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 26 PATRICK RODRIGUEZ

27 UNITED STATES DISTRICT COURT
 28 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO/OAKLAND DIVISION

29 PATRICK RODRIGUEZ, as an individual
 30 and on behalf of all others similarly
 31 situated,

32 Plaintiff

33 vs.

34 SEARS HOLDINGS CORPORATION, a
 35 corporation; SEARS ROEBUCK AND
 36 CO., a corporation; and DOES 1 through
 37 100, inclusive,

38 Defendants

Case No. 3:10-cv-01268-SC

**STIPULATION AND [PROPOSED]
 ORDER RE LEAVE TO FILE FIRST
 AMENDED COMPLAINT**

1 COME NOW THE PARTIES HERETO by and through their attorneys of record, and
2 stipulate as follows:

3 WHEREAS, on February 11, 2010, Plaintiff Patrick Rodriguez, individually and on behalf
4 of all others similarly situated, filed a proposed class action Complaint in the Superior Court of
5 California for the County of Alameda.

6 WHEREAS, on March 25, 2010, Defendants Sears Holdings Corporation and Sears
7 Roebuck and Co., filed a Notice of Removal;

8 WHEREAS, the Complaint seeks relief on behalf of Plaintiff and the proposed Plaintiff
9 Class based on Defendants' (a) alleged failure to pay overtime compensation in violation of Labor
10 Code § 1194 and the orders and standards promulgated by the California Division of Labor
11 Standards Enforcement and the California Industrial Commission, (b) alleged failure to allow and
12 pay for meal and rest breaks pursuant to Labor Code §§ 220, 226.7 and 512, (c), alleged failure to
13 pay compensation at the time of termination in violation of Labor Code §§ 201-203, (d) alleged
14 failure to furnish plaintiff and the Plaintiff Class with accurate itemized statements upon payment
15 of wages as required by Labor Code § 226, and (e) alleged violation of California's unfair
16 competition laws (Business & Professions Code § 17200). Plaintiff and the proposed Plaintiff
17 Class also seek equitable remedies in the form of declaratory relief, injunctive relief, accounting,
18 and restitution;

19 WHEREAS, Plaintiff's current proposed class definition is: "All persons employed by
20 Defendants in the State of California as "Assistant Managers," and similar positions, who were
21 misclassified as exempt employees during the period from February 1, 2006, up to and including
22 the date judgment is rendered herein";

23 WHEREAS, the parties have agreed that the operative pleading should further specify the
24 entities that employ the proposed class members;

25 WHEREAS, Defendants are stipulating only to the Court's granting leave to amend the
26 Complaint in order to allow Plaintiff to better identify the specific entities whose employees he
27 seeks to include in the proposed class definition, and are not stipulating to the suitability of
28 Plaintiff's proposed class definition or the propriety of including the various entities Plaintiff

1 identifies;

2 WHEREAS Defendants reserve their rights to respond to an amended Complaint in any
3 fashion permitted by law (including via a motion under Federal Rule of Civil Procedure 12) within
4 20 days of service and filing of an amended Complaint;

5 NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the parties, through
6 their respective counsel of record, that the Plaintiff should be granted leave to file a First Amended
7 Complaint pursuant to FRCP Rule 15(a)(2) in order to specifically identify the Sears' entities that
8 employ the proposed class members.

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Dated: May 20, 2010
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LYNNE C. HERMLE
JOSEPH C. LIBURT
CHRISTIAN N. BROWN
KATINA M. MINER
ORRICK, HERRINGTON & SUTCLIFFE LLP



Christian N. Brown
Attorneys for Defendants

Dated: May 20, 2010

STANLEY SALTZMAN
MARCUS J. BRADLEY
STEPHEN O'DELL



Marcus J. Bradley
Attorneys for Plaintiff and Proposed Class

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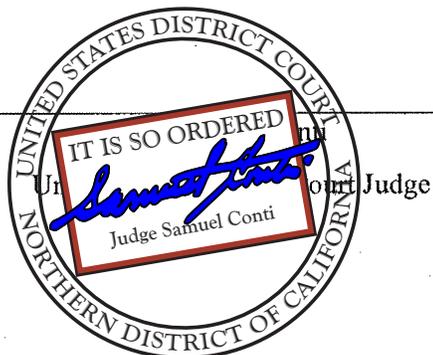
ORDER

THE COURT, having received and considered the parties' stipulation to permit the filing of the First Amended Complaint and having no objection thereto and finding good cause appearing therefor,

IT IS HEREBY ORDERED that Plaintiff is granted leave to file a First Amended Complaint on or before July 2, 2010. Defendants shall respond no later than twenty (20) days after the First Amended Complaint is filed and served.

