

1 LYNNE C. HERMLE (STATE BAR NO. 99779)
 JOSEPH C. LIBURT (STATE BAR NO. 155507)
 2 JESSICA R. PERRY (STATE BAR NO. 209321)
 SITTHIKIT CHARİYASATIT (STATE BAR NO. 252028)
 3 ORRICK, HERRINGTON & SUTCLIFFE LLP
 1000 Marsh Road
 4 Menlo Park, CA 94025
 Telephone: 650-614-7400
 5 Facsimile: 650-614-7401
 lchermle@orrick.com
 6 jliburt@orrick.com
 jperry@orrick.com
 7 schariyasatit@orrick.com

8 Attorneys for Defendant
 APPLE INC.

10 UNITED STATES DISTRICT COURT
 11 SOUTHERN DISTRICT OF CALIFORNIA

13 DAVID WALSH, an individual, on behalf of
 himself, and on behalf of all persons similarly
 14 situated,

15 Plaintiff,

16 v.

17 APPLE INC.; and DOES 1-10,

18 Defendants.

Civil No. 08 CV 1410 JM POR

INDEX OF ATTACHMENTS TO
DEFENDANT APPLE INC.'S
NOTICE OF MOTION AND MOTION
TO STRIKE AND FOR A MORE
DEFINITE STATEMENT

Date: November 14, 2008
 Time: 1:30 p.m.
 Dept.: 16
 Judge: Hon. Jeffrey T. Miller

20 Memorandum of Points and Authorities..... MPA 1-16
 21
 22
 23
 24
 25
 26
 27
 28

1 LYNNE C. HERMLE (STATE BAR NO. 99779)
JOSEPH C. LIBURT (STATE BAR NO. 155507)
2 JESSICA R. PERRY (STATE BAR NO. 209321)
SITTHIKIT CHARİYASATIT (STATE BAR NO. 252028)
3 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
4 Menlo Park, CA 94025
Telephone: 650-614-7400
5 Facsimile: 650-614-7401
lchermle@orrick.com
6 jliburt@orrick.com
jperry@orrick.com
7 schariyasatit@orrick.com

8 Attorneys for Defendant
APPLE INC.

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

13 DAVID WALSH, an individual, on behalf of
14 himself, and on behalf of all persons similarly
situated,

15 Plaintiff,

16 v.

17 APPLE INC.; and DOES 1-10,

18 Defendants.

CASE NO. 08 CV 1410 JM POR

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT APPLE INC'S
MOTIONS TO STRIKE AND FOR A
MORE DEFINITE STATEMENT**

Date: November 14, 2008
Time: 1:30 p.m.
Dept.: 16
Judge: Hon. Jeffrey T. Miller

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

	<u>Page</u>
I. INTRODUCTION	1
II. PLAINTIFF’S ALLEGATIONS	2
III. ARGUMENT	3
A. Legal Standards	3
1. Class Allegations May Be Stricken Under 12(f)	3
2. Ambiguous Pleadings Should Be Stricken Under 12(e)	4
B. Plaintiff’s Proposed Class Definition Is Imprecise And Ambiguous Because Plaintiff Fails To Identify Sufficiently The Job Titles At Issue	4
C. California Labor Code Sections 203 And 226 Cannot Serve As The Basis For Plaintiff’s First Claim Under Business & Professions Code Section 17200.....	6
D. All References To “Doe” Defendants Are Improper And Must Be Stricken.	8
E. Portions Of Plaintiff’s Prayer For Relief Must Be Stricken	9
1. Plaintiff’s Request For Accounting Must Be Stricken.....	9
2. Plaintiff’s Request For Constructive Trust Must Be Stricken	10
IV. CONCLUSION.....	11

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

FEDERAL CASES

Aiken v. Miller,
442 F. Supp. 628 (E.D. Cal. 1977)..... 5

Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.,
77 F.3d 364 (11th Cir. 1996)..... 4

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,
498 U.S. 533 (1991)..... 6

