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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT CALIFORNIA
14

15 MOUANG SAECHAO, individually and on
16 behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 LANDRY’S, INC., a Delaware corporation,
20 and McCORMICK & SCHMICK
RESTAURANT CORP, a Delaware
21 corporation,

22 Defendants.
23
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25
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27
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Case No: 4:15-CV-00815

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR VIOLATIONS OF
THE CALIFORNIA LABOR CODE,
UNFAIR COMPETITION LAW AND
RELATED CLASS AND NON-CLASS
CLAIMS FOR RELEF**

DEMAND FOR JURY TRIAL

1 Plaintiff Mouang Saechao, individually and on behalf of (1) all others similarly situated,
2 and (2) all other current and former aggrieved employees of Defendants, alleges as follows:

3 **INTRODUCTION**

4 1. This is an action for wage theft and other violations of the California Labor Code
5 and Industrial Welfare Commission Wage Order No. 5 brought against defendants Landry’s,
6 Inc. and McCormick & Schmick Restaurant Corp., and each of them (collectively,
7 “Defendants”) by Plaintiff, a former employee of Defendants. Defendants committed numerous,
8 repeated violations against their employees working in non-exempt positions at Spenger’s Fresh
9 Fish Grotto (“Spenger’s), a restaurant in Berkeley, California.

10 2. As set forth in greater detail below, Defendants’ unlawful conduct includes,
11 without limitation, suffering employees to work off-the-clock and without compensation, failing
12 to provide meal and rest breaks, failing to pay all wages owed (including but not limited to
13 overtime wages, premium pay, and reporting time pay), failing to provide accurate and complete
14 wage statements, and engaging in false and fraudulent recordkeeping practices.

15 **THE PARTIES**

16 3. Plaintiff Mouang “Michelle” Saechao is a citizen of the State of California who
17 was employed by Defendants in hourly, non-exempt positions at Spenger’s from approximately
18 November 20, 2013 through December 1, 2014.

19 4. Defendant Landry’s, Inc. (“Landry’s”) is a Delaware corporation with its
20 principal place of business in Houston, Texas.

21 5. Defendant McCormick & Schmick Restaurant Corp. (“McCormick & Schmick”) is a
22 Delaware Corporation with its principal place of business in Houston, Texas. Plaintiff is
23 informed and believes that Spenger’s is and at all times relevant was owned and operated by
24 McCormick & Schmick and that McCormick & Schmick is and at all times relevant was a
25 wholly-owned subsidiary of Landry’s.

26 6. Plaintiff is informed and believes that Defendants were her joint employers and
27 that Defendants continue to jointly employ the workers at Spenger’s. She is informed and
28 believes that Defendants jointly controlled, and continue to control, working conditions at

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1 Spenger’s and that they jointly suffer(ed) or permit(ted) employees to work there. Thus,
2 Landry’s and McCormick & Schmick, as joint employers, are jointly and severally liable for the
3 claims Plaintiff asserts on her own behalf and on behalf of other employees.

4 **JURISDICTION AND VENUE**

5 7. This Court has original subject matter jurisdiction over this action pursuant to 28
6 U.S.C. § 1332(a), as there is complete diversity of citizenship, and the amount in controversy
7 exceeds \$75,000, exclusive of interest and costs.

8 8. The Court likewise has personal jurisdiction over the Defendants. This action
9 arises out of each Defendant’s business within this judicial district, and the harm alleged
10 occurred within this district. Thus, each Defendant has sufficient minimum contacts with
11 California and with this judicial district that each may be served with process under California’s
12 long-arm statute, and requiring each Defendant to respond to this action does not violate due
13 process.

14 9. Venue is proper in this district under 28 U.S.C. § 1391(b)(1) and (2) because
15 each Defendant is deemed, pursuant to 28 U.S.C. § 1391(c)(2), to reside in this district and
16 because a substantial part of the events and/or omissions giving rise to Plaintiff’s claims
17 occurred within this district.

18 **FACTUAL ALLEGATIONS**

19 10. Defendants own and operate, and at all times relevant owned and operated,
20 Spenger’s. They employ(ed) numerous individuals at Spenger’s in hourly, non-exempt
21 positions including but not limited to servers, hosts, bartenders, banquet servers, bussers, cooks,
22 and dishwashers.

23 11. At all times relevant, daily operations at Spenger’s have been directed by general
24 manager Richard Villareal and assistant general manager Kevin Jones. Other so-called “floor
25 managers” had less authority to create customs, policies, and/or practices and were charged with
26 enforcing customs, policies, and/or practices as directed by Mr. Villareal and Mr. Jones. Mr.
27 Villareal and Mr. Jones had authority over all employees working at Spenger’s, and they applied
28 the customs, policies, and/or practices described herein uniformly to all non-exempt employees.

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1 12. The uniform custom and practice at Spenger’s at all times was and is to fail to
2 provide employees with meal and rest breaks as required by the California Labor Code and
3 Industrial Welfare Commission Wage Order No. 5-2001 (the “Wage Orders). The work
4 schedules and staffing levels at Spenger’s generally require, and have required, that the hourly,
5 non-exempt employees forego off-duty meal and rest periods.

6 13. Defendants require(d) their non-exempt employees to sign a waiver of meal
7 breaks for shifts lasting greater than five but less than six hours. Defendants further require(d)
8 Plaintiff, like all non-exempt employees, to clock out before the end of the sixth hour of each
9 shift, without regard to whether the employees were actually able to stop, or had stopped,
10 working at that time and take an off-duty meal break. In fact, Defendants did not provide meal
11 periods, and the employees continued working after clocking out. Defendants’ managers,
12 including but not limited to Mr. Villareal and Mr. Jones, knew the press of business prevented
13 employees from taking off-duty, 30-minute meal breaks; these managers took no action to
14 provide breaks and instead required the employees to continue working off the clock.
15 Employees who failed to clock out before the end of the sixth hour of each shift were
16 disciplined.