Pursuant to the stipulation of the parties set forth above, IT IS SO ORDERED.

Dated: 6/2/10



ATTACHMENT TO STIPULATION

First Amended Complaint

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9 Attorneys for Plaintiff and the Proposed Plaintiff Class

10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO/OAKLAND DIVISION**

14 PATRICK RODRIGUEZ, as an individual
15 and on behalf of all others similarly
16 situated,

Plaintiff

17 vs.

18 SEARS HOLDINGS CORPORATION, a
19 corporation and SEARS ROEBUCK AND
20 CO., a corporation,

Defendants

Case No. 3:10-cv-01268-SC

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR:**

1. **Failure to Pay Overtime Wages (*Lab. Code § 1194*);**
2. **Failure to Allow and Pay for Meal and Rest Periods (*Lab. Code §§ 200, 226.7, 512*);**
3. **Failure to Pay Compensation Upon Discharge (*Lab. Code §§ 201-203*);**
4. **Failure to Provide Proper Wage Statement (*Lab. Code § 226*);**
5. **Violation of California *Bus. & Prof. Code §§ 17200-17208*.**

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24 PATRICK RODRIGUEZ, individually and behalf of all others similarly situated, alleges the
25 following against SEARS HOLDINGS CORPORATION, and SEARS ROEBUCK AND CO.
26 (hereinafter sometimes collectively referred to as “defendants”):

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1 **INTRODUCTION**

2 1. This matter is brought as a class action pursuant to *California Code of Civil Procedure*
3 § 382, on behalf of Plaintiff and the Plaintiff Class, which is comprised of all persons who are, or have
4 been employed by defendants as Assistant Managers in any of defendants' California retail stores
5 during the Class Period, which is February 11, 2006, to the date judgment is rendered herein.

6 2. Plaintiff seeks relief on behalf of himself and the Plaintiff Class based on defendants'
7 (a) failure to pay overtime compensation in violation of *Labor Code* § 1194 and the orders and
8 standards promulgated by the California Division of Labor Standards Enforcement and the California
9 Industrial Commission, (b) failure to allow and pay for meal and rest breaks pursuant to *Labor Code*
10 §§ 220, 226.7 and 512, (c), failure to pay compensation at the time of termination in violation of *Labor*
11 *Code* §§ 201-203, (d) failure to furnish plaintiff and the Plaintiff Class with accurate itemized
12 statements upon payment of wages as required by *Labor Code* § 226, and (e) violation of California's
13 unfair competition laws (*Business & Professions Code* § 17200). Plaintiff and the Plaintiff Class also
14 seek equitable remedies in the form of declaratory relief, injunctive relief, accounting, and restitution.

15 3. Plaintiff's claims are based on the erroneous misclassification of Plaintiff and members
16 of the Plaintiff Class as exempt from California's wage and hour laws which require defendants to pay
17 overtime compensation, and provide its employees proper, statutorily required meal and rest periods.
18 In fact, Plaintiff and members of the Plaintiff Class performed non-exempt job duties, and thus are,
19 and were entitled to, but denied overtime compensation, and proper meal and rest periods.

20 **JURISDICTION AND VENUE**

21 4. Venue is proper in Alameda County because defendants maintain offices and transact
22 business in Alameda County, because plaintiff Patrick Rodriguez resides in Alameda County, and
23 because the conduct alleged herein which gives rise to the claims asserted occurred within Alameda
24 County. Specifically, plaintiff Patrick Rodriguez worked for defendants within Alameda County, and
25 the wages herein claimed were earned by him in Alameda County.

