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10 Attorneys for Representative Plaintiff  
11 and the Plaintiff Class

12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF ORANGE**

14 DANTE COLBERT, individually, and )  
15 on behalf of all others similarly situated, )

16 Plaintiffs, )

17 vs. )

18 TBS COURIERS, INC., and DOES 1 )  
19 through 100, inclusive, )

20 Defendants. )  
21 \_\_\_\_\_ )

**Case No.: 05 CC00269**

**CLASS ACTION**

**FIRST AMENDED COMPLAINT FOR  
DAMAGES, INJUNCTIVE RELIEF AND  
RESTITUTION**

22 Representative Plaintiff alleges as follows:

23 **PRELIMINARY STATEMENT**

24 1. This is a class action, under Code of Civil Procedure § 382, seeking restitution  
25 of all monies due to Representative Plaintiff and Class Members, penalties, injunctive and other  
26 equitable relief and reasonable attorneys' fees and costs, under, *inter alia*, Industrial Welfare  
27 Commission Wage Order(s), Labor Code §§ 200-203, inclusive, 218.5, 218.6 and 226.7, Business  
28 & Professions Code § 17200, et seq. and Code of Civil Procedure § 1021.5. The Representative  
Plaintiff brings this action, on behalf of himself and all other persons similarly situated (hereinafter  
referred to as the "Class Members" and/or the "Plaintiff Class") who are or have been employed by  
defendants TBS COURIERS, INC. and Does 1 through 100, inclusive (collectively "TBS" and/or

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Plaintiff brings this action, on behalf of himself and all other persons similarly situated (hereinafter  
referred to as the "Class Members" and/or the "Plaintiff Class") who are or have been employed by  
defendants TBS COURIERS, INC. and Does 1 through 100, inclusive (collectively "TBS" and/or

1 “Defendant[s]”) in any non-exempt courier/driver positions within the State of California, at any  
2 time between November 10, 2001 and the present, and who have been denied meal and/or rest  
3 periods. The Representative Plaintiff, on behalf of himself and the Class Members, also seeks  
4 injunctive relief and restitution of all benefits TBS has enjoyed from its failure to provide meal  
5 and/or authorize and permit rest periods under Business and Professions Code §§ 17200-17208.

6 2. The “Class Period” is designated as the time from November 10, 2001  
7 through the trial date, based upon the allegation that the violations of California’s wage and hour  
8 laws, as described more fully below, have been ongoing since that time. During the Class Period,  
9 TBS has had a consistent policy toward its couriers/drivers of (1) permitting, encouraging, and/or  
10 requiring the Representative Plaintiff and Class Members to work, oftentimes in excess of eight  
11 hours per day, without consistently providing all meal and/or rest periods due, as required by  
12 California state wage and hour laws.

### 13 INTRODUCTION

14 3. The Representative Plaintiff is informed and believes and, based thereon,  
15 alleges that, within the Class Period, defendant TBS has employed thousands of individuals in  
16 courier/driver positions in recent years alone at these facilities/locations within the State of  
17 California.

18 4. Despite actual knowledge of these facts and legal mandates, TBS has enjoyed  
19 an advantage over its competition and a resultant disadvantage to its workers by electing not to  
20 provide all meal and/or authorize and permit all rest periods to its non-exempt employees.

21 5. The Representative Plaintiff is informed and believes and, based thereon,  
22 alleges that officers of TBS knew of these facts and legal mandates, yet, nonetheless, repeatedly  
23 directed, authorized and/or ratified the violation of the laws cited herein.

24 6. Despite TBS’s knowledge of the Plaintiff Class’ entitlement to meal and/or  
25 rest periods for all applicable work periods, TBS failed to provide same to members of the Plaintiff  
26 Class, in violation of the California Labor Code, Industrial Welfare Commission Wage Orders and  
27 Title 8 of the California Code of Regulations. This action is brought to redress and end this long-  
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1 “Defendant[s]”) in any non-exempt courier/driver positions within the State of California, at any  
2 time between November 10, 2001 and the present, and who have been denied meal and/or rest  
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27 Class, in violation of the California Labor Code, Industrial Welfare Commission Wage Orders and  
28 Title 8 of the California Code of Regulations. This action is brought to redress and end this long-

1 time pattern of unlawful conduct.