17 14. Defendants also instruct(ed) and require(d) employees to alter the time records of
18 workers who clock(ed) out after the end of the sixth hour of a shift to falsely create the
19 appearance that a compliant meal break had been taken, or that the shift was shorter than 6
20 hours.

21 15. Defendants likewise did not, and do not, provide rest breaks. Defendants did not
22 provide work schedules (and/or sufficient staff) to permit employees to take rest breaks.
23 Management was aware that employees’ workloads prevented them from taking breaks but did
24 not take any action to relieve the employees from their duties.

25 16. Defendants generally did not, and do not, pay employees premium pay for missed
26 or untimely meal breaks or for missed rest breaks. As noted above, in many instances,
27 Defendants altered employees’ time clock records to avoid paying premium pay by falsifying
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1 and/or destroying evidence of missed, untimely, and/or truncated meal breaks, or to fabricate
2 evidence that shifts were shorter than six hours.

3 17. Defendants routinely require(d) and/or knowingly suffer(ed) employees to work
4 “off the clock” and thereby fail(ed) to pay them for all hours worked. As described above,
5 employees routinely and at management’s directive clocked out – to provide the appearance that
6 they took meal breaks or that no meal break was required to be provided – but were required to,
7 and did, continue working. In addition, managers routinely require(d) employees to complete
8 their “sidework” (e.g., cleaning, restocking, rolling silverware) after clocking out; it often took
9 employees more than an hour to complete their sidework.

10 18. Plaintiff is informed and believes that at least one employee who worked or
11 works at Spenger’s as a host and server frequently works for approximately two hours before
12 clocking in, with the knowledge and approval of management.

13 19. Defendants also occasionally require(d) employees to attend meetings.
14 Employees did not, and do not, clock in for these meetings. By way of example, one such
15 meeting occurred at the beginning of each shift on a day in or around late October 2014, when
16 corporate representatives came to Spenger’s to recognize certain employees – including Plaintiff
17 – for excellent work. The employees were not compensated for this off-the-clock work.

18 20. Defendants fail(ed) to pay overtime for hours worked in excess of 8 (or, in some
19 instances, 12) hours per day or for working 7 consecutive days in a work week in violation of
20 Wage Order paragraph 3 and Labor Code sections 510, 1194 *et seq.*, and 1198. As previously
21 described, Defendants require(d) and/or knowingly permit(ted) employees to perform work off
22 the clock, both during purported meal breaks and before and/or after their shifts. The aggrieved
23 employees were therefore deprived of overtime wages on each occasion when the total hours
24 worked exceeded 8. This was not an infrequent occurrence; for example, Plaintiff was typically
25 clocked in for between 6 and 8 hours for shifts when she worked as a banquet server. On those
26 occasions, all of her off-the-clock work should have been, but was not, compensated at the
27 appropriate overtime rate.
28

1 21. Defendants fail(ed) to pay reporting time pay in violation of Wage Order
2 paragraph 5. Defendants' managers frequently scheduled, and continue to schedule, more staff
3 than were needed for a given shift, only to send employees home early (*i.e.*, before having
4 worked half of their regularly scheduled shifts), and often before they even clock in. This
5 practice was and is particularly common with respect to servers, hosts, bussers, cooks and
6 dishwashers. Yet Defendants do and did not pay these employees for half their scheduled hours
7 (but no less than two nor more than four hours), as required by the Wage Order.

8 22. Defendants' practice of sending employees home before, or during the first half
9 of, their shifts contributed and contributes to Defendants' other violations of the Labor Code. In
10 particular, this practice often resulted or results in such understaffing that no meal periods or rest
11 breaks are or were provided to the employees who remain(ed) at work.

12 23. Defendants fail(ed) to pay split shift premiums in violation of Wage Order
13 paragraph 4(C). Defendants routinely failed and fail to pay employees working split shifts (*i.e.*,
14 work schedules interrupted by non-paid non-working periods established by the employer, other
15 than *bona fide* meal periods) one hour's pay at the minimum wage in addition to the minimum
16 wage for hours worked that day. Employees at Spenger's are and were at times scheduled to
17 work "doubles" – both the lunch and dinner shifts in the same day, with an unpaid, non-working
18 break of longer than an hour between the shifts. Additionally, at times Defendants required and
19 require employees to attend meetings that both began and ended hours before the employees'
20 shifts began. For example, one of the meetings in or around late October 2014 described above
21 began at approximately 3:00 pm and lasted roughly an hour; yet many of the employees required
22 to attend worked shifts that day that did not begin until 6:00 pm.

23 24. Defendants fail(ed) to pay all earned wages (including overtime compensation,
24 wages for off-the-clock work, reporting time pay, split shift premiums, and premium pay for
25 missed meal and rest breaks) at least twice a month in violation of Labor Code section 204. As
26 described above, Defendants systematically failed and refused to pay all overtime compensation
27 and premium pay owed to their employees and required or knowingly permitted employees to
28 perform work off the clock and without compensation. As such, although the employees

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1 received pay every two weeks, their wages were not timely paid in full, as required by the
2 statute.

3 25. Defendants willfully fail(ed) to pay all earned wages (including overtime
4 compensation, wages for off-the-clock work, reporting time pay, split shift premiums, and
5 premium pay for missed meal and rest breaks) at the time of an employee’s termination or
6 within 72 hours of an employee’s resignation in violation of Labor Code sections 201, 202, 203,
7 and 206. For the reasons stated in the immediately preceding paragraph, the employees’ earned
8 wages were not timely paid in full following their separation from Defendants.

9 26. Further, Plaintiff’s purportedly final paycheck – the one she was given on or
10 about December 1, 2014 at the time of her termination – did not include all the compensation
11 she was owed, even without regard to off-the-clock work and unpaid premium pay and/or
12 overtime wages. On or about December 30, 2014, she received a second check, purporting to
13 pay her a “commission” earned between November 25 and December 8. (Defendants refer to
14 the portion of the mandatory gratuity on banquets paid to each banquet server as a
15 “commission.”) Although the check was dated December 15, it was sent by Federal Express on
16 December 26 – nearly a month after Plaintiff’s last day of work at Spenger’s.