26 **THE PARTIES**

27 5. At all times mentioned herein Plaintiff Patrick Rodriguez was, and now is, a resident
28 of the County of Alameda, State of California.

1 6. Plaintiff was employed by defendants as an Assistant Manager of defendants' Sears
2 store in Oakland, California, from March, 2008, to January, 2010.

3 7. The members of the proposed class are likewise current and former employees of
4 defendants, employed by defendants within the state of California as Assistant Managers.

5 8. Defendants Sears Roebuck and Company and Sears Holding Corporations are
6 corporations doing business in the State of California, including the County of Alameda. Defendants
7 conduct businesses under the names of Sears Roebuck and Company, Sears Home Centers, Sears
8 Department Stores, Sears Essentials, The Great Indoors, K-Mart, and other entities unknown to
9 Plaintiff at this time. All of these entities are retail entities which operate in and around Alameda
10 County, and throughout the State of California, and employ and have employed individuals in the
11 position of Assistant Manager.

12 9. Defendants herein are engaged in an integrated enterprise in connection with their retail
13 enterprises in California including, but not limited to, Sears Roebuck and Company, Sears Home
14 Centers, Sears Department Stores, Sears Essentials, The Great Indoors and K-Mart. As such, these
15 entities have and operate with (1) an interrelation of operations, (2) common management, (3)
16 centralized control of labor relations and human resource issues, and (4) common ownership or
17 financial control.

18 10. Defendant Sears Holding Corporation is a publically traded corporation and is required
19 to file an annual Form 10-K with the United States Securities and Exchange Commission. Its report
20 for the Fiscal Year Ending February 3, 2007 sets forth the following relevant facts:

21 a. Defendant Sears Holding Corporation ("Holding") is the parent company of
22 Kmart Holding Corporation ("Kmart") and Sears, Roebuck and Co. ("Sears").
23 Holding was formed in connection with the merger of Kmart and Sears.

24 b. "The Company is a broadline retailer with approximately 2,300 full-line and
25 1,100 specialty retail stores in the United States operating through Kmart and
26 Sears. . . ."

27 c. All employees are considered employees of Defendant Sears Holding
28 Corporation. "As of February 3, 2007, the Company had approximately

1 315,000 employees in the United States and U.S. territories, and approximately
2 37,000 employees in Canada through Sears Canada including, in each case,
3 part-time employees.”

4 10. Plaintiff is ignorant of the true names, capacities, relationships and extent of
5 participation in the conduct herein alleged of the defendants. Plaintiff is informed and believes, and
6 thereon alleges that each defendant named herein was the agent of the other, and the agent of all
7 defendants. Plaintiff is further informed and believes, and thereon alleges, that each defendant was
8 acting within the course and scope of said agency at all relevant times herein, for the benefit of
9 themselves, each other, and the other defendants, and that each defendant’s actions as alleged herein
10 was authorized and ratified by the other defendants.

11 **FACTUAL ALLEGATIONS**

12 11. Throughout the Class Period, as the same is defined herein, plaintiff and each member
13 of the Plaintiff Class was a non-exempt employee, performing job duties which are classified as non-
14 exempt, and thus covered by one or more Industrial Welfare Commission (“IWC”) Wage Orders,
15 including, but not limited to, Wage Order Nos. 7-1989, 7-1998, 7-200, 7-2001 (“Wage Orders”), as
16 well as Cal. Code Regs., tit. 8, § 11070, and *Labor Code* § 510, and/or other applicable wage orders,
17 regulations and statutes.

18 12. Specifically, the primary job duties performed by plaintiff and members of the Plaintiff
19 Class were, and are maintaining the inventory and sales floor, cleaning the store, working the cash
20 registers, sales, and assisting customers. Plaintiff and the members of the Plaintiff Class spent the vast
21 majority of their time performing these non-exempt job duties, as opposed to job duties classified as
22 exempt under California law.

23 13. Plaintiff and members of the Plaintiff Class are not involved in managing defendants’
24 enterprise, and are not subject to any exemptions for executive, administrative or professional
25 employees. Defendants were therefore obligated to pay plaintiff and members of the Plaintiff Class
26 compensation for overtime, and to provide them the statutorily mandated meal and rest periods, and/or
27 to compensate plaintiffs therefore. However, defendants improperly classified plaintiff and members
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1 of the Plaintiff Class as exempt employees, exempt from the wage and hour provisions identified
2 above.

