C-00-4538 VRW, 2002 WL 1363868 (N.D.
2 Cal. June 17, 2002), the parties signed a lease, but learned three months later that the property
3 required three million dollars in seismic upgrades to be usable. *Id.* at *1-2. The court found “no
4 reasonable dispute” that both parties were unaware of the unsuitability of the property at the time
5 they formed the contract. *Id.* at *4.

6 Here, in contrast to both *Hess* and *Palo Alto Town*, the purported mistake regarded
7 information within the exclusive control of one party — Tata. Plaintiff Beri testified that she
8 understood the \$50,000 U.S. salary term to mean what it said (Beri Dep., 122:21-25, 126:12-
9 127:12, 127:19-128:5), strongly disputes the purported mistake, and has never acknowledged that
10 any purported mistake occurred. Application of the mutual mistake doctrine is simply
11 inappropriate here.

12 **2. Plaintiff Vedachalam**

13 As with Ms. Beri, the unambiguous terms of Mr. Vedachalam’s employment contract
14 required Tata to pay him: (1) a gross U.S. salary, (2) a separate Indian salary, and (3) an initial
15 stipend for relocation expenses. Hutchinson Decl., Exs. 22, 30. Tata breached Mr. Vedachalam’s
16 signed employment contract by deducting the amount of his Indian salary from his U.S.
17 compensation despite the fact that his contract does not contain any provision permitting Tata to
18 do so. *See id.* Tata has not challenged the portion of Mr. Vedachalam’s claim alleging that Tata
19 breached his employment contract by making these deductions of his Indian salary despite the
20 absence of any such contractual language.

21 Tata further breached Mr. Vedachalam’s employment contract by failing to pay the
22 promised gross U.S. salary. Plaintiff Vedachalam’s employment contract lists the U.S. salary
23 amount as “\$_____.” Extrinsic evidence — in the form of the visa petitions — is necessary to
24 determine the ambiguous and/or missing term. The discrepancy between that evidence and the
25 amount actually paid by Tata gives rise to a genuine dispute of material fact regarding whether
26 Tata paid Mr. Vedachalam what it owed him under the contract.

27 The visa petitions constitute written, contemporaneous evidence of Mr. Vedachalam’s
28 U.S. salary terms for 2002 through July 1, 2005. Under California law, such extrinsic evidence is

1 admissible to clarify an ambiguous or missing contact term. *See, e.g., In re Estate of Gardner*,
2 187 Cal. App. 4th 543, 550 (Cal. Ct. App. 2010) (“[P]arol evidence may be used to explain the
3 missing terms”); *Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.*, 205 Cal. App.
4 3d 442 (Cal. Ct. App. 1988) (finding that industry custom and practice evidence is admissible to
5 supply a missing term or aid in interpreting ambiguous contract terms); *see also Beverly Hills*
6 *Firemen’s Assn., Inc. v. City of Beverly Hills*, 119 Cal. App. 3d 620, 629-31 (Cal. Ct. App. 1981)
7 (class case analyzing extrinsic evidence to determine whether contractual requirement of city to
8 pay portion of firefighters’ retirement contributions constituted a salary increase). With
9 Mr. Vedachalam, Tata adhered to its standard custom and practice of completing visa documents,
10 signing them under penalty of perjury, submitting them to the INS, and providing them to
11 employees. Tata does so “because we want the employee to know what salary you get.”
12 Mukherjee Dep. at 181:12-21. It is reasonable to infer that Tata’s visa petitions — in which Tata
13 states under penalty of perjury the specific salary an employee will receive *and provides it to the*
14 *employee to inform him or her of the salary he or she will get* — provide admissible evidence to
15 explain or clarify the missing salary term of Mr. Vedachalam’s employment contract.

16 Tata’s contentions that (a) the DTAs are unambiguous and (b) the Court cannot consider
17 extrinsic evidence (Defs.’ Motion at 15) are inconsistent with California law. As the Ninth
18 Circuit recently summarized:

19 Where the meaning of the words used in a contract is disputed, the trial court must
20 provisionally receive any proffered extrinsic evidence which is relevant to show
21 whether the contract is reasonably susceptible of a particular meaning. Indeed, it
22 is reversible error for a trial court to refuse to consider such extrinsic evidence on
the basis of the trial court’s own conclusion that the language of the contract
appears to be clear and unambiguous on its face.

23 *First National Mortg. Co. v. Federal Realty Inv. Trust*, 631 F.3d 1058, at *6 (9th Cir. 2011)
24 (quoting *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. Ct. App. 1998). In *First National*,
25 because the express terms of the agreement did not specify the duration of a lease, the court
26 admitted extrinsic evidence that permitted the jury to determine a ten-year term. *Id.* at *6-8.
27 *First National* straightforwardly dictates that here, where the agreement omits the salary term, the
28 Court must consider relevant extrinsic evidence.

1 A two-step process requires the court to: (1) receive provisionally (without actually
 2 admitting) all credible evidence to determine whether the language is “reasonably susceptible” to
 3 the interpretation urged by a party, and (2) if so, admit the extrinsic evidence to interpret the
 4 contract. *Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (Cal. Ct. App. 1992); *see also* Cal. Civ. P.
 5 § 1856; *State Farm Mutual Automobile Ins. Co. v. Weir*, 2004 WL 2988429, at *4 (Cal. Ct. App.
 6 Dec. 27, 2004) (cited by Tata despite Tata’s acknowledgment that this unpublished opinion
 7 provides neither binding nor persuasive authority) (same); *Appling v. State Farm Mut. Auto Ins.*
 8 *Co.*, 340 F.3d 769, 777 (9th Cir. 2003) (cited by Tata) (holding that California law permits
 9 “extrinsic evidence of the parties understanding and intended meaning of the words used in their
 10 written agreement” and “to define the terms in the contract”).⁹