17 27. Defendants make or made improper deductions from employees’ wages in
18 violation of Labor Code section 221. Defendants deducted the price of participation in their
19 “Employee Discount Program” from the wages paid to Plaintiff when they terminated her, even
20 though she could no longer participate in the program following her termination. Even worse,
21 Defendants again charged Plaintiff for the employee discount program on the check she received
22 on or about December 30, 2014. Plaintiff is informed and believes that Defendants made similar
23 improper deductions from other separating employees’ wages.

24 28. Defendants fail(ed) to reimburse employees for costs incurred in the performance of
25 their job duties, in violation of the Wage Order, paragraph 9(B) and Labor Code section 2802.
26 Plaintiff and other employees participating in Landry’s so-called “Wow” and “Ambassador”
27 programs drove or drive, in their own vehicles and at their own expense, to hotels near
28 Spenger’s to deliver gifts (such as free desserts from Spenger’s) and coupons to encourage hotel

1 personnel to refer guests to Spenger's. These employees were required to purchase packaging,
2 bows, and/or ribbons for the gifts; although managers told Plaintiff that Defendants would
3 reimburse her for those purchases, and she turned in receipts from the purchases, she was never
4 reimbursed. Plaintiff is informed and believes that Defendants likewise failed to reimburse
5 other employees for such expenses.

6 29. Defendants fail(ed) to keep accurate records in violation of Wage Order
7 paragraph 7(A). Because Defendants require their employees to work off the clock, and because
8 they alter employee time records, they fail(ed) to maintain accurate information concerning the
9 beginning and ending of each work period, meal periods, split shift intervals, and total hours
10 worked by each employee.

11 30. Defendants fail(ed) to provide accurate, itemized statements of hours worked,
12 wages, and deductions, in violation of Wage Order paragraph 7(B) and Labor Code section 226.
13 Plaintiff is informed and believes that employees who receive(d) their wages via direct deposit,
14 or any other method aside from receiving a live check, are or were not provided with wage
15 statements at all; such employees wishing to receive a wage statement must – for each pay
16 period – affirmatively (and repeatedly) request a statement and then wait several days to receive
17 it.

18 31. Even the wage statements that Defendants do provide fail to comply with Labor
19 Code section 226. Specifically, the statements do not include an address for Landry's and
20 include no information concerning McCormick & Schmick. More confusingly, the paychecks
21 themselves indicate they are drawn on an account in McCormick & Schmick's name and include
22 no reference to Landry's.

23 32. Further, as described above, Defendants require(d) employees to work off the
24 clock (including but not limited to times when employees were required to clock out to create
25 false evidence of meal breaks). Thus, not all hours worked were documented on employees'
26 wage statements. Additionally, the wage statements did not reflect premium pay owed to the
27 employees for missed meal and rest breaks, overtime wages, split shift premiums, or reporting
28 time pay.

1 33. Defendants unlawfully prohibit(ted) employees from discussing their wages, and
 2 Defendants discharge(d), formally discipline(d), or otherwise discriminate(d) against employees
 3 who disclose(d) the amount of their wages in violation of Labor Code section 232. Defendants'
 4 employee handbook states that "[e]mployee compensation, bonuses, and/or benefits are
 5 confidential, and are not to be discussed with employees other than your supervisor." Plaintiff is
 6 informed and believes that Defendants have terminated or otherwise discriminated against at
 7 least two employees who purportedly violated this unlawful policy.

8 34. Defendants fail(ed) to timely provide personnel records upon request in violation
 9 of Labor Code sections 432 and 1198.5. On or about December 2, 2014, Plaintiff hand-
 10 delivered to Spenger's general manager, Mr. Villareal, a written request for "copies of all
 11 documents [she] signed in connection with [her] employment and all personnel records related
 12 to [her] job performance or to any grievance concerning [her]." She received no response until
 13 approximately January 6, 2015, when Landry's Employee Relations Representative Kari
 14 Martinez left her a message demanding payment for the documents. Plaintiff returned Ms.
 15 Martinez' call on or about January 8 and tried repeatedly over the next several days to obtain the
 16 details concerning how and where to make the payment. Immediately after receiving payment
 17 instructions from Ms. Martinez, on or about January 15, Plaintiff mailed a money order to
 18 Landry's. She finally received her personnel file on or about February 4, more than two months
 19 after submitting her request. Plaintiff is informed and believes that during the relevant time
 20 period Defendants' have similarly failed to timely comply with other employees' requests for
 21 personnel records.

CLASS ALLEGATIONS

22 35. Plaintiff brings this lawsuit in part as a class action under Rule 23(a), Rule
 23 23(b)(1), 23(b)(2), and/or 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the
 24 following Class of similarly situated persons:
 25

26 All current and former non-exempt employees of Landry's and/or McCormick &
 27 Schmick who, during the four years prior to the filing of this Complaint, worked at Spenger's
 28 and:

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1 a. were not provided a 30-minute, off-duty meal break during any work
2 day lasting five hours or longer (or, to the extent employees validly waived breaks for shifts
3 lasting between five and six hours, any work day lasting six hours or longer) and/or were not
4 provided with a second 30-minute, off-duty break during work periods lasting over ten hours;

5 b. were not provided a 10-minute rest break during any shift lasting 3.5
6 hours or longer and/or were not provided subsequent rest breaks for each additional four hours,
7 or major fraction thereof, worked;

8 c. were not paid for all hours worked;

9 d. were not paid overtime wages for working longer than eight hours in a
10 day;

11 e. were not paid reporting time pay when they were sent home before
12 having worked half of their scheduled shifts;

13 f. were not paid split shift premiums when they worked “doubles” or split
14 shifts; and/or

15 g. received a wage statement from Defendants.

16 36. Plaintiff also brings this lawsuit on behalf of a “Waiting Time Subclass,” defined
17 as follows:

18 All former non-exempt employees of Landry’s and/or McCormick & Schmick who
19 worked at Spenger’s and separated from their employment during the three years prior to the
20 filing of this Complaint.