3 14. Plaintiff and each member of the Plaintiff Class routinely worked in excess of the
4 maximum regular rate hours established by the IWC in the above-described Wage Orders, regulations,
5 and statutes, which entitled them to overtime compensation as set by law. Since at least February 11,
6 2006, and continuing to the present, defendants have had a consistent policy of failing to pay wages
7 and/or overtime to plaintiff and members of the Plaintiff Class for all work performed and/or work
8 over eight (8) hours per day or forty (40) per week. Relying upon, and consistent with defendants'
9 standard policy, practice and procedure of classifying plaintiff and each member of the Plaintiff Class
10 as exempt employees, defendants failed and refused to compensate plaintiff and members of the
11 Plaintiff Class for overtime worked by them.

12 15. Plaintiff and each member of the Plaintiff Class were routinely not allowed meal and
13 rest breaks as required by the IWC in the above-described Wage Orders, regulations, and statutes.
14 Since at least February 11, 2006, and continuing to the present, defendants have had a consistent
15 policy of failing to provide plaintiff and members of the Plaintiff Class statutorily required meal and
16 rest periods. Relying upon, and consistent with defendants' standard policy, practice and procedure
17 of classifying plaintiff and each member of the Plaintiff Class as exempt employees, defendants failed
18 and refused to allow plaintiff and members of the Plaintiff Class statutorily required meal and rest
19 periods.

20 16. Plaintiff and each member of the Plaintiff Class were routinely provided wage
21 statements which do not truly and accurately reflect the number of hours worked by them, or the
22 wages due to them, specifically including but not limited to, failing to reflect hours worked overtime,
23 and overtime wages due, and compensation due for missed meal and rest breaks. Since at least
24 February 11, 2006, and continuing to the present, defendants have had a consistent policy of failing
25 to provide plaintiff and members of the Plaintiff Class true and accurate wage statements upon
26 payment of wages, as required by *California Labor Code* § 226(a).

27 17. Plaintiff and each member of Sub-Class No. 1 (hereinafter sometimes referred to as the
28 "Terminated Sub-Class"), whose employment with defendants was terminated during the class period,

1 were routinely not paid, upon termination, all wages due to them, in violation of California *Labor*
2 *Code* section 201-203. Specifically, plaintiff and members of the Terminated Sub-Class were not paid
3 for overtime, nor were they compensated for missed meal and rest breaks. Since at least February 11,
4 2006, and continuing to the present, defendants have had a consistent policy of failing to provide
5 plaintiff and members of the Terminated Sub-Class all wages due to them upon termination. Relying
6 upon, and consistent with defendants' standard policy, practice and procedure of classifying plaintiff
7 and each member of the Terminated Sub-Class as exempt employees, defendants failed and refused
8 to compensate plaintiff and members of the Terminated Sub-Class for overtime, and missed meal and
9 rest breaks at the time their employment was terminated.

10 18. During the Class Period, defendants required Plaintiff and members of the Plaintiff
11 Class to work overtime without lawful compensation, and without proper meal and rest breaks.
12 Defendants, in violation of the above-described Wage Orders and statutes, willfully failed and refused
13 to pay plaintiff and members of the Plaintiff Class overtime compensation, failed to provide them, or
14 to compensate them for meal and rest periods, failed to pay all wages due upon termination, and failed
15 to provide true and accurate wage statements. Said policies, procedures, and practices are in violation
16 of the California *Labor Code*, including, but not limited to, *Labor Code* §§ 201-203 and 227.3.

17 **CLASS ACTION ALLEGATIONS**

18 19. Plaintiff brings this action on behalf of himself and all others similarly situated as a
19 class action, pursuant to *California Code of Civil Procedure* section 382. The class which plaintiff
20 seeks to represent is composed of, and defined as follows:

21 Plaintiff Class:

22 All persons employed by defendants during the Class Period as
23 "Assistant Managers" and similar positions, at any of defendants' retail
24 facilities in the State of California, specifically including to Sears
25 Department Store, Sears Hardware Store, Sears Grand, Sears
26 Essentials, Sears Appliance & Hardware (formerly known as Sears
27 Hardware), Sears Outlet, The Great Indoors, Sears Full-line Stores,
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1 Sears Home Centers, Sears Roebuck and Co., Kmart, Big Kmart, and
2 Kmart Super Centers.