11 Since extrinsic evidence must be admitted here to define the ambiguous “\$_____” salary
 12 term, Tata’s summary judgment motion must fail. Summary judgment is inappropriate in
 13 contract cases that rely upon the application of extrinsic evidence, because contract interpretation
 14 in such cases is the purview of the jury. *Welles v. TurnerEntertainment Co.*, 503 F.3d 728, 737
 15 (9th Cir. 2007); *see also Minnesota Mut. Life Ins. Co. v. Ensley*, 174 F.3d 977, 982-83 (9th Cir.
 16 1999) (summary judgment inappropriate where parties disputed which document contained the
 17 contract terms); *see also First Nat. Mortg.*, 631 F.3d 1058, at *6 (“As trier of fact, it is the jury’s
 18 responsibility to resolve any conflict in the extrinsic evidence properly admitted to interpret the
 19 language of a contract.”).

20 If the Court nonetheless decides to weigh the evidence before it to determine if Tata is

21 ⁹ Tata relies upon two slivers of dicta from an unpublished California case to suggest that failure
 22 to include a term does not render a contract ambiguous. Defs.’ Motion at 23, 24 (citing *Weir*,
 23 2004 WL 2988429, at *6 (Cal. Ct. App. Dec. 27, 2004)). In *Weir*, the court found, after a review
 24 of the extrinsic evidence, that an insurance agent agreement, which did not address whether good
 25 cause was required for termination of the relationship, could not be held to include such a
 26 requirement. Here, in contrast, the employment agreement was not silent, but instead included a
 27 provision that specifically related to Mr. Vedachalam’s U.S. salary, with a blank for the actual
 28 number. Extrinsic evidence is appropriate to define that ambiguous term. *Bustamante v. Intuit,*
Inc., 141 Cal. App. 4th 1999 (Cal. Ct. App. 2006), relied on by Tata, is also inapposite.
Bustamante involved a vague purported oral promise with no key terms, based on “hypothetical
 scenarios.” *Id.* at 211-13. Logically, the court found no contract because no contract existed. *Id.*;
accord Major League Baseball Props. v. Opening Day Prods., Inc., 385 F. Supp. 2d 256, 271-72
 (S.D.N.Y. 2005) (finding, under New York law, that proposals did not constitute licensing
 contract). That is not this case here, where the parties have a detailed, written contract that
 contains a specific provision regarding Mr. Vedachalam’s U.S. salary.

1 entitled to summary adjudication on Mr. Vedachalam's contract claim, there is a genuine dispute
 2 of material facts regarding whether Tata paid Mr. Vedachalam the amount promised in his
 3 employment contract from 2002 to July 2005, and wrongfully recouped his 2001 tax refunds in
 4 September 2004.

5 In sum, Plaintiffs have presented a genuine dispute as to the material fact of whether Tata
 6 failed to pay Mr. Vedachalam the amounts promised in his employment contract for each year
 7 from 2002 through July 2005.

8 **B. A Genuine Dispute Of Material Facts Exists Regarding Tata's Unlawful**
 9 **Recoupment Of Plaintiffs' Wages**

10 California Labor Code § 221 prohibits employers from collecting or receiving from an
 11 employee any part of the wages the employer had previously paid to the employee.¹⁰ The
 12 evidence in the record demonstrates that a genuine dispute of material facts exists regarding
 13 whether, in violation of § 221, Tata unlawfully collected portions of Plaintiffs' wages by
 14 deducting their Indian salary amounts from their U.S. pay; manipulating their tax exemptions and
 15 reported marital status without their knowledge such that too much money was withheld from
 16 their paychecks; and recouping this money by requiring them to sign over their tax refund checks
 17 and/or to pay Tata the estimated amount of their tax refunds. Moreover, Tata's assertion that
 18 Plaintiffs voluntarily allowed Tata to reduce their wages is unfounded.

19 **1. Tata's Practices Unlawfully Reduced Plaintiffs' Standard Wages**

20 As it argued previously and unsuccessfully in its motion to dismiss, Tata argues that the
 21 tax refunds it required Plaintiffs to repay to it do not constitute "wages" for purposes of Labor
 22 Code § 221. Once again, Tata relies on *Wightman v. Franchise Tax Board*, 202 Cal. App. 3d 966
 23 (Cal. Ct. App. 1988), and *Kokoszka v. Belford*, 417 U.S. 642, 648 (1974), and on pages from the
 24 "Overseas Deputation Manual" that Plaintiffs have testified they never received. *See* Vedachalam
 25 Dep. at 270:24-271:5; Beri Dep. at 94:9-96:5, 97:3-7, 195:2-13.¹¹ The Court previously rejected

26 ¹⁰ Labor Code § 221 provides as follows: "It shall be unlawful for any employer to collect or
 27 receive from an employee any part of wages theretofore paid by said employer to said employee."

28 ¹¹ As discussed in Section II(A), above, the Overseas Manual does not constitute part of
 Plaintiffs' employment contract with Tata.