Gillespie v. Civiletti,
629 F.2d 637 (9th Cir. 1980)..... 8

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002)..... 11

Hagen v. City of Winnemucca,
108 F.R.D. 61 (D. Nev. 1985)..... 5

Kamm v. Sugawara,
509 F.2d 205 (9th Cir. 1975)..... 4

Miller v. Yokohama Tire Corp.,
358 F.3d 616 (9th Cir. 2004)..... 10

O'Connor v. Boeing N.A., Inc.,
197 F.R.D. 404 (C.D. Cal. 2000)..... 4

Palmer v. Combined Ins. Co. of Am.,
2003 U.S. Dist. LEXIS 2534 (N.D. Ill. Aug. 29, 2003)..... 4

Senter v. GM Corp.,
532 F.2d 511 (6th Cir. 1976)..... 4

Sidney-Vinstein v. A.H. Robins Co.,
697 F.2d 880 (9th Cir. 1983)..... 3

In re Tetracycline,
107 F.R.D. 719 (W.D. Mo. 1985)..... 5

Tomlinson v. Indymac Bank,
359 F. Supp. 2d 891 (C.D. Cal. 2005)..... 7, 8

Warth v. Seldin,
422 U.S. 490 (1975)..... 4

TABLE OF AUTHORITIES
(continued)

Page

STATE CASES

1
2
3
4 *Amid v. Hawthorne Community Med. Gp., Inc.*,
212 Cal. App. 3d 1383 (1989)..... 9
5
6 *Calvao v. Superior Court (Klippert)*,
201 Cal. App. 3d 921 (1988)..... 10
7
8 *Cel-Tech Commc'ns v. Los Angeles Cellular Tel. Co.*,
20 Cal. 4th 163 (1999) 7
9
10 *Cortez v. Purolator Air Filtration Products*,
23 Cal. 4th 163 (2000) 8
11
12 *Farmers Ins. Exchange v. Superior Court*,
2 Cal. 4th 377 (1992) 6
13
14 *Hills Transp. Co. v. Southwest Forest Indus., Inc.*,
266 Cal. App. 2d 702 (1968)..... 10
15
16 *Kasky v. Nike, Inc.*,
27 Cal. 4th 939 (2002) 7
17
18 *Korea Supply Company v. Lockheed Martin Corporation*,
29 Cal. 4th 1134 (2003) 7, 10
19
20 *Odorizzi v. Bloomfield Sch. Dist.*,
246 Cal. App. 2d 123 (1966)..... 9
21
22 *Prince v. Harting*,
177 Cal. App. 2d 720 (1960)..... 9
23
24 *Reese v. Walmart Stores, Inc.*,
73 Cal. App. 4th 1225 (1999)..... 7
25
26 *St. James Church of Christ Holiness v. Superior Court*,
135 Cal. App. 2d 352 (1955)..... 9
27
28 *Union Bank v. Superior Court*,
31 Cal. App. 4th 573 (1995)..... 9

FEDERAL STATUTES

25 Fed. R. Civ. P. 9(b) 10
26 Fed. R. Civ. P. 11 6
27 Fed. R. Civ. P. 12(e)..... 4
28 Fed. R. Civ. P. 12(f)..... 3, 9

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

STATE STATUTES

Cal. Bus. & Prof. Code § 17200 6

Cal. Bus. & Prof. Code § 17203 7

Cal. Civ. Proc. Code § 340..... 8

Cal. Lab. Code § 203..... 8

Cal. Lab. Code § 226(e)-(f)..... 8

MISCELLANEOUS

Newberg on Class Actions, § 6.14 6

5 Witkin Cal. Proc. 4th (1997) Plead., § 669 10

5 Witkin Cal. Proc. 4th (1997) Plead., § 796 10

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

STATE STATUTES

Cal. Bus. & Prof. Code § 17200 6
Cal. Bus. & Prof. Code § 17203 7
Cal. Civ. Proc. Code § 340..... 8
Cal. Lab. Code § 203..... 8
Cal. Lab. Code § 226(e)-(f)..... 8

MISCELLANEOUS

Newberg on Class Actions, § 6.14 6
5 Witkin Cal. Proc. 4th (1997) Plead., § 669 10
5 Witkin Cal. Proc. 4th (1997) Plead., § 796 10

1 **I. INTRODUCTION**

2 Defendant Apple Inc. (“Apple”) brings its Motions to Strike and For a More Definite
3 Statement with respect to the proposed class definition, the first claim under Business and
4 Professions Code Section 17200 *et seq.* (“UCL”), references to “Doe” defendants, and the Prayer
5 for Relief, in Plaintiff David Walsh’s First Amended Class and Collective Action Complaint
6 (“FAC”). The FAC fails to meet basic pleading requirements and requests improper relief.