21 37. Subject to additional information obtained through further investigation and
22 discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or
23 amended complaint. Defendants, their subsidiaries, their officers, directors, managing agents,
24 and members of those persons’ immediate families, the Court, Court personnel, and legal
25 representatives, heirs, successors or assigns of any excluded person or entity are excluded from
26 the Class.

27 38. **Numerosity.** The Class for whose benefit this action is brought is so numerous
28 that joinder of all Class members is impracticable. While Plaintiff does not presently know the

1 exact number of Class members, Plaintiff is informed and believes that there are hundreds of
2 Class members and that those Class members can be readily determined and identified through
3 Defendants' files and, if necessary, appropriate discovery.

4 39. **Typicality.** Plaintiff's claims are typical of the claims of the members of the
5 Class. Plaintiff, like all class members, was a victim of wage theft by Defendants resulting from
6 the same customs, practices, and policies. Furthermore, the factual bases of Defendants'
7 misconduct are common to all Class members and represent a common thread of unfair and
8 unlawful conduct resulting in injury to all members of the Class.

9 40. **Commonality.** Common questions of law and fact exist as to all members of the
10 Class and predominate over any questions solely affecting individual members. Issues of law
11 and fact common to the Class include:

12 (a) Whether each Defendant is/was a joint employer of the Class members;

13 (b) Whether Defendants violated the California Labor Code by failing to
14 provide Class members with meal breaks;

15 (c) Whether Defendants violated the California Labor Code by failing to
16 provide Class members with rest breaks;

17 (d) Whether Defendants violated the California Labor Code by failing to pay
18 Class members premium pay for missed or untimely meal periods and/or missed rest periods;

19 (e) Whether Defendants violated the California Labor Code by failing to pay
20 overtime;

21 (f) Whether Defendants violated the California Labor Code by failing to pay
22 Class members for all time worked;

23 (g) Whether Defendants violated the California Labor Code by failing to pay
24 reporting time wages;

25 (h) Whether Defendants violated the California Labor Code by failing to pay
26 split shift premiums;
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1 (i) Whether Defendants violated the California Labor Code by failing to pay
2 all earned wages at the time of Class members' termination or within 72 hours of their
3 resignation;

4 (j) Whether Defendants violated the California Labor Code by failing to keep
5 accurate records of the time worked by Class members and by failing to provide accurate
6 itemized statements of earnings;

7 (k) Whether Defendants intentionally falsified time records;

8 (l) Whether Defendants by way of the conduct alleged herein, engaged in
9 unfair acts or practices in violation of California unfair trade practices laws including, but not
10 limited to, California Business & Professions Code § 17200, *et seq.*, for which Class members
11 are entitled to recover;

12 (m) Whether Class members have been damaged by Defendants' actions or
13 conduct; and

14 (n) Whether declaratory and injunctive relief are appropriate to curtail
15 Defendants' conduct as alleged herein.

16 41. **Adequacy.** Plaintiff will fairly and adequately represent the interests of the Class
17 and has no interests adverse to or in conflict with other Class members. Plaintiff's retained
18 counsel will vigorously prosecute this case, have previously been designated class counsel in
19 cases in the state and federal courts of California, and are highly experienced in both
20 employment law and class litigation.

21 42. **Superiority.** A class action is superior to other available methods for the fair and
22 efficient adjudication of this controversy since, among other things, joinder of all Class
23 members is impracticable, and a class action will reduce the risk of inconsistent adjudications or
24 repeated litigation over the same conduct. Further, the expense and burden of individual
25 lawsuits would make it virtually impossible for Class members, Defendants, or the Court to
26 cost-effectively redress separately the unlawful conduct alleged. Thus, absent a class action,
27 Defendants would unjustly retain the benefits of their wrongdoings. Plaintiff knows of no
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1 difficulties to be encountered in the management of this action that would preclude its
2 maintenance as a class action, either with or without subclasses.

3 43. Adequate notice can be given to Class members directly using information
4 maintained in Defendants’ records and/or through notice by publication or other reasonable
5 means.

6 44. Accordingly, class certification is appropriate under Rule 23.

7 **LABOR CODE PRIVATE ATTORNEYS GENERAL ACT ALLEGATIONS**

8 45. Pursuant to the California Labor Code Private Attorneys General Act (“PAGA”),
9 Labor Code section 2698 *et seq.*, Plaintiff brings this action on behalf of all current and former
10 aggrieved employees of Defendants who work or worked at Spenger’s.

11 46. By letter dated February 13, 2015, sent by certified mail, Plaintiff through her
12 counsel notified the Labor and Workforce Development Agency (“LWDA”) and each
13 Defendant of the specific provisions of the Labor Code and Wage Orders that Defendants have
14 violated. A return receipt states that LWDA received the letter on February 17, 2015.

15 47. LWDA did not respond within 33 calendar days of the postmark date of the
16 notice letter. Further, to the extent that any of the alleged violations could have been cured
17 pursuant to Labor Code section 2699.3(c)(2), Defendants did not provide any notice within 33
18 calendar days of such cure. Plaintiff has therefore exhausted her administrative remedies and,
19 pursuant to Labor Code section 2699.3, is permitted to pursue her claim for PAGA penalties in
20 this action.

21 **FIRST CLAIM FOR RELIEF**
22 **FAILURE TO PROVIDE MEAL PERIODS**
(Wage Order No. 5-2001 ¶ 11; Cal. Lab. Code §§ 226.7, 512)

23 48. Plaintiff, on her own behalf and on behalf of all Class members, incorporates the
24 above allegations as if fully set forth herein.

25 49. California Labor Code § 512 provides, in pertinent part, as follows:

26 An employer may not employ an employee for a work period of more
27 than five hours per day without providing the employee with a meal period of not
28 less than 30 minutes, except that if the total work period per day of the employee
is no more than six hours, the meal period may be waived by mutual consent of
both the employer and employee. An employer may not employ an employee for

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a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

50. California Labor Code § 226.7(a) provides: “No employer shall require an employee to work during any meal . . . period mandated by an applicable order of the Industrial Welfare Commission.”