1 Tata's argument that the tax refunds that Tata admits it required Plaintiffs to pay to Tata
2 represented a "gross up" over their promised net salaries and thus were not wages within the
3 meaning of § 221. Hutchinson Decl., Ex. 52 (Dkt. No. 127 (Feb. 4, 2010 Order)) at 10-11. In
4 rejecting Tata's argument, the Court noted that, to withhold wages with an employee's consent,
5 two conditions must be met: (a) the deduction must be authorized in writing and (b) it must not
6 reduce the employee's standard wage. *Id.* at 11 (citing *Koehl v. Verio*, 142 Cal. App. 4th 1313,
7 1337 (Cal. Ct. App. 2006)). The Court noted further that § 221 was enacted to prevent employers
8 from making secret deductions or keeping kick-backs to make it appear that employees' wages
9 were paid when they were not. *Id.* (citing *Kerr's Catering Service v. Dep't of Indus. Relations*,
10 57 Cal. 2d 319, 328 (1962)). The Court denied Tata's motion to dismiss this claim, concluding
11 that, if Plaintiffs' allegations were true, "their standard wages were involuntarily reduced through
12 defendants' practice of withholding earnings above the actual taxation rate and then forcing
13 employees to turn over those wages in the form of refund checks." *Id.* As described below,
14 evidence in the record supports the Court's earlier Order, confirming that summary adjudication
15 of this claim is inappropriate because Tata's practice of recouping over-withheld earnings has
16 involuntarily reduced Plaintiffs' wages. *Id.*

17 For purposes of § 221, "wages" are defined as "the amount the employer has offered or
18 promised to pay, or has paid pursuant to such an offer or promise, as compensation for that
19 employee's labor." *Prachasaisoradej v. Ralph's Grocery Co.*, 42 Cal. 4th 217, 228 (2007)
20 (emphasis omitted). Applying Labor Code § 221 and related statutes forbidding wage
21 recoupment by employers, the *Prachasaisoradej* Court stated that an employer improperly takes a
22 deduction or contribution from an employee's wages when it "subtracts, withholds, sets off, or
23 requires the employee to return a portion of the *compensation* offered [or] promised . . . so that
24 the employee . . . actually receives less than the *paid, offered, or promised compensation*, and
25 effectively makes a forced 'contribution' of the difference." *Id.* (emphasis in original).

26 The record demonstrates that a genuine dispute of material facts exists regarding whether
27 either of the following two Tata practices amounted to a reduction in the compensation Tata
28 promised to Plaintiffs: (1) deducting Plaintiffs' Indian salaries from their paychecks and (2) over-

1 withholding taxes and then recouping this money by requiring Plaintiffs to pay their tax refunds
2 over to the company (or, in the case of Ms. Beri, pay an equivalent amount to receive a W-2
3 form).

4 First, Tata reduced Plaintiffs' wages by deducting the Indian salary from their U.S. salary,
5 even though the Indian salary and U.S. salary were two discrete amounts Tata had agreed to pay.
6 With respect to Ms. Beri, as noted above in Section II(D)(2), in the DTA, Tata agreed to pay
7 gross U.S. wages of \$50,000 *plus* her Indian salary. Hutchinson Decl., Ex. 7 at TCS 373. As
8 summarized in Table 1, Tata (in addition to simply reducing the salary, unlawfully) deducted the
9 Indian salary from the U.S. salary. *Id.*, Exs. 9, 12. Similarly, with respect to Mr. Vedachalam, as
10 noted above in Section II(E)(1), Tata agreed to pay a gross salary of \$74,000 in 2004 and 2005
11 *plus* his Indian salary. As with Ms. Beri, however, Tata (again, after unlawfully reducing the U.S.
12 salary), deducted the Indian salary from the U.S. salary. *See, e.g., id.*, Exs. 24, 32, 38, 45.

13 The deduction of the Indian salary constitutes an improper reduction of wages under
14 *Koehl* and *Prachasaisoradej* because it effectively reduced Plaintiffs' standard wages: they were
15 each supposed to receive a certain amount in U.S. salary *in addition to* their Indian salary, yet
16 Tata deducted the Indian salary from their U.S. salary — thereby reducing that amount below the
17 amount agreed to in the DTAs. These deductions violate Labor Code § 221 because they amount
18 to a deduction from the U.S. salary that is directly contrary to the terms of Plaintiffs' employment
19 agreements. *See Kerr's Catering*, 57 Cal. 2d at 329 (observing that legislative disapproval for
20 deductions "exists in the reliance of the employee on receiving his expected wage. . . .[, and t]o
21 subject that compensation to unanticipated or undetermined deductions is to impose a special
22 hardship on the employee"); *Prachasaisoradej* 42 Cal. 4th at 228 (improper deduction occurs
23 when employer takes a deduction from employee's wages or subtracts a portion of the
24 compensation such that the employee receives less than the promised compensation).

25 Second, evidence in the record shows that Tata further violated Labor Code § 221 by first
26 over-withholding taxes from Plaintiffs' paychecks, then later recouping this money by requiring
27 the Plaintiffs to pay over the outsized tax refunds that resulted from the over-withholding —
28 thereby depriving Plaintiffs of wages they properly earned. Tata did so by improperly changing

1 the number of tax exemptions and reported marital status applicable to Plaintiffs.
2 Mr. Vedachalam was married and had a child well before March 2001, when he signed an IRS
3 W-4 form indicating the correct number of exemptions applicable to him (three). *See* Hutchinson
4 Decl. Ex. 2 at TCS 226. Nonetheless, without Mr. Vedachalam's consent, Tata changed these
5 exemptions from 3 to 1 for purposes of his tax withholding in 2001, 2002, and 2003. *See id.*,
6 Exs. 16, 23, 31. Indeed, in 2002 and 2003, Tata identified Mr. Vedachalam as "single." *Id.* The
7 reduction in Mr. Vedachalam's exemptions and the change in marital status to single increased
8 the amount of his wages that was withheld from his take home pay. *See* Hutchinson Decl., Ex. 49
9 (IRS Publication 919 (2011)) ("How do I adjust my tax withholding? . . . Decrease the number of
10 allowances you claim.").

11 Similarly, Tata increased the amount of Ms. Beri's withholding by (1) incorrectly listing
12 her marital status as "single" on her 2003 W-2 without her consent, (Hutchinson Dec., Ex. 8) and
13 (2) in September 2004, changing her tax exemptions from 2 to 1, and changing her marital status
14 from married back to single without providing any advance notice to Ms. Beri that it was doing
15 so. *Id.*, Ex. 13.