3 Sub-Class No. 1:

4 All members of the Plaintiff Class whose employment ended during the
5 proposed class.

6 20. The Class period is designated as the period from February 11, 2006, through and
7 including the date judgment is rendered in this matter, and includes anyone employed by defendants
8 in the State of California during that period meeting the class definition.

9 21. The Class is so numerous that the individual joinder of all members is impracticable.
10 While the exact number and identification of Class Members are unknown to plaintiff at this time and
11 can only be ascertained through appropriate discovery directed to defendants, plaintiffs are informed
12 and believe that the Class includes hundreds, and possibly thousands of members.

13 22. Common questions of law and fact exist as to all members of the Class which
14 predominate over any questions affecting only individual members of the Class. These common legal
15 and factual questions, which do not vary from class member to class member, and which may be
16 determined without reference to the individual circumstances of any class member, include, but are
17 not limited to, the following:

- 18 a. Whether Plaintiff and members of the proposed class are subject to and entitled to the
19 benefits of California Wage and Hour statutes;
- 20 b. Whether defendants misclassified plaintiff and members of the Plaintiff Class as
21 exempt employees under California's wage and hour laws;
- 22 c. Whether plaintiff and members of the Plaintiff Class are entitled to overtime
23 compensation;
- 24 d. Whether defendants failed to pay overtime compensation to plaintiff and members of
25 the Plaintiff Class;
- 26 e. Whether defendant's policy and practice of classifying plaintiff and members of the
27 Plaintiff Class as exempt, and failing to provide them overtime compensation violated
28 provisions of California's wage and hour laws;

- 1 f. Whether plaintiff and members of the Plaintiff Class are entitled to meal and rest
2 periods;
- 3 g. Whether defendants failed to provide and/or compensate plaintiff and members of the
4 Plaintiff Class for meal and rest periods;
- 5 h. Whether defendant’s policy and practice of not providing plaintiff and members of the
6 Plaintiff Class meal and rest periods violated provisions of California’s wage and hour
7 laws;
- 8 I. Whether defendants unlawfully and/or willfully failed to promptly pay compensation
9 owing to plaintiff and members of the Terminated Sub-Class upon termination of their
10 employment, in violation of *Labor Code* §§ 201-203;
- 11 j. Whether defendants unlawfully and/or willfully failed to provide plaintiff and members
12 of the Plaintiff Class with true and proper wage statements upon payment of wages,
13 in violation of *Labor Code* section 226;
- 14 k. Whether plaintiff and members of the Plaintiff Class sustained damages, and if so, the
15 proper measure of such damages, as well as interest, penalties, costs, attorneys’ fees,
16 and equitable relief; and
- 17 l. Whether defendants violated the Unfair Business Practices Act of California, *Bus. &*
18 *Prof. Code* § 17200, et seq., by violating the above cited provisions, and treating
19 plaintiff and members of the Plaintiff Class unfairly by failing to pay them overtime,
20 failing to provide them meal and rest periods, failing to pay them wages due upon
21 termination, and failing to provide true and accurate wage statements.

22 23. The claims of the named Plaintiff are typical of the claims of the members of the
23 proposed class. Plaintiff and other class members sustained losses, injuries and damages arising out
24 defendants’ common policies, practices, procedures, protocols, routines, and rules which were applied
25 to other Class Members as well as plaintiff. Plaintiff seeks recovery for the same type of losses,
26 injuries, and damages as were suffered by other members of the proposed class.

27 24. Plaintiff is an adequate representative of the Class because he is a member of the Class
28 and his interests do not conflict with the interest of the members he seeks to represent. Plaintiff has

1 retained counsel competent experienced in prosecution of complex class actions, and together plaintiff
2 and his counsel intend to prosecute this action vigorously for the benefit of the Class. The interests
3 of the Class members will fairly and adequately be protected by plaintiff and his attorneys.