51. Paragraph 11(A) of the Wage Order provides, in pertinent part, as follows: “Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an ‘on duty’ meal period and counted as time worked.”

52. As alleged herein, Plaintiff and the Class members routinely and uniformly were not provided with meal periods and instead were required to forego the meal periods required to be provided to them.

53. By failing to provide Plaintiffs with these meal periods, Defendants violated California Labor Code sections 512 and 226.7, as well as applicable provisions of the Wage Order.

54. As a result of the unlawful acts of Defendants set forth herein, Plaintiff and each Class member have been unfairly and illegally deprived of up to two meal periods per day, and are entitled to one additional hour of premium pay for each missed meal period.

SECOND CLAIM FOR RELIEF
FAILURE TO PROVIDE REST PERIODS
(Wage Order No. 5-2001 ¶ 12; Cal. Lab. Code §§ 226.7)

55. Plaintiff, on her own behalf and on behalf of all Class members, incorporates the above allegations as if fully set forth herein.

56. Paragraph 12(A) of the Wage Order authorizes employees to take paid rest periods based on the total hours worked daily at the rate of ten minutes rest per four hours or major fraction thereof.

57. Cal. Labor Code § 226.7(a) provides: “No employer shall require an employee to work during any . . . rest period mandated by an applicable order of the Industrial Welfare Commission.”

1 58. Plaintiff and the Class members routinely and uniformly were not provided with
2 the rest periods required to be provided to them, which amounted to a total of one to three rest
3 periods per day, depending upon the actual length of the employee’s workday.

4 59. By failing to provide Plaintiff and the Class members with these rest periods,
5 Defendants violated Paragraph 12 of the Wage Order and California Labor Code section 226.7.

6 60. As a result of the unlawful acts of Defendants set forth herein, Plaintiff and the
7 Class members have been unfairly and illegally deprived of up to three rest periods per day, and
8 are entitled to one additional hour of premium pay for each missed rest period.

9 **THIRD CLAIM FOR RELIEF**
10 **FAILURE TO PAY FOR ALL HOURS WORKED**
11 (Wage Order No. 5-2001 ¶¶ 4(B), 11; Cal. Lab. Code §§ 221, 223
12)

13 61. Plaintiff, on her own behalf and on behalf of all Class members, incorporates the
14 above allegations as if fully set forth herein.

15 62. Paragraph 4(B) of the Wage Order provides that all employers must “pay to each
16 employee, on the established payday for the period involved, not less than the applicable
17 minimum wage for all hours worked in the payroll period....”

18 63. As described above, Defendants require(d) Plaintiff and the Class members to
19 clock out before the end of the sixth hour of their shifts, even when Plaintiff and the Class
20 members continued to work after the sixth hour, to create the appearance that Defendants
21 provided timely, off-duty meal periods. Contrary to that appearance, however, Defendants
22 required or suffered Plaintiff and the Class members to continue working off the clock through
23 these purported meal periods. Pursuant to Paragraph 11 of the Wage Order, “[u]nless the
24 employee is relieved of all duty during a 30 minute meal period, the meal period shall be
25 considered an “on duty” meal period and *counted as time worked*” (emphasis added). Plaintiff
26 and the Class members were never compensated for the time worked during their purported
27 meal periods, in violation of Paragraphs 4(B) and 11.
28

64. At times Defendants likewise required or suffered Plaintiff and the Class
members to attend meetings. Defendants did not permit Plaintiff or the Class members to clock

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1 in for such meetings, and as a result, Plaintiff and the Class members were not paid for time
2 spent in these meetings.

3 65. Defendants routinely required or suffered Plaintiff and the Class members to
4 perform work off the clock at the end of a shift. Plaintiff and the Class members were never
5 compensated for this off-the-clock labor, in violation of Paragraph 4(B).

6 66. As a result of the wrongful and unlawful acts of Defendants alleged herein,
7 Plaintiff and the Class members have been deprived of compensation for all hours worked in
8 amounts to be determined, and are entitled to recovery of said amounts according to proof,
9 interest thereon, injunctive relief, attorneys' fees and costs.

10 **FOURTH CLAIM FOR RELIEF**
11 **FAILURE TO PAY OVERTIME WAGES**

(Wage Order No. 5-2001 ¶ 3; Cal. Labor Code §§ 510, 1194 *et seq.*, 1198)

12 67. Plaintiff, on her own behalf and on behalf of the Class members, incorporates the
13 above allegations as if fully set forth herein.

14 68. California Labor Code § 510(a) provides, in pertinent part, as follows:

15 Eight hours of labor constitutes a day's work. Any work in excess of
16 eight hours in one workday and any work in excess of 40 hours in one workweek
17 and the first eight hours worked on the seventh day of work in any one workweek
18 shall be compensated at the rate of no less than one and one-half times the regular
19 rate of pay for an employee. Any work in excess of 12 hours in one day shall be
20 compensated at the rate of no less than twice the regular rate of pay for an
21 employee.

22 69. California Labor Code § 1194 provides, in pertinent part, as follows:

23 any employee receiving less than the . . . legal overtime compensation
24 applicable to the employee is entitled to recover in a civil action the unpaid
25 balance of the full amount of this . . . overtime compensation, including interest
26 thereon, reasonable attorney's fees, and costs of suit.

27 70. Paragraph 3(A) of the Wage Order provides, in pertinent part, as follows:

28 [E]mployees shall not be employed more than eight (8) hours in any
workday or more than 40 hours in any workweek unless the employee receives
one and one-half (1 ½) times such employee's regular rate of pay for all hours
worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a
day's work. Employment beyond eight (8) hours in any workday or more than

1 six (6) days in any workweek is permissible provided the employee is
2 compensated for such overtime at not less than:

3 * * *

4 (b) Double the employee's regular rate of pay for all hours worked in
5 excess of 12 hours in any workday and for all hours worked in excess of eight (8)
6 hours on the seventh (7th) consecutive day of work in a workweek.