16 The evidence indicates, therefore, that Tata manipulated the amount of wages withheld
17 from Plaintiffs' paychecks. Tata then recouped these wages by requiring Plaintiffs to pay back to
18 the company the money that had been over-withheld. It did so by requiring Mr. Vedachalam to
19 sign over to Tata his state and federal tax refund checks and requiring Ms. Beri to pay back to
20 Tata \$2,440 (her anticipated tax refund amount) to receive her W-2 form. Hutchinson Decl.,
21 Exs. 10, 19-20, 27-28, 35-36, 41-42.¹² The money that Tata improperly deducted from Plaintiffs'
22 paychecks — both in the form of the Indian salary and in the form of over-withheld taxes that

23 _____
24 ¹² Tata's manipulation of Mr. Vedachalam's tax exemptions did not end in 2004. In tax year
25 2005, after Tata had ostensibly stopped its practice of demanding that tax refund checks be paid
26 back to the company, Tata began changing Mr. Vedachalam's tax exemptions far *above* what
27 they should have been: Tata changed his tax exemptions from 3 to 8 in May, 2005; changed them
28 again to 9 in June 2005; then from 9 to 6 in August 2005. Hutchinson Decl., Ex. 46.
Mr. Vedachalam did not authorize these changes and did not, for example, suddenly have (and
then lose) multiple children, such that these changes in exemptions were warranted. Vedachalam
Dep. 37:25-39:17, 247:21-251:13, 281:23-283:3, 343:9-345:2, 348:6-351:19, 367:23-368:24.
Tata continued to overstate Mr. Vedachalam's number of exemptions as "6" in 2006 and 2007.
Hutchinson Decl., Ex. 47-48.

1 Tata later recouped from the Plaintiffs — constitutes “wages” because that money was part of the
2 gross amount Tata had promised in the DTAs to pay Plaintiffs for their labor. *See*
3 *Prachasaisoradej*, 42 Cal. 4th at 228.

4 Tata’s manipulation of Plaintiffs’ pay through the Indian pay deductions and
5 overwithholding is precisely the sort of conduct that Labor Code § 221 was enacted to prevent.
6 *See Finnegan v. Schrader*, 91 Cal. App. 4th 572, 584 (Cal. Ct. App. 2001) (“§ 221 was enacted to
7 prevent employers from utilizing secret deductions or kickbacks to pay employees less than their
8 stated wages”); *Kerr*, 57 Cal. 2d at 328 (use of deductions “creates the danger that the employer,
9 because of his superior position, may defraud or coerce the employee by deducting improper
10 amounts”). The evidence of Tata’s practices creates a genuine issue of fact whether, by deducting
11 the Indian salary and deliberately manipulating the Plaintiffs’ tax exemptions and reported marital
12 status, Tata violated Labor Code § 221 by deliberately reducing Plaintiffs’ promised
13 compensation and “effectively mak[ing] a forced ‘contribution’ of the difference.” *See*
14 *Prachasaisoradej*, 42 Cal. 4th at 228.

15 Tata argues that Plaintiffs are not entitled to their tax refunds because the refunds
16 purportedly do not represent pay for “labor performed” by Plaintiffs. Tata’s argument, however,
17 incorrectly assumes that the tax refund represents additional money, paid *on top of* their agreed-
18 upon salaries, that was *not* promised to the Plaintiffs — *i. e.*, it assumes that Tata agreed to pay
19 Plaintiffs a *net* salary, which would be supplemented by paying the employees’ taxes on top of
20 that net salary. Evidence in the record, however, reflects that Plaintiffs’ employment agreements
21 provide that they were entitled to receive compensation in the United States “in the gross amount”
22 of \$50,000 (for Ms. Beri) and \$74,000 (for Mr. Vedachalam in 2004 and 2005). *See* Beri Dep. at
23 127:19-130:2; Hutchinson Decl., Ex. 7; Vedachalam Dep. at 256:16-258:22, 296:20-24, 339:8-20,
24 365:18-366:22; Hutchinson Decl., Exs. 29, 43. A genuine dispute of fact exists, therefore,
25 whether the tax refunds constitute money that was over-withheld from Plaintiffs’ gross salary
26 amounts (as the DTAs indicate) or money that Tata paid on behalf of Plaintiffs, on top of their
27 purported “net salaries” (*see* Defs.’ Motion at 20).

28 Tata cites several distinguishable cases in its Motion — some of which it previously cited

1 in its unsuccessful Motion to Dismiss — that fail to support Tata’s argument because these cases
2 addressed whether the *government* — not an employer — may recover tax refunds as property
3 under state or federal law. For example, Tata’s continued reliance on *Wightman*, 202 Cal. App.
4 3d 966, and *Kokoszka*, 417 U.S. 642 (both previously cited in its motion to dismiss) is misplaced.
5 In *Wightman*, taxpayers challenged the withholding of their state income tax refunds by the
6 Franchise Tax Board and the State Controller — not by the employer. 202 Cal. App. 3d at 969.
7 The court found that a tax refund is not considered wages for purposes of offsetting tax refunds
8 by money owed to a state agency under a narrow interpretation of Government Code § 12419.5.
9 The statute at issue in *Wightman* expressly allowed the State to deduct money owed to the State
10 from the taxpayer’s tax refund. *Id.* at 971. By contrast, Labor Code § 221 provides no similar
11 provision allowing an *employer* to recoup tax refunds from an employee. *See* Labor Code § 221.
12 Tata’s reliance on *Kokoszka* is similarly misplaced because it involved the issue of whether the
13 State — not an employer — may recover a tax refund as property under the Bankruptcy Act. *See*
14 *Kokoszka*, 417 U.S. at 645.