7 First, the proposed class definitions are so ambiguous and unascertainable that Apple
8 cannot reasonably determine who is included within the classes, and Apple and this Court are
9 improperly left to guess which employees Plaintiff is attempting to include in his putative classes.
10 Plaintiff repeatedly uses the phrases “other similarly situated” positions and “substantially similar
11 positions,” but fails to provide any information about who such “similarly situated” employees
12 are or what positions Plaintiff considers “similar” or “substantially similar.” Identifying the
13 specific job title(s) at issue in this litigation should not be difficult for Plaintiff, particularly since
14 he is claiming to be an adequate representative for employees in these unspecified job titles. This
15 Court should therefore strike the class definitions and all class allegations in the FAC, or in the
16 alternative, order that Plaintiff clarify his class definitions by specifying all of the job title(s) in
17 his putative classes.

18 Second, the Court should strike Plaintiff’s attempts to incorporate California Labor Code
19 sections 203 and 226 into his first claim under the UCL because these Labor Code provisions
20 provide for penalties, not restitution, and therefore cannot be recovered under the UCL.
21 Additionally, the Court should strike all references to “Doe” defendants from the FAC on the
22 ground that such references are improper.

23 Finally, Apple moves to strike portions of Plaintiff’s Prayer for Relief. Plaintiff has not
24 pled any facts in any of his claims that could support his requests for an accounting or a
25 constructive trust, and as a matter of law, Plaintiff cannot show that any grounds exist to impose
26 an accounting or establish a constructive trust. Therefore, this Court should strike Plaintiff’s
27 requests for an order requiring an accounting or the imposition of a constructive trust.

28 For all of these reasons, and as explained more fully below, Apple respectfully requests

1 that the Court grant its Motion to Strike and Motion for a More Definite Statement without leave
2 to amend.

3 **II. PLAINTIFF'S ALLEGATIONS**

4 Plaintiff purports to bring this suit as a class action on behalf of himself and a "California
5 Class" consisting of:

6 [A]ll individuals who are or previously were employed by
7 DEFENDANT as Network Support Staff Members and other
8 similarly situated positions in California during the period four
9 years prior to the filing of this Complaint and ending on the date as
10 determined by the Court ("CALIFORNIA CLASS PERIOD"),
11 who were classified by Defendant as exempt, and who have been
12 or may be subject to the challenged exemption classification
13 policies and practices used by Defendant (the "CALIFORNIA
14 CLASS").

15 FAC, ¶ 18.

16 Plaintiff further brings his second, third, fourth and fifth claims on behalf of a "California
17 Labor Subclass" consisting of:

18 [A]ll members of the CALIFORNIA CLASS who were employed
19 by Defendant Apple who were classified by Defendant as exempt
20 and who performed work in excess of eight (8) hours in one day
21 and/or forty (40) hours in one week and/or hours on the seventh
22 (7th) consecutive day of a workweek and did not receive overtime
23 compensation as required by Labor Code Section 510 and Wage
24 Order 4-2001 (the "CALIFORNIA LABOR SUBCLASS").

25 *Id.*, ¶ 29.

26 Plaintiff additionally purports to bring this suit as a collective action under the FLSA on
27 behalf of himself and a collective class, which he defines as:

28 [A]ll persons who were, are, or will be employed by
DEFENDANTS as Network Support Staff Members, or in other
substantially similar positions during the period commencing three
years prior to the filing of this Complaint and ending on the date as
the Court shall determine (the "COLLECTIVE CLASS PERIOD"),
who performed work in excess of forty (40) hours in one week and
did not receive overtime compensation as required by the FLSA
(the "COLLECTIVE CLASS").

Id., ¶ 88.