7 71. Plaintiff and the Class members did not receive proper compensation for all hours
8 worked in excess of eight (or twelve) hours per day or forty hours per week, or for working
9 more than six days in a work week.

10 72. By their conduct described above, Defendants violated, *inter alia*, the provisions
11 of California Labor Code §§ 510, 1194, 1198, and Paragraph 3 of the Wage Order and are
12 therefore liable to Plaintiff and the Class members for the damages caused.

13 73. As described above, Defendants required and/or suffered employees to work both
14 before and after clocking in – sometimes for hours at a time – as well as during unpaid meetings.
15 Thus, on numerous occasions, employees worked in excess of eight hours in a day, but
16 Defendants' time records falsely indicated such employees worked shorter hours and were not
17 entitled to overtime wages.

18 74. Plaintiff is informed and believes that she worked shifts in excess of eight hours,
19 but was not paid overtime wages, during numerous pay periods, including but not limited to pay
20 periods ending January 20, 2014, February 3, 2014, February 17, 2014, March 3, 2014, March
21 17, 2014, March 31, 2014, April 14, 2014, April 28, 2014, and/or May 12, 2014.

22 75. As a result of the wrongful and unlawful acts of Defendants alleged herein,
23 Plaintiff and the Class members have been deprived of overtime compensation in amounts to be
24 determined, and are entitled to recovery of said amounts according to proof, interest thereon,
25 injunctive relief, attorneys' fees and costs
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FIFTH CLAIM FOR RELIEF
REPORTING TIME PAY
(Wage Order No. 5-2001 ¶ 5)

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3 76. Plaintiff, on her own behalf and on behalf of the Class members, incorporates the
4 above allegations as if fully set forth herein.

5 77. IWC Wage Order No. 5-2001 provides, in pertinent part, as follows:

6 Each workday an employee is required to report for work and does report,
7 but is not put to work or is furnished less than half said employee’s usual or
8 scheduled day’s work, the employee shall be paid for half the usual or scheduled
9 day’s work, but in no event for less than two (2) hours nor more than four (4)
10 hours, at the employee’s regular rate of pay, which shall not be less than the
11 minimum wage.

12 78. As alleged above, Defendants routinely scheduled more hourly employees for
13 each shift than were permitted to work their full shifts. When this happened, one or more
14 employees (often including Plaintiff) would arrive at work only to be sent home before having
15 worked half their scheduled shifts – and often before even clocking in.

16 79. Defendants did not pay those employees reporting time pay, in violation of
17 paragraph 5 of the Wage Order.

18 80. As a result of the wrongful and unlawful acts of Defendants alleged herein,
19 Plaintiff and the Class members have been deprived of reporting time pay in amounts to be
20 determined, and are entitled to recovery of said amounts according to proof, interest thereon,
21 injunctive relief, attorneys’ fees and costs.

SIXTH CLAIM FOR RELIEF
SPLIT SHIFT PREMIUM PAY
(Wage Order No. 5-2001 ¶ 4)

22
23 81. Plaintiff, on her own behalf and on behalf of the Class members, incorporates the
24 above allegations as if fully set forth herein.

25 82. Paragraph 2(R) of the Wage Order defines “split shift” as a work schedule which
26 is interrupted by non-paid non-working periods established by the employer, other than bona
27 fide rest or meal periods.” Paragraph 4(C) requires that “[w]hen an employee works a split shift,
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1 one hour’s pay at the minimum wage shall be paid in addition to the minimum wage for that
2 workday.”

3 83. As alleged above, Defendants routinely scheduled employees, including Plaintiff,
4 to work “doubles,” *e.g.*, to work both the lunch and dinner shift in the same day. In addition,
5 Defendants scheduled meetings that employees, including Plaintiff, were required to attend,
6 hours before working their shifts scheduled for later in the same day. Defendants failed to pay
7 these employees split shift premiums.

8 84. As a result of the wrongful and unlawful acts of Defendants alleged herein,
9 Plaintiff and the Class members have been deprived of split shift premium pay in amounts to be
10 determined, and are entitled to recovery of said amounts according to proof, interest thereon,
11 injunctive relief, attorneys’ fees and costs.

12 **SEVENTH CLAIM FOR RELIEF**
13 **STATUTORY PENALTIES FOR VIOLATION OF RECORD KEEPING REQUIREMENTS**
14 **(Wage Order No. 5-2001 ¶ 7; Cal. Lab. Code § 226(b))**

15 85. Plaintiff, on her own behalf and on behalf of the Class members, incorporates the
16 above allegations as if fully set forth herein.

17 86. California Labor Code § 226(a) provides, in pertinent part, as follows:

18 Every employer shall, semimonthly or at the time of each payment of
19 wages, furnish each of his or her employees, either as a detachable part of the
20 check, draft, or voucher paying the employee's wages, or separately when wages
21 are paid by personal check or cash, an accurate itemized statement in writing
22 showing . . . gross wages earned, . . . total hours worked by the employee . . .
23 [and] all deductions . . . and . . . all applicable hourly rates in effect during the
24 pay period and the corresponding number of hours worked at each hourly rate by
25 the employee.

26 87. IWC Wage Order No. 5-2001 paragraph 7 provides additionally, in pertinent part,
27 as follows:

28 Every employer shall keep accurate information with respect to each
employee including the following:

* * *

(3) Time records showing when the employee begins and ends each work
period. Meal periods, split shift intervals and total daily hours worked shall also
be recorded. . . .

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1 (5) Total hours worked in the payroll period and applicable rates of pay.

2 * * *

3 Every employer shall semimonthly or at the time of each payment of
4 wages furnish each employee ... an itemized statement in writing showing: (1)
5 all deductions...

6 88. Defendants have violated the above Labor Code section and Wage Order
7 provision with respect to Plaintiff and the Class members by failing to keep accurate time
8 records showing all hours worked and failing to provide accurate itemized statements of
9 earnings and the amounts lawfully deducted from wages.