15 Tata’s other cited cases are similarly unhelpful. *See In re Annis*, 232 F.3d 749 (10th Cir.
16 2000) (income tax refunds did not constitute “earnings” within the meaning of Oklahoma’s
17 “undue hardship” bankruptcy exemption statute and thus belonged to the bankruptcy estate); *In re*
18 *Orndoff*, 100 B.R. 516 (E.D. Cal. 1989) (holding that portion of income tax refund distributed
19 before filing a bankruptcy petition was property of bankruptcy estate pursuant to a California
20 statute).¹³ Unlike in the cases cited by Tata, here no federal or state statute provides that the
21 Plaintiffs’ tax refunds constitute property owed to Tata. Moreover, none of Tata’s cases
22 addresses the situation at issue here, where an employer over-withheld wages for taxes by
23 improperly understating the number of tax exemptions and misstating marital status and then
24 required the employee to repay the amount of the over-withholding.

25
26
27 ¹³ *Vaessen v. Woods*, 35 Cal. 3d 749 (1984) is similarly distinguishable because it involved
28 whether the State could withhold money to families with dependent children by treating tax
refunds as income under the Social Security Act. The Court expressly found that the State could
not withhold tax refunds from the recipients under this Act. *Id.* at 764.

1 2. **Plaintiffs Did Not Voluntarily Allow Tata to Reduce Their Wages**

2 Tata’s next argument — that Plaintiffs agreed to donate their tax refunds to Tata, and
3 therefore cannot show an involuntary reduction in standard wages — also misses the mark.
4 Evidence in the record shows that Plaintiffs’ repayment of tax refund money to Tata was
5 involuntary. In 2004, when Ms. Beri informed Tata that she would like to file her own tax
6 returns, Tata improperly refused to provide her with her W-2 tax forms¹⁴ and ultimately informed
7 her that Tata would provide her W-2 form only if she first paid Tata \$2,440. Hutchinson Decl.
8 Ex. 10. *Id.* Similarly, Mr. Vedachalam had no choice in providing Tata with his tax refund
9 because Tata stamped the back of his check with language that read: “Pay to the Order of . . .
10 Tata Consultancy Services, Ltd.” *Id.*, Exs. 19-20, 27-28, 35-36, 41-42.

11 An employer cannot escape liability for unlawful wage deductions simply by compelling
12 the employee to agree to the deductions in writing. *City of Oakland v. Hassey*, 163 Cal. App. 4th
13 1477, 1501 (Cal. Ct. App. 2008) (reversing summary adjudication as to whether employees
14 authorized deductions from a final paycheck through an MOU). The *Hassey* court noted that “it
15 is questionable whether employees may enter into agreements authorizing unlawful deductions”
16 given that the prompt payment of wages due is a fundamental public policy in California. *Id.*
17 Similarly, here, Tata cannot avoid liability under Labor Code § 221 by compelling Plaintiffs to
18 return wages that should have been paid to them under their employment agreements. Moreover,
19 Plaintiffs’ DTAs belie Tata’s argument that Plaintiffs consented to a deduction of their Indian
20 salary, since the DTAs described the U.S. wages as payable in “addition to” Indian salary.
21 Hutchinson Decl., Exs. 7, 22, 30.

22 Tata’s reliance on the Overseas Deputation Manual and on a questionnaire apparently
23 signed by Mr. Vedachalam in 2005 as evidence of Plaintiffs’ “consent” to the reductions of their
24 salary is misplaced for four reasons. First, there is a factual dispute as to whether Plaintiffs ever
25 received the Overseas Deputation Manual. *See, e.g.*, Vedachalam Dep. at 270:24-271:5; Beri
26 Dep. at 94:9-96:5, 97:3-7, 195:2-13. Second, the questionnaire signed in 2005 has no bearing on

27 _____
28 ¹⁴ *See* 26 C.F.R. § 31.6051-1 (setting forth requirement that employers must provide their
employees with two copies of their W-2 forms on or before January 31 following the tax year).

1 Tata's tax refund recoupment in 2002, 2003, and 2004. Third, neither document addresses the
 2 improper deduction of Plaintiffs' Indian salary. Fourth, the evidence is in dispute whether Tata
 3 agreed to pay Plaintiffs gross salaries (as indicated by the explicit terms of the DTAs) or a net
 4 salary, as Tata asserts, in which the employees would receive a net amount that Tata would "gross
 5 up" to include taxes. *See* Defs.' Motion at 20-21.

6 Because evidence in the record indicates that Tata promised Plaintiffs a gross U.S. salary
 7 separate from and in addition to what Tata paid them in Indian salary, any amounts that were
 8 deducted from the U.S. salary amount for Indian salary or that are required to be paid back to
 9 Tata in over-withheld taxes constitute a reduction of the Plaintiff's wages below what they were
 10 promised in their employment agreements. *See Prachasaisoradej*, 42 Cal. 4th at 228; *Koehl*,
 11 142 Cal. App. 4th at 1337. Given the language of the parties' employment agreements to pay
 12 Plaintiffs a gross salary and the legislative intent of § 221 as outlined in *Kerr* and *Finnegan*,
 13 Plaintiffs' tax refunds constitute wages under § 221. Summary adjudication of Plaintiffs' fourth
 14 claim is inappropriate.

15 C. **A Genuine Dispute Of Material Facts Exists Regarding Whether Tata Paid**
 16 **Vacation Pay To Plaintiff Beri**

17 Summary judgment on Plaintiff Beri's claim for accrued vacation is not appropriate.
 18 Tata's vacation policy during Ms. Beri's tenure stated that every employee was eligible for four
 19 weeks of vacation for every twelve months of continuous overseas deputation, provided that the
 20 employee was assigned to go back on deputation for a further twelve months, and that he or she
 21 took the vacation in India. *Sivasubramini Dep.* at 178:6-183:7. If an employee was terminated
 22 before returning to India, the employee forfeited his or her vacation pay. *Id.* at 191:23-198:15.