Plaintiff defines "Network Support Staff Members" as individuals "in a staff position as a
Network Engineer, or in any other similarly situated position[.]" *Id.*, ¶ 13.

1 Plaintiff alleges that he worked for Apple from around April 1995 to November 2007 as a
2 “Network Engineer.” *Id.*, ¶ 5. Plaintiff alleges that Apple misclassified him and members of the
3 putative classes as exempt from overtime. *See id.*, ¶¶ 7, 9, 15, 20-22, 46, 57, 59 and 96. Plaintiff
4 further alleges that he and other “Network Support Staff Members” worked in excess of eight (8)
5 hours per day and/or forty (40) hours per week and/or on the seventh (7th) day of the workweek.
6 *Id.*, ¶ 7 and 11. Plaintiff contends that as a result he and members of the putative classes are
7 entitled to unpaid overtime wages. *Id.*, ¶ 14 and 35. Plaintiff also alleges that Apple failed to
8 provide rest and/or meal periods for him and the California Class and California Labor Subclass
9 as required by Labor Code 226.7. *Id.*, ¶ 85. Plaintiff further alleges Apple did not pay him and
10 the California Class and California Labor Subclass all wages due upon the termination of their
11 employment. *Id.*, ¶ 74. Finally, Plaintiff alleges Apple failed to provide him and the California
12 Class and California Labor Subclass with accurate itemized wage statements showing the correct
13 number of hours he and the putative classes worked at the effective regular and overtime rates of
14 pay. *Id.*, ¶ 78.

15 Plaintiff alleges six claims: (1) unfair competition in violation of California Business and
16 Professions Code § 17200 *et seq.*; (2) failure to pay overtime wages in violation of Cal. Lab.
17 Code § 510, *et seq.*; (3) failure to provide wages when due in violation of Cal. Lab. Code § 203;
18 (4) failure to provide accurate itemized wage statements in violation of Cal. Lab. Code § 226; (5)
19 failure to provide meal and rest periods in violation of Cal. Lab. Code §§ 226.7 and 512; and (6)
20 failure to pay compensation in violation of 29 U.S.C. § 201, *et seq.*

21 **III. ARGUMENT**

22 **A. Legal Standards**

23 **1. Class Allegations May Be Stricken Under 12(f)**

24 Rule 12(f) provides that a court “may order stricken from any pleading any redundant,
25 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). This provision allows the
26 Court to dispense with spurious issues prior to trial to prevent waste of the Court’s time and
27 resources. *See Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983) (“[T]he
28 function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise

1 from litigating spurious issues by dispensing with those issues prior to trial”).

2 Class allegations may also be dismissed or stricken at the pleading stage. Rule
3 23(d)(1)(D) provides that “the court may make appropriate orders ... requiring that the pleadings
4 be amended to eliminate therefrom allegations as to representation of absent persons, and that the
5 action proceed accordingly.” *See also Kamm v. Sugawara*, 509 F.2d 205, 212 (9th Cir. 1975)
6 (district court properly granted motion to dismiss and strike class allegations); *Palmer v.*
7 *Combined Ins. Co. of Am.*, No. 02 C 1764, 2003 U.S. Dist. LEXIS 2534, *5 (N.D. Ill. Aug. 29,
8 2003) (“[I]t is sometimes possible to determine from the pleadings alone [the Rule 23]
9 requirements cannot possibly be met, and in such cases, striking class allegations before
10 commencing discovery is appropriate.”).

11 **2. Ambiguous Pleadings Should Be Stricken Under 12(e)**

12 Under Federal Rule of Civil Procedure 12(e), the Court has broad discretion to order
13 Plaintiff to provide a more definite statement where the complaint is “so vague or ambiguous”
14 that Apple “cannot reasonably be required to frame a responsive pleading.” Fed. R. Civ. P. 12(e).
15 Trial courts have broad discretion to require amendment of the complaint to provide additional
16 detail. *Warth v. Seldin*, 422 U.S. 490, 501-502 (1975). An order for a more definite statement
17 serves the Court’s and the parties’ interests because, “[u]nless cases are pled clearly and
18 precisely, issues are not joined, discovery is not controlled, the trial court’s docket becomes
19 unmanageable, the litigants suffer, and society loses confidence in the court’s ability to administer
20 justice.” *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367 (11th Cir.
21 1996) (holding that trial court should have instructed plaintiff’s counsel to provide more definite
22 statement).