10 89. California Labor Code § 226(e) provides, in pertinent part, as follows:

11 An employee suffering injury as a result of a knowing and intentional
12 failure by an employer to comply with subdivision (a) is entitled to recover the
13 greater of all actual damages or fifty dollars (\$ 50) for the initial pay period in
14 which a violation occurs and one hundred dollars (\$ 100) per employee for each
15 violation in a subsequent pay period, not exceeding an aggregate penalty of four
16 thousand dollars (\$ 4,000), and is entitled to an award of costs and reasonable
17 attorney's fees.

18 90. California Labor Code § 226(g) provides, in pertinent part, as follows: “An
19 employee may also bring an action for injunctive relief to ensure compliance with this section,
20 and is entitled to an award of costs and reasonable attorney's fees.”

21 91. Defendants’ violations of the Labor Code section and the Wage Order recited
22 above have been knowing and intentional.

23 92. Plaintiff and the Class members have been misled, misinformed, deceived,
24 defrauded, underpaid and otherwise injured as a result of said violations.

25 93. As a result of the aforesaid wrongful and illegal conduct of Defendants, Plaintiff
26 and each Class member herein are entitled to penalties in the amount of \$50 for the initial pay
27 period for each violation by Defendants, and \$100 for each such violation in every subsequent
28 pay period during the relevant limitations period.

94. As a result of the aforesaid wrongful and illegal conduct of Defendants, Plaintiff
and the Class members are also entitled to injunctive relief, costs and attorney’s fees.

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EIGHTH CLAIM FOR RELIEF
WAITING TIME PAY
(Cal. Lab. Code §§ 201-203, 206)

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3 95. Plaintiff, on her own behalf and on behalf of the members of the Waiting Time
4 Subclass (the “Subclass”), incorporates the above allegations as if fully set forth herein.

5 96. California Labor Code § 201(a) provides, in pertinent part, as follows: “If an
6 employer discharges an employee, the wages earned and unpaid at the time of discharge are due
7 and payable immediately.”

8 97. California Labor Code § 202(a) provides, in pertinent part, as follows:

9 If an employee not having a written contract for a definite period quits his
10 or her employment, his or her wages shall become due and payable not later than
11 72 hours thereafter, unless the employee has given 72 hours previous notice of
12 his or her intention to quit, in which case the employee is entitled to his or her
13 wages at the time of quitting.

14 98. California Labor Code § 206(a) provides, in pertinent part, as follows:

15 In case of a dispute over wages, the employer shall pay, without
16 condition, and within the time set by this article, all wages, or parts thereof,
17 conceded by him to be due, leaving to the employee all remedies he might
18 otherwise be entitled to as to any balance claimed.

19 99. Where an employer willfully fails to pay, without abatement or reduction, in
20 accordance with sections 201 through 203 of the California Labor Code, all wages due to an
21 employee who has been discharged or has quit, California Labor Code §203 entitles the affected
22 employee to receive from the employer a penalty of up to 30 days wages calculated from the due
23 date of the wages until the time an action to recover the wages is commenced.

24 100. As alleged herein, Defendants have failed to pay earned wages (including but not
25 limited to overtime compensation, premium pay for missed meal and rest breaks, reporting time
26 pay, and split shift premiums) to Plaintiff and the Subclass members at the time they became
27 due and payable, and have thus violated sections 201, 202 and 206 of the California Labor Code.

28 101. Defendants’ failure to pay wages as alleged herein was willful in that Defendants
knew that Plaintiff and the Subclass members were not receiving all of their earned
compensation because, *inter alia*, Defendants knew Plaintiff and the Subclass members did not

1 receive all the wages to which they were entitled, including (without limitation) overtime and
2 reporting time pay.

3 102. As to each of the Subclass members (including Plaintiff), it has been more than
4 30 days since the date of termination of employment.

5 103. As a result of Defendants' willful, unlawful acts, discussed herein, Plaintiff and
6 the Subclass members are each entitled to recover, pursuant to California Labor Code §203,
7 continuing wages as a penalty for a total of 30 days.

8 **NINTH CLAIM FOR RELIEF**
9 **UNJUST ENRICHMENT/CONSTRUCTIVE TRUST**
10 **(Cal. Civ. Code §§ 2223, 2224)**

11 104. Plaintiff, on her own behalf and on behalf of all Class members, incorporates the
12 above allegations as if fully set forth herein.

13 105. Defendants have knowingly and intentionally failed to pay Plaintiff and the Class
14 members all compensation for employment that was and is due to them under the law.

15 106. The work performed by Plaintiff and the Class members, for which they have not
16 received full and fair compensation, was at the direction and behest of Defendants, and each of
17 them. Plaintiff and the Class members did not perform this work gratuitously, but with the
18 expectation that they would receive wages and compensation in amounts and in a manner that
19 fully complied with the law.

20 107. Said underpaid compensation is rightfully the property of Plaintiff and the Class
21 members.

22 108. Defendants' retention of said underpaid wages is wrongful, inequitable and
23 represents an unjust enrichment of Defendants, and each of them, to the detriment of the
24 Plaintiff and the Class members. Defendants' wrongful retention of such underpaid wages and
25 premium pay makes them involuntary trustees of said property, and as such Defendants have a
26 duty to re-convey to Plaintiff and the Class members said unpaid and underpaid wages and
27 premium pay that are rightfully the property of Plaintiff and the Class members.
28

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TENTH CLAIM FOR RELIEF
VIOLATION OF UNFAIR COMPETITION LAW
(Cal. Bus. & Prof. Code §§ 17200 *et seq.*)

109. Plaintiff, on her own behalf and on behalf of all Class members, incorporates the above allegations as if fully set forth herein.

110. By their actions described in this Complaint, Defendants have committed unfair, unlawful and/or fraudulent business practices in violation of California Business & Professions Code section 17200 *et seq.* (the “UCL”).