23 Vacation benefits are a form of deferred wages under California law. *Suastez v. Plastic*
 24 *Dress-Up Co.*, 674 P.2d 122, 128 (Cal. 1982). As a result, (1) vacation benefits vest on a pro-rata
 25 basis as the employee works; (2) once vested, such vacation benefits cannot be forfeited; and
 26 (3) all accrued unused vacation benefits must be paid to an employee upon termination. *Id.*;
 27 Labor Code § 227.3.

28 Tata's vacation policy violated California's vacation accrual rules. The policy set forth

1 two conditions precedent to employees' eligibility for paid vacation: (1) they had to return to
2 India before taking their paid vacation; and (2) they had to be assigned to another, subsequent
3 deputation period of at least twelve months. Since vacation benefits vest as an employee works
4 throughout the year and cannot be forfeited, these two requirements were illegal accrual rules.
5 *Suastez*, 674 P.2d at 128 (holding that where the vacation policy required a full year of
6 continuous service before the employee earned his or her vacation time, an employee who served
7 for part of the year was deemed entitled to a pro-rata share of vacation time). Tata's vacation
8 accrual rules effectively denied earned, vested vacation pay to employees if they did not fulfill the
9 conditions precedent. Such a result is impermissible under *Suastez*.

10 The case Tata relies on for the proposition that deputed employees did not accrue vacation
11 in California is distinguishable. In *Owen v. Macy's Inc.*, 175 Cal. App. 4th 462 (Cal. Ct. App.
12 2009), the court held that a vacation policy imposing a six-month waiting period before new
13 employees *began to earn* vacation was permissible in California. "The employer is free to
14 determine when an employee becomes eligible for vacation benefits so long as eligibility and
15 vesting occur simultaneously. Thus, a 'waiting period' for vacation benefits to accrue and vest is
16 permissible." *Id.* at 467. The *Owens* court noted that whereas in *Suastez*, the annual week of
17 vacation vested all at once (cliff vesting), at the end of the year during which the employee had
18 been earning the vacation time (in violation of § 227.3), in *Owens*, there was a waiting period
19 during which the employee had not yet begun to earn vacation time. Once an employee under the
20 *Owens* policy had completed the initial waiting period, he or she would begin earning vacation,
21 day by day, pro-rata, just as *Suastez* required. The *Owens* court observed that the *Suastez* policy's
22 one-year requirement was not a "waiting period"; the *Suastez* employees did not have to wait to
23 begin accruing their vacation — they began earning their one week of vacation, bit by bit,
24 "starting on day one of the employment." *Id.* at 470. Thus, the plaintiff in *Suastez* was entitled to
25 a pro-rata share of the vacation he or she was earning throughout the year, even if he or she did
26 not complete the full-year prerequisite. *Id.* Significantly, the *Owens* court held that "[i]f the
27 legislature had intended the contract to control the time of vesting, it could easily have drafted the
28 statute to compel such a result. It did not. The primary rule to be extracted from *Suastez* is that

1 vacation pay vests as it is earned, under Labor Code section 227.3.” *Id.* at 469 (internal
2 quotations omitted).

3 Tata’s policy, which contains two conditions precedent to earning vacation pay (regarding
4 tenure and geography), is like the policy in *Suastez*, which contained one condition precedent
5 (regarding tenure). Unlike the policy in *Owens*, Tata’s policy has no waiting period. As in
6 *Suastez*, Tata employees earn vacation for time worked while on deputation, and that earned
7 vacation time vests on a pro-rata basis. Tata’s two conditions precedent to eligibility are illegal
8 for the same reason the one-year requirement was illegal in *Suastez*. *Owens* does not contradict
9 or invalidate this result.¹⁵ *See also Lopez v. G.A.T. Airline Ground Support, Inc.*, 2010 U.S. Dist.
10 LEXIS 73029 (S.D. Cal. July 19, 2010) (distinguishing *Owens* from *Suastez* and holding that
11 employer policy, whereby employees terminated before completion of one year of employment
12 forfeited vacation pay, was unlawful under section 227.3).¹⁶

13 Ms. Beri worked for Tata for a period of eighteen months. She should have earned a
14 corresponding amount of vacation days, which the evidence indicated she never used and for
15 which, at the time of her termination, she was not compensated. Because Tata withheld vacation
16 pay from Plaintiff Beri in accordance with the unenforceable conditions precedent of its policy,
17 Tata is not entitled to summary judgment on this claim.

18 **D. A Genuine Dispute Of Material Facts Exists Regarding Whether Plaintiff**
19 **Beri Fits Within California’s Narrow Administrative Exemption.**

20 Tata cannot show that there is no genuine dispute of material fact regarding whether
21 Ms. Beri falls within California’s narrow administrative exemption. Under California law, Tata
22

23 ¹⁵ The unpublished district court case cited by Tata, *Harris v. Manpower, Inc.*, 2010 U.S. Dist.
24 LEXIS 107199 (S.D. Cal. October 7, 2010) addressed the same waiting period issue as *Owens*,
and was decided based on *Owens*. Therefore, it is similarly distinguishable from this case.

25 ¹⁶ Tata argues that section 227.3 does not apply to Ms. Beri because her employment terminated
26 outside of California. This argument is patently flawed. Since the vacation was vested as she
27 worked, her location upon termination is irrelevant. In addition, Ms. Beri and other long term
28 deputed employees in California are entitled to the protections of California’s worker protection
laws even though they work for a foreign company. *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996) (holding that an employee who works “principally” in California is deemed to be a “wage earner in California” and thereby presumptively enjoys the protection of California employment law).