23 **B. Plaintiff’s Proposed Class Definition Is Imprecise And Ambiguous Because** 24 **Plaintiff Fails To Identify Sufficiently The Job Titles At Issue**

25 A class action complaint must set forth facts sufficient to show the requisite ascertainable
26 class. The class definition must be “precise, objective and presently ascertainable.” *O’Connor v.*
27 *Boeing N.A., Inc.*, 197 F.R.D. 404, 416 (C.D. Cal. 2000)¹ (quoting Manual for Complex

28 ¹ It is Plaintiff’s burden to establish that all the requirements for class action adjudication are met. *Senter*
OHS West:260489734.5

1 Litigation Third § 30.14 at 217 (1995)); *see also In re Tetracycline*, 107 F.R.D. 719, 728 (W.D.
2 Mo. 1985) (proposed class must not be amorphous, vague or indeterminate). The class definition
3 must be sufficiently definite so that it is administratively feasible for the court to determine
4 whether a particular individual is a member. *Aiken v. Miller*, 442 F. Supp. 628, 658 (E.D. Cal.
5 1977); *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 63 (D. Nev. 1985).

6 Here, Plaintiff's current class definitions are imprecise, vague, and ambiguous because the
7 identities of the people who fall within them are unascertainable. Plaintiff seeks to represent
8 individuals in an unspecified and unlimited number of job titles within his proposed classes.
9 Rather than identifying specific job titles, Plaintiff vaguely defines each of his classes to include
10 individuals "in a staff position as a Network Engineer, or in any other similarly situated position
11 (the 'Network Support Staff Members')." FAC, ¶ 13 (emphasis added); *see also id.*, ¶ 18
12 ("Network Support Staff Members and other similarly situated positions") and ¶ 88 ("Network
13 Support Staff Members, or in other substantially similar positions"). This definition renders each
14 of Plaintiff's class definitions impermissibly vague and ambiguous because it does not clearly
15 apprise Apple or the Court of the identities of those Plaintiff seeks to represent. The phrase "or in
16 any other similarly situated position" leaves Apple and the Court to guess at what Plaintiff
17 considers "similar" or "substantially similar." The terms "similar" or "substantially similar" are
18 amorphous terms that can mean different things to different people at different times. How
19 Plaintiff construes these undefined and broad terms, and thus the class definition, is open to
20 constant revision at the whim of Plaintiff without Court notice or approval. Plaintiff's overly
21 broad and ambiguous class definition makes it impossible to determine who is encompassed in
22 the purported classes and whether Plaintiff will attempt to claim later that the class definitions
23 include other employees not specifically mentioned in the FAC. If there are titles meant to be
24 included in Plaintiff's class definitions, Plaintiff should simply identify them and remove the
25 uncertainty. If Plaintiff later wishes to change the class definitions, Plaintiff can file a motion to
26 amend. However, vague language such as "or in any other similarly situated position" in the
27 proposed class definitions will almost certainly lead to confusion and the inability to proceed with

28 v. *GM Corp.*, 532 F.2d 511, 522 (6th Cir. 1976).

OHS West:260489734.5

- 5 -

1 coherent discovery, or to give notice to the purported class.

2 Because it is impossible to determine who falls within the purported classes, Apple cannot
3 respond to these allegations, and these allegations fail to state a claim. *See* Newberg on Class
4 Actions § 6.14 (class definition of complaint serves to demonstrate existence of adequate class
5 definition). The Court should therefore strike the class definitions and all class allegations, or
6 order Plaintiff to fix these defects in his proposed class definitions by specifying the particular job
7 title(s) he seeks to include in his class definitions. This should not be difficult to do for a
8 proposed class representative who contends he is an adequate representative. If Plaintiff does not
9 know which positions he contends are similar, how would Apple have any idea? Apple cannot be
10 expected to attempt to read Plaintiff's mind and ascertain who he considers similarly situated.
11 And if Plaintiff cannot identify them, he should not be trying to represent them.² As the FAC is
12 presently pled, the Court and Apple are left to guess which persons are intended to be included in
13 the class definitions. Accordingly, the Court should strike Plaintiff's putative class definitions, or
14 order a more definite statement.