4 25. A class action is superior to other available methods for the fair and efficient
5 adjudication of this litigation since individual litigation of the claims of all Class members is
6 impracticable. It would be unduly burdensome to the courts if these matters were to proceed on an
7 individual basis, because this would result in hundreds, and potentially thousands of individual,
8 repetitive lawsuits. Individual litigation presents the potential for inconsistent or contradictory
9 judgments, and the prospect of a “race to the courthouse,” and an inequitable allocation of recovery
10 among those with equally meritorious claims. By contrast, the class action device presents far fewer
11 management difficulties and provides the benefit of a single adjudication, economics of scale, and
12 comprehensive supervision by a single court.

13 26. The various claims asserted in this action are additionally or alternatively certifiable
14 under the provisions of the *California Code of Civil Procedure* section 382 because:

- 15 a. The prosecution of separate actions by hundreds or thousands of individual class
16 members would create a risk of varying adjudications with respect to individual class
17 members, thus establishing incompatible standards of conduct for defendants.
- 18 b. The prosecution of separate actions by individual class members would also create the
19 risk of adjudications with respect to them that, as a practical matter, would be
20 dispositive of the interest of the other class members who are not a party to such
21 adjudications and would substantially impair or impede the ability of such non-party
22 class members to protect their interests.
- 23 c. Defendants have acted or refused to act on grounds applicable to the entire Class,
24 thereby making appropriate final declaratory and injunctive relief with respect to the
25 Class as a whole.

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1 **FIRST CAUSE OF ACTION**

2 **(Failure to Pay Overtime Compensation)**

3 **(By All Plaintiffs Against All Defendants)**

4 27. Plaintiff incorporates herein by reference the allegations set forth above in paragraphs
5 1 through 26.

6 28. Plaintiff and each member of the Plaintiff Class are entitled to overtime compensation
7 for all hours worked in excess of the hours and time specified in the Wage Orders, statutes and
8 regulations identified above.

9 29. Defendants committed the acts alleged herein knowingly and willfully, with the
10 wrongful and deliberate intention of injuring plaintiff and the Plaintiff Class, with improper motives
11 amounting to malice, and in conscious disregard of the rights of plaintiff and the Plaintiff Class.
12 Plaintiff and the Plaintiff Class are thus entitled to recover nominal, actual, compensatory, punitive,
13 and exemplary damages in amounts according to proof at the time of trial, but in excess of the
14 minimum jurisdiction of this Court.

15 30. Defendants' conduct described herein violates the California *Code of Regulations*, Title
16 8, § 11070, and *Labor Code* §§ 200, 203, 226, 226.7, 512, and 1194. Plaintiff and members of the
17 Plaintiff Class are thus entitled to recover, in addition to the unpaid balance of overtime compensation
18 defendants owe them, interest, penalties, attorneys' fees, expenses and costs of suit. Plaintiff and
19 members of the Plaintiff Class assert a claim for penalties pursuant to *Labor Code* §§ 201, 202, 203,
20 204, 210, 225.5, 223, 226, 226.3, 226, 226.3, 226.7, 227.3, 510, 512, 1194, and 1194.2.

21 **SECOND CAUSE OF ACTION**

22 **(Failure to Allow and Pay for Meal and Rest Breaks)**

23 **(By All Plaintiffs Against All Defendants)**

24 31. Plaintiff incorporates herein by reference the allegations set forth above in paragraphs
25 1 through 30.

26 32. *Labor Code* § 226.7(a) provides, "no employer shall require any employee to work
27 during any meal or rest period mandated by an applicable order of the Industrial Welfare
28 Commission."

1 time wage continuation penalty pursuant to *Labor Code* § 203. Additionally, plaintiffs seek costs,
2 interest, disbursements, and attorneys' fees, as provided by *Labor Code* §§ 218.5 and 218.6.

3 **FOURTH CAUSE OF ACTION**

4 **(Failure to Provide Accurate Wage Statements)**

5 **(By All Plaintiffs Against All Defendants)**

6 38. Plaintiff incorporates herein by reference the allegations set forth above in paragraphs
7 1 through 37.