1 must shoulder the burden of persuasion to establish that Ms. Beri satisfies *all* of the exemption
2 requirements. *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 794-95 (1999); *Bothell v.*
3 *Phase Metrics, Inc.*, 299 F.3d 1120, 1124 (9th Cir. 2002). Moreover, “[e]xemptions are narrowly
4 construed against the employer and their application is limited to those employees plainly and
5 unmistakably within their terms.” *Nordquist v. McGraw-Hill Broad. Co.*, 32 Cal. App. 4th 555,
6 562 (Cal. Ct. App. 1995); *Eicher v. Advanced Bus. Integrators, Inc.*, 151 Cal. App. 4th 1363,
7 1369-70 (Cal. Ct. App. 2007) (“[T]he statutory provisions [protecting employees] are to be
8 liberally construed with an eye to promoting such protection. Thus, under California law,
9 exemptions from statutory mandatory overtime provisions are narrowly construed.”) (quoting
10 *Ramirez*, 20 Cal. 4th at 794 (internal quotations and citations omitted)).

11 Tata asserts that it properly classified Ms. Beri as an administrative professional. An
12 employer can satisfy its burden of proof on this exemption by proving that (1) the employee was
13 paid by salary, (2) the employee’s “primary duty” consisted of “[t]he performance of office or
14 nonmanual work directly related to management policies or general business operations of his
15 employer or the employer’s customers,” and (3) the employee “customarily and regularly
16 exercises discretion and independent judgment.” IWC Wage Order No. 4-2001, § 1(A)(2)(a)-(f);
17 8 Cal. Code Regs. § 11040(1)(A)(2)(a)-(f) (2010).

18 **1. The Definition of “Primary Duty” Aids Plaintiffs**

19 Notably, the exemption analysis focuses on the employee’s primary duty, to the exclusion
20 of other duties; if an employee performs exempt tasks, but those tasks do not constitute her
21 primary duty, the exemption is not met. In California, the test for “primary duty” is a simple one:
22 an employee is administratively exempt only if he or she spends “more than one-half [of his or
23 her] work time” doing exempt work. IWC Wage Order No. 4-2001, § 2(N); 8 Cal. Code Regs.
24 § 11040(2)(N) (2010). Thus, if the employee spent less than half of her time on exempt tasks, she
25 is nonexempt. Here, Tata cannot show that Ms. Beri spent more than 50 percent of her time on
26 “running the business” or determining its policies or procedures.

1 2. **Neither Prong of the Administrative Exemption Can Be Satisfied.**

2 a. **Tata Cannot Satisfy the First Prong of the Administrative**
3 **Exemption Because Ms. Beri Did Not “Run the Business”**

4 The “directly related to management policies or general business operations” requirement
5 “is met if the employee engages in ‘*running the business itself or determining its overall course*
6 *or policies,*’ not just in the day-to-day carrying out of the business’ affairs.” *Bothell*, 299 F.3d at
7 1125 (quoting *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990)) (emphasis
8 added); *Webster v. Public Sch. Employees of Wash., Inc.*, 247 F.3d 910, 916 (9th Cir. 2001).

9 The evidence in the case demonstrates that Ms. Beri was *not* engaged in running Tata’s or
10 its clients’ business or determining or affecting the overall course or policies. She played a purely
11 supportive role, ensuring that those who did run the business had a functioning infrastructure
12 within which to work. Beri Dep. at 47:17-48:17; 225:14-25. Specifically, Ms. Beri was engaged
13 in the day-to-day, mechanical work of maintaining computers and computer systems “to the
14 specifications and designs of others.” *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 581-
15 83 (6th Cir. 2004); Beri Dep. at 42:2-5; 44:19-45:5.

16 The Ninth Circuit and courts elsewhere have found that technical support workers like
17 Ms. Beri are not involved in “running the business” just because they are “highly skilled.” For
18 example, the Ninth Circuit has held that if “[plaintiff] was a highly skilled repairman whose
19 primary duty was to install, troubleshoot, and maintain production equipment, he would not
20 qualify as exempt and would be entitled to overtime compensation.” *Bothell*, 299 F.3d at 1129.
21 Likewise, the Sixth Circuit has found that a computer employee whose job was “to assist in
22 keeping the computers and network running to the specifications and designs of others” was not
23 engaged in work “related to the administrative operations” of the business. *Martin*, 381 F.3d at
24 581-83. As Tata points out in its brief (Defs.’ Motion at 23), employees whose primary duties
25 consist of “writing code, programming, or ‘administering’ databases or networks” are generally
26 deemed exempt, while those whose primary duties involve “installing or trouble-shooting
27 computer systems” are generally considered nonexempt. *Heffelfinger v. Electronic Data Sys.*
28 *Corp.*, 580 F. Supp. 2d 933, 961 (C.D. Cal. 2008); *see also Eicher*, 151 Cal. App. 4th at 1370

1 (employee whose primary duty involved “trouble shooting the software” and “gathering
2 information about the customers” was nonexempt because this activity did not involve “policy-
3 making,” nor did it “alter the general operation of the business.”).

4 The majority of Ms. Beri’s job duties fall into the support category. Her testimony shows
5 that she primarily tested code, written by others, using a procedure developed by others, to see if
6 it met requirements determined by others. *Beri Dep.* at 40:16-42:5. If she encountered a
7 problem, she reported it to her supervisor for further direction. *Id.* at 42:6-19. Even at the end of
8 her deputation at Tata, when Ms. Beri took on more responsibility, because several developers
9 left the team, she still followed the guidelines set forth by those developers and by her supervisor.
10 *Id.* at 44:19-45:5. Tata cannot establish that Ms. Beri spent more than 50% of her time
11 performing exempt tasks.