111. California Labor Code § 90.5(a) states that it is the public policy of California to vigorously enforce minimum labor standards in order to ensure that employees are not required to work under substandard and unlawful conditions, and to protect employers who comply with the law from those employers who try to gain competitive advantage by not so complying, at the expense of the health, safety and welfare of their employees.

112. As set forth above, Defendants have failed and refused to provide timely, off-duty meal periods to their employees; failed and refused to provide rest breaks; failed and refused to compensate employees for such missed or untimely breaks; failed to properly pay employees for all hours worked; failed to properly pay overtime; failed to pay reporting time pay and split shift premiums; failed to timely pay all wages earned at the time of termination; and failed to comply with recordkeeping and wage statement requirements. As a result of these actions, Defendants have engaged in unfair competition within the meaning of the UCL because their conduct has violated state wage and hour laws and policies, including but not limited to Labor Code sections 201, 202, 204, 221, 223, 226, 226.7, 510, 512, 1194 *et seq.*, 1198 and Paragraphs 3, 4, 5, 7, 11, and 12 of the Wage Orders.

113. In addition, it has been Defendants’ custom, policy and practice to fail and refuse to pay Plaintiff and the Class members all earned wages at the time such wages became due and payable. Specifically, Defendants have failed to timely pay earned wages (*e.g.*, overtime compensation and premium pay for missed or untimely meal breaks and for missed rest breaks) as required by Labor Code section 204. This conduct likewise constitutes unfair competition.

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1 114. Defendants have fraudulently destroyed and/or altered Plaintiff’s and the Class
2 members’ time records to create a false appearance that Plaintiff and the Class members were
3 provided with timely, 30-minute meal breaks, or that no such breaks were required. Such
4 conduct flagrantly violates Labor Code section 226 and Paragraph 7 of the Wage Order.
5 Plaintiff reasonably relied on Defendants to keep accurate and complete records of her time
6 worked and to pay her all earned wages. She was harmed by Defendants’ destruction and
7 falsification of time records. Defendants’ conduct as alleged in this paragraph therefore also
8 constitutes unfair competition under the UCL.

9 115. Defendants’ conduct as described herein has been anti-competitive and injurious
10 to Defendants’ competitors who complied with the laws and policies violated by Defendants, as
11 Defendants’ conduct provided an unfair and illegal advantage in the marketplace as a result of,
12 *inter alia*, paying less for the labor of their employees than required by law.

13 116. Defendants’ conduct has injured each Plaintiff and Class member by, *inter alia*,
14 wrongfully denying them earned wages, overtime pay, premium pay, and meal and rest periods.
15 As such, Plaintiff and the Class members are entitled to restitution and injunctive relief.

16 **ELEVENTH CLAIM FOR RELIEF**
17 **CIVIL PENALTIES**
(Cal. Lab. Code §§ 2698 *et seq.*)

18 117. Plaintiff, on her own behalf and on behalf of all aggrieved employees (as defined
19 below), incorporates the above allegations as if fully set forth herein.

20 118. California Labor Code section 2699 provides in pertinent part, as follows:

21 (a) Notwithstanding any other provision of law, any provision of this code that
22 provides for a civil penalty to be assessed and collected by the Labor and
23 Workforce Development Agency or any of its departments, divisions,
24 commissions, boards, agencies, or employees, for a violation of this code, may,
25 as an alternative be recovered through a civil action brought by an aggrieved
employee on behalf of himself or herself and other current or former
employees...

26 * * *

27 (b) For purposes of this part, “aggrieved employee” means any person who was
28 employed by the alleged violator and against whom one or more of the alleged
violations was committed.

* * *

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(f) For all provisions of this code except for those which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

* * *

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

* * *

(g)(1) ... Any employee who prevails in any action shall be entitled to an award of reasonable attorneys' fees and costs. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

119. California Labor Code section 558 provides in pertinent part, as follows:

(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

(1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(3) Wages recovered pursuant to this section shall be paid to the affected employee.

* * *

(c) The civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.

120. Plaintiff is an aggrieved employee. She was employed by Defendants, and the violations alleged herein were committed against her. She brings this action on behalf of herself and all other current and former aggrieved employees against whom Defendants committed such violations.

121. At the time of each violation, Defendants employed one or more employees.

1 122. Plaintiff complied with all procedural requirements of Labor Code section 2699.3
2 prior to filing this First Amended Complaint. LWDA did not respond to Plaintiff's notice of the
3 alleged violations, and Defendants did not cure any of the alleged violations, within the statutory
4 timeframe. Plaintiff has therefore exhausted administrative remedies.

5 123. As a result of the aforesaid wrongful and illegal conduct of the Defendants, and
6 each of them, Plaintiff is entitled to civil penalties in an amount to be determined at trial, costs
7 and attorneys' fees against said Defendants.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff, individually and on behalf of the Class members and on
10 behalf of all other current and former aggrieved employees of Defendants, prays for judgment in
11 her favor and relief against Defendants and each of them as follows:

- 12 (a) For injunctive relief restraining further acts of wrongdoing by Defendants;
13 (b) For compensatory damages, including, without limitation, lost wages and
14 premium pay, in amounts to be determined at trial;
15 (c) For statutory penalties;
16 (d) For civil penalties;
17 (e) For interest, at the legal rate;
18 (f) For imposition of a constructive trust over all amounts by which Defendants have
19 been unjustly enriched;
20 (g) For restitution of all amounts Class members have been unlawfully denied as a
21 result of Defendants' unfair and unlawful business practices;
22 (h) For attorneys' fees and costs; and
23
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1 (i) For all such other and further relief as the Court may deem just, proper and
2 equitable.

3 Dated: March 26, 2015

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4
5 By /s/ Cari A. Cohorn

6 Cari A. Cohorn

7 Attorneys for Plaintiff

8 **DEMAND FOR JURY TRIAL**

9 Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of
10 Civil Procedure.

11
12 Dated: March 26, 2015

COHORN LAW

13
14 By /s/ Cari A. Cohorn

15 Cari A. Cohorn

16 Attorneys for Plaintiff
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