8 39. *Labor Code* §226(a) sets forth reporting requirements for employers when they pay
9 wages, as follows: "Every employer shall . . . at the time of each payment of wages, furnish his or her
10 employees . . . an itemized statement in writing showing (1) gross wages earned; (2) total hours
11 worked by the employee . . . (3) the number of piece-rate units earned and any applicable piece rate
12 if the employee is paid on a piece-rate basis. . . ." Section (e) provides: "An employee suffering injury
13 as a result of a knowing and intentional failure by an employer to comply with subdivision (a) shall
14 be entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period
15 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
16 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4000), and shall
17 be entitled to an award of costs and reasonable attorney's fees."

18 40. Defendants failed to accurately record the overtime hours worked by plaintiff and
19 members of the Plaintiff Class.

20 41. Plaintiff and members of the Plaintiff Class were damaged by these failures because,
21 among other things, the failure to break down the incentive pay hindered Plaintiff and members of
22 the Plaintiff Class from determining the amounts of wages actually owed to them.

23 42. Plaintiff and members of the Plaintiff Class request recovery of *Labor Code* § 226(e)
24 penalties according to proof, as well as interest, attorney's fees and costs pursuant to *Labor Code*
25 §226(e), in a sum as provided by the *Labor Code* and/or other statutes.

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1 **FIFTH CAUSE OF ACTION**

2 **(Unfair Competition: California *Business and Professions Code* § 17200 etc.)**

3 **(By All Plaintiff, on Behalf of Herself, the Plaintiff Class, and the**
4 **General Public, Against All Defendants)**

5 43. Plaintiff incorporates herein by reference the allegations set forth above in paragraphs
6 1 through 42.

7 44. Section 17200 of the California *Business and Professions Code* prohibits any unlawful,
8 unfair or fraudulent business act or practice.

9 45. Plaintiff brings this cause of action in a representative capacity on behalf of the general
10 public and the persons affected by the unlawful and unfair conduct described hereafter. Plaintiff and
11 members of the proposed class have suffered and continue to suffer injury in fact and monetary
12 damages as a result of defendants' actions.

13 46. The actions by defendants, including, but not limited to, the continuing failure to pay
14 overtime, failure to provide meal and rest periods, failure to provide itemized wage statements, and
15 failure to pay wages due upon termination, amount to conduct which is unlawful and a violation of
16 law as alleged herein. As such, said conduct amounts to unfair business practices in violation of
17 *Business and Professions Code* § 17200 et. seq.

18 47. Defendants' conduct as herein alleged has damaged plaintiffs and the members of the
19 Plaintiff Class by denying them wages due and payable, and failing to provide proper wage statements.
20 Defendants' actions are thus substantially injurious to Plaintiff and the members of the Plaintiff Class,
21 causing them injury in fact and loss of money.

22 48. As a result of such conduct, defendants have unlawfully and unfairly obtained monies
23 due to the plaintiff and the members of the Plaintiff Class.

24 49. All members of the Plaintiff Class can be identified by reference to payroll and related
25 records in the possession of the defendants. The amount of wages due plaintiff and members of the
26 Plaintiff Class can be readily determined from defendants' records. The members of the proposed
27 class are entitled to restitution of monies due and obtained by defendants during the Class Period as
28 a result of defendants' unlawful and unfair conduct.

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- 4. For penalties permitted by *Labor Code* §§ 201, 202, 203, 204, 210, 225.5, 223, 226, 226.3, 226, 226.3, 226.7, 227.3, 510, 512, 1194, and 1194.2;
- 5. For all penalties permitted by California’s Private Attorney General’s Act (PAGA), *Labor Code* § 2698, *et seq.*;
- 6. For interest accrued to date;
- 7. For costs of suit and expenses incurred herein pursuant to *Labor Code* §§ 226 and 1194;
- 8. For reasonable attorney's fees pursuant to *Labor Code* §§ 226 and 1194; and
- 9. For all such other and further relief that the Court may deem just and proper.

Dated: May 25, 2010

MARLIN & SALTZMAN, LLP

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