12 **b. Tata Cannot Satisfy the Second Prong of the Administrative**
13 **Exemption Because Ms. Beri Did Not Customarily “Exercise**
14 **Discretion and Independent Judgment”.**

15 Genuine disputes of material fact also exist regarding the discretion and independent
16 judgment prong. As an initial matter, case law and the regulations explicitly caution that “the
17 use of skill in applying techniques, procedures, or specific standards” is not relevant to the
18 “discretion and independent judgment” inquiry. *Bothell*, 299 F.3d at 1129 (quoting 29 C.F.R.
19 § 541.207(b)(1) & (c) (2003)) (noting that “the regulations specifically warn against confusing”
20 the two notions). Ms. Beri is skilled in applying computer techniques and procedures, but this by
21 no means leads to the conclusion that she exercised independent judgment or discretion. “The
22 exercise of discretion and independent judgment must be more than the use of skill in applying
23 well-established techniques, procedures or specific standards described in manuals or other
24 sources. . . . The exercise of discretion and independent judgment also does not include . . .
25 performing other mechanical, repetitive, recurrent or routine work.” 29 C.F.R. § 541.202(e)
26 (2010); 29 C.F.R. § 541.704 (2010) (“The [] exemptions are not available, however, for
27 employees who simply apply well-established techniques or procedures described in manuals or
28 other sources within closely prescribed limits to determine the correct response to an inquiry or
set of circumstances.”).

1 As noted above, Ms. Beri primarily spent her time testing code to see if it matched the
2 specifications given her by the client. Beri Dep. at 40:16-42:1; 225:17 (“50 percent was testing.”)
3 She did not determine what the specifications were; instead, she simply ran pre-installed test
4 software and checked the results against the specifications given her. *Id.* at 42:2-5. If they did
5 not match, she informed her supervisor and the developer, and they instructed her how to proceed
6 from there. *Id.* 42:6-19.

7 In sum, there are genuine disputes of material fact regarding whether Ms. Beri’s primary
8 duty satisfies the administrative exemption. Tata has not proved as a matter of law that she was
9 properly classified as exempt.

10 **E. A Genuine Dispute Of Material Fact Exists Regarding Plaintiff Beri’s**
11 **Waiting Time Penalties Claim**

12 Tata asserts in passing that Ms. Beri has failed to demonstrate that, within 72 hours of
13 Ms. Beri’s dismissal, Tata did not pay her all wages owed to her. Tata’s assertion is without
14 merit. Under California law, when an employee quits or is terminated, an employer must pay that
15 employee all wages owed; an employer who fails to do so owes that employee additional amounts
16 (known as “waiting time penalties”) of up to 30 days of additional wages. Cal. Lab. Code §§ 201,
17 203. Ms. Beri’s §§ 201 and 203 claim is predicated on her claims for breach of contract, unlawful
18 recoupment of wages, unpaid overtime, and unpaid vacation time. Because, as described above
19 in Sections IV(A) – (D), a genuine dispute of material facts exists regarding whether Tata
20 (1) failed to pay her \$50,000 in gross U.S. salary, as explicitly promised in her DTA, (2) required
21 her to pay the amount of her estimated tax refund to Tata in order to receive her W-2 form,
22 (3) failed to pay her for vacation that she earned but did not use, and (4) failed to pay her
23 overtime pay for overtime hours worked, a genuine dispute of fact also exists regarding whether it
24 paid her all wages that were “earned and unpaid at the time of discharge” Labor Code
25 § 201(a).

26 If, as the evidence suggests, Tata agreed in the DTA to pay Ms. Beri a gross salary of
27 \$50,000 but failed to do so, then at the time of termination, Tata failed to pay her all wages that
28 she had earned. Similarly, if Tata failed to pay overtime or vacation pay to Ms. Beri, as the

1 evidence supporting these claims indicates (*see* Sections IV(C), and (D)), these were wages she
 2 had earned that remained unpaid at the time of her termination. The genuine disputes of material
 3 fact regarding these claims are likewise genuine disputes with regard to her § 201 claim because
 4 the claim is premised on these underlying claims, rendering summary adjudication of this claim
 5 inappropriate. *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508, 525 (Cal. Ct. App. 2009) (because
 6 summary judgment was unwarranted on overtime claim, it was similarly unwarranted on waiting
 7 time penalties claim); *Takacs v. A.G. Edwards and Sons, Inc.*, 444 F. Supp. 2d 1100, 1127 (S.D.
 8 Cal. 2006) (summary judgment on § 203 claim denied where genuine dispute of fact existed
 9 regarding defendant's failure to pay overtime and correct prevailing wage); *Adoma v. University*
 10 *of Phoenix, Inc.*, 270 F.R.D. 543, 553 (E.D. Cal. 2010) (proof of employer's knowledge of unpaid
 11 overtime also supported Labor Code § 203 claim).

12 **F. A Genuine Dispute Of Material Facts Exists Regarding Whether Tata Sons Is**
 13 **A Proper Defendant**

14 Tata Sons claims that it did not employ Plaintiffs after August 9, 2004. Evidence in the
 15 record shows, however, that Tata Sons continued to employ Ms. Beri through at least
 16 September 30, 2004. Hutchinson Decl., Ex. 13 (listing Defendants "Tata Sons Ltd." and "Tata
 17 Consultancy Services" on the pay stub).¹⁷

18 **V. CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request that the Court deny Tata's motion
 20 for partial summary judgment in its entirety.

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 25 ¹⁷ Moreover, as Tata acknowledges, "liability may fall on an employer if he or she has knowledge
 26 of the prohibited condition and fails to prevent it from occurring." Defs.' Motion at 32 (citing
 27 *Martinez v. Combs*, 49 Cal.4th 35, 70 (2010)). As Plaintiffs' employer through at least
 28 September 30, 2004, Tata Sons had knowledge of the alleged breaches of Plaintiffs' contracts and
 violations of California law. Given its knowledge, there is a genuine dispute of material fact
 regarding whether Tata Sons can be held liable for its continued failure to prevent these violations
 from occurring from September 30, 2004 through June 2005.

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Respectfully submitted,

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