15 C. **California Labor Code Sections 203 And 226 Cannot Serve As The Basis For**
16 **Plaintiff's First Claim Under Business & Professions Code Section 17200**

17 Business and Professions Code Section 17200 defines "unfair competition" as "any
18 unlawful, unfair or fraudulent business act or practice" An action based on the UCL to
19 redress "unlawful" practices "borrows" violations of other laws and treats them as unlawful
20 practices independently actionable under the UCL. *Farmers Ins. Exchange v. Superior Court*, 2
21 Cal. 4th 377, 383 (1992). Although the UCL permits the borrowing of other substantive claims,

22 ² Plaintiff seeks to be a class representative, and as such must have knowledge adequate to show that he
23 and the proposed classes are similarly situated. Plaintiff alleged that he worked for Apple in the position
24 of "Network Engineer," and does not allege that he worked in any other position or under any other job
25 titles. It is extremely unlikely that he has knowledge of the job duties of any position other than his own,
26 such that he can knowledgeably claim that other unnamed positions are similarly situated to him. At the
27 pleading stage, however, Plaintiff should at least be able to identify the specific job titles he is seeking to
28 represent. This is not just a class action requirement, it is a basic pleading and Rule 11 requirement.
Under Rule 11, both Plaintiff and his counsel are required to conduct a reasonable inquiry to establish that
the allegations in the FAC are well founded in fact and law. Fed. R. Civ. P. 11; *Business Guides, Inc. v.*
Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991). If Plaintiff cannot even identify
specific job titles within Apple that are similarly situated, he cannot plead that these unnamed and
unknown individuals were subject to the same alleged wrongdoing, and thus, his compliance with Rule 11
is highly questionable.

1 its own unique remedies are very narrow. *Cel-Tech Commc'ns v. Los Angeles Cellular Tel. Co.*,
2 20 Cal. 4th 163, 180 (1999) (“In contrast to its *limited remedies*, the unfair competition law’s
3 scope is broad”) (emphasis added). The Supreme Court has emphasized that the only remedies
4 available to a private plaintiff under the UCL are injunctive relief and restitution. *Cel-Tech*, 20
5 Cal. 4th at 179 (“Prevailing plaintiffs are generally limited to injunctive relief and restitution”);
6 *Korea Supply Company v. Lockheed Martin Corporation*, 29 Cal. 4th 1134, 1144 (2003) (same);
7 *see* Cal. Bus. & Prof. Code § 17203 (court may order defendant “to restore to any person in
8 interest any money or property, real or personal, which may have been acquired by means of such
9 unfair competition”).

10 Thus, penalties cannot be recovered in a private UCL action³ because they are not
11 restitution. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002) (“In a suit under the UCL, a *public*
12 *prosecutor* may collect civil penalties, but a *private plaintiff’s* remedies are generally limited to
13 injunctive relief and restitution”) (internal quotation marks omitted) (emphases added); *Korea*
14 *Supply*, 29 Cal. 4th at 1144 (“Civil penalties may be assessed in *public* unfair competition actions,
15 but the law contains no criminal provisions. (§ 17206.) We have stated that under the UCL,
16 ‘[p]revailing plaintiffs are generally limited to injunctive relief and restitution.’”) (emphasis
17 added); *Tomlinson v. Indymac Bank*, 359 F. Supp. 2d 891, 895 (C.D. Cal. 2005) (“The Court
18 agrees ... that the remedy contained in [Labor Code] section 203 is a penalty because section 203
19 does not merely compel Indymac to restore the *status quo ante* by compensating Plaintiffs for the
20 time they worked; rather, it acts as a penalty by punishing Indymac to pay Plaintiffs an additional
21 amount. *This type of payment is clearly not restitutionary, and thus cannot be recovered under*
22 *the UCL.*”) (emphasis added); *Reese v. Walmart Stores, Inc.*, 73 Cal. App. 4th 1225, 1240 n.8
23 (1999) (in discussing section 17200 claims, the court stated: “the decisions do suggest that the
24 equitable relief available under the unfair competition statutes can argue against the superiority of
25 class treatment. And although *equitable relief would not include the statutory penalties* offered

26 ³A “public action” under the UCL is one brought in the name of the people of the State of California by
27 the Attorney General, a district attorney, county counsel, or a city attorney, as described in Business &
28 Professions Code Sections 17204, 17204.5, and 17206-17207. A “private action” under the UCL is one
brought by any person who has “suffered injury in fact and has lost money or property as a result of unfair
competition” as described in Business & Professions Code Section 17204.

1 under the Unruh Civil Rights Act or the Gender Tax Repeal Act, the inability to obtain such
2 penalties on a class-wide basis would not justify class treatment here because they are
3 unnecessary to avoid unjust enrichment”) (emphasis added).

4 In his first claim, Plaintiff attempts an end-run around this black-letter law by seeking in
5 his UCL claim penalties provided by Labor Code Sections 203 and 226. *See* FAC, ¶ 46. As
6 discussed above, penalties are not restitution, and thus cannot be recovered under the UCL.
7 Consequently, those portions of the FAC that seek Labor Code section 203 waiting-time penalties
8 under the UCL must be stricken. *Tomlinson*, 359 F. Supp. 2d at 895 (section 203 penalties not
9 recoverable under UCL). For the same reason, Plaintiff cannot recover under the UCL penalties
10 for alleged failure to furnish accurate itemized wage statements or failure to timely compensate
11 for all wages due at end of employment. Cal. Lab. Code § 226(e)-(f) (providing for a penalty for
12 failure to provide itemized wage statements); Cal. Lab. Code § 203 (providing for a penalty for
13 failure to timely compensate wages due at termination of employment). This is important
14 because waiting time penalties under Labor Code Section 203 have a three year statute of
15 limitations (*see* Cal. Lab. Code §203), and violation of the itemized wage statement statute only
16 has a one-year statute of limitations. *See* Cal. Civ. Proc. Code § 340 (providing that an action
17 upon a statute for a penalty must be brought within one year). However, Business & Professions
18 Code Section 17200 has a four-year statute of limitations. *Cortez v. Purolator Air Filtration*
19 *Products*, 23 Cal. 4th 163, 179 (2000) (noting different statute of limitations for claims brought
20 under Labor Code and claims under Section 17200). If Plaintiff is allowed to incorporate Labor
21 Code sections 203 and 226 into his UCL claim, he may recover additional years of Labor Code
22 penalties to which he is not entitled under the statute.

23 Thus, all language referencing Labor Code sections 203 and 226 must be stricken from the
24 first claim. *See* FAC, ¶ 46.

25 **D. All References To “Doe” Defendants Are Improper And Must Be Stricken.**

26 Plaintiff purports to assert claims against “Does 1-10” as defendants in this action.
27 However, the use of “Doe” defendants is improper under the federal pleading rules. *See Gillespie*
28 *v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (use of “Doe” to identify defendants improper

1 except in special circumstances, such as where the identity of a specific individual is not known at
2 time of filing). Therefore, any facts or references related to such fictitious defendants are
3 irrelevant and must be stricken. *See* FAC, ¶ 8; Fed. R. Civ. P. 12(f).

4 **E. Portions Of Plaintiff's Prayer For Relief Must Be Stricken**

5 **1. Plaintiff's Request For Accounting Must Be Stricken**

6 Plaintiff requests an order requiring Apple to provide an accounting of all wages and all
7 sums allegedly withheld from Plaintiff and the putative classes. *See* Prayer for Relief, ¶ 1C. To
8 request an accounting, Plaintiff must show: (1) a fiduciary relationship or other circumstance that
9 requires an accounting; and (2) that an unknown balance is due that cannot be ascertained without
10 an accounting. To meet the first element of an accounting, Plaintiff must plead either a fiduciary
11 relationship, that money is owed and the accounting relationship is so complicated that an
12 ordinary legal action would be inappropriate, *Union Bank v. Superior Court*, 31 Cal. App. 4th
13 573, 593 (1995), or that the facts are peculiarly within the knowledge of one party who acted
14 fraudulently. *Prince v. Harting*, 177 Cal. App. 2d 720, 733 (1960).

15 Here, plaintiff has not pled any of these circumstances. Plaintiff alleges only a simple
16 employer/employee relationship, which, without more, does not constitute a fiduciary
17 relationship. *See Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 129 (1966) (“Under
18 prevailing judicial opinion no presumption of a confidential relationship arises from the bare fact
19 that parties to a contract are employer and employee; rather, additional ties must be brought out in
20 order to create the presumption of a confidential relationship between the two.”) (emphasis
21 added); *see also Amid v. Hawthorne Community Med. Gp., Inc.*, 212 Cal. App. 3d 1383, 1391
22 (1989) (“A bare employee-employer relationship does not create a confidential relationship.”).

23 Nor has plaintiff alleged sufficient facts to show a complicated accounting relationship. A
24 suit for accounting will not lie where it appears from the complaint that none is necessary or that
25 there is an adequate remedy at law. *St. James Church of Christ Holiness v. Superior Court*, 135
26 Cal. App. 2d 352, 359 (1955). Plaintiff pleads no factual allegation that facts needed to calculate
27 the amount of overtime compensation allegedly due Plaintiff and the purported class are not
28 available through the normal course of discovery.

1 Plaintiff has not alleged a fiduciary duty, complicated accounts, or fraud.⁴ Accordingly,
2 his request for an accounting is improper, and Apple’s motion to strike thereto should be granted
3 without leave to amend.

4 **2. Plaintiff’s Request For Constructive Trust Must Be Stricken**

5 Plaintiff additionally requests imposition of a constructive trust. *See* Prayer for Relief, ¶
6 1D. To assert a constructive trust, Plaintiff must plead “fraud, breach of fiduciary duty, breach of
7 promise to buy property for plaintiff, or repudiation of [an] unenforceable express trust.” 5
8 Witkin Cal. Proc. 4th (1997) Plead., § 796, p. 253. As previously explained, Plaintiff has not pled
9 that Apple defrauded him. Nor has Plaintiff pled that Apple owed him a fiduciary duty. In any
10 event, Plaintiff cannot allege a fiduciary duty because no such duty exists between employers and
11 employees under California law. *See Calvao v. Superior. Court (Klippert)*, 201 Cal. App. 3d 921,
12 923 (1988) (“There is no confidential or fiduciary relationship in this [employment contract]
13 context”). Indeed, “[n]o presumption of a confidential relationship arises from the bare fact that
14 parties to a contract are employer and employee; rather, additional ties must be brought out in
15 order to create the presumption of a confidential relationship between the two.” *Miller v.*
16 *Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004) (holding that a fiduciary relationship did
17 not exist between employer and employee and that an employee’s fraud claim could not rest on
18 the employee-employer relationship). Finally, Plaintiff has not alleged, and there is no basis upon
19 which he can allege, that Apple breached a promise to buy property from him or that Apple
20 repudiated an unenforceable express trust. Thus, Plaintiff has not pled any claims that could
21 support a constructive trust, and as a matter of law, Plaintiff cannot show that any of the grounds
22 for establishing a constructive trust exist.

23 Moreover, to create a constructive trust, there must also be a *res*, an “identifiable kind of
24 property or entitlement in defendant’s hands.” *Korea Supply Co.*, 29 Cal. 4th at 1150. As

25 ⁴ Plaintiff has not alleged that Apple has committed fraud, except to state vaguely that Apple “acted
26 deceptively by falsely and fraudulently telling” Plaintiff and the putative classes certain facts. *See* FAC, ¶
27 15. Because fraud must be pled with particularity, such a bare allegation is an insufficient allegation of
28 fraudulent behavior. A general pleading of misrepresentation or fraud is insufficient; the facts constituting
every element of the fraud must be alleged factually and specifically. *See, e.g.,* Fed. R. Civ. P. 9(b); 5
Witkin Cal. Proc. 4th (1997) Plead., § 669; *Hills Transp. Co. v. Southwest Forest Indus., Inc.*, 266 Cal.
App. 2d 702 (1968). Plaintiff has failed to meet this heightened pleading requirement.