2 **JURISDICTION AND VENUE**

3 7. This Court has jurisdiction over the Representative Plaintiff's and Class  
4 Members' claims for unpaid wages and/or penalties under, *inter alia*, Industrial Welfare  
5 Commission Wage Orders and Title 8 of the California Code of Regulations, Labor Code §§ 201-  
6 203, 218, 218.5, 218.6, 226, 226.3, 226.7, 512, 558, 1174, 1174.5, Business & Professions Code §  
7 17200, et seq. and Code of Civil Procedure § 1021.5.

8 8. This Court has further jurisdiction over the Representative Plaintiff's and  
9 Class Members' claims for injunctive relief, and restitution of ill-gotten benefits arising from  
10 defendant TBS's unlawful business practices under Business & Professions Code §§ 17203 and  
11 17204.

12 9. Venue as to Defendant(s) is proper in this judicial district, pursuant to Code  
13 of Civil Procedure § 395(a). Defendant TBS provides courier/delivery services in the County of  
14 Orange, and transacts business, has agents, and is otherwise within this Court's jurisdiction for  
15 purposes of service of process. The unlawful acts alleged herein have a direct effect on the  
16 Representative Plaintiff and those similarly situated within the State of California and Orange  
17 County. Defendant TBS provides said services and has employed numerous Class Members in  
18 Orange County as well as in other counties within the State of California.

19  
20 **PLAINTIFFS**

21 10. During a portion of the herein-relevant time period, plaintiff DANTE  
22 COLBERT (the "Representative Plaintiff") was and is a natural person, and was, during the relevant  
23 time period identified herein, employed by defendant TBS in a courier/driver position, an  
24 employment position which was entitled and continues to enjoy an entitlement to various conditions  
25 of employment such as meal and/or rest periods.

26 11. In said position, the Representative Plaintiff was frequently permitted to work  
27 and did work, during the Class Period, shifts exceeding five hours without an uninterrupted,  
28 unrestricted meal period of not less than thirty (30) minutes and was frequently permitted to work

1 time pattern of unlawful conduct.

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27 and did work, during the Class Period, shifts exceeding five hours without an uninterrupted,  
28 unrestricted meal period of not less than thirty (30) minutes and was frequently permitted to work

1 and did work four hours or a “major fraction” thereof, without being afforded net ten minute rest  
2 periods. Representative Plaintiff is informed and believes and, on that basis, alleges that this  
3 conduct of TBS is/was commonplace at every facility owned and/or operated thereby.

4 12. As used throughout this Complaint, the terms “Class Members” and/or the  
5 “Plaintiff Class” refer to the named plaintiff herein as well as each and every person eligible for  
6 membership in the Plaintiff Class, as further described and defined below.

7 13. The Plaintiff Class consists, generally, of all members who are/were employed  
8 as non-exempt employees by TBS employed in courier/driver positions (as defined in paragraph 22  
9 of this Complaint) within the State of California, and who (a) worked shifts exceeding four hours  
10 or a major fraction thereof (i.e., of at least three and one-half hours), without being afforded net ten  
11 minute rest periods during one or more work period(s) and/or (b) worked shifts exceeding five  
12 hours, without being afforded an uninterrupted, unrestricted meal period of not less than thirty (30)  
13 minutes.

14 14. At all times herein relevant, the Representative Plaintiff was and now is a  
15 person within the class of persons further described and defined herein.

16 15. The Representative Plaintiff brings this action on behalf of himself and as a  
17 class action, pursuant to California Code of Civil Procedure § 382, on behalf of all persons or  
18 entities similarly situated and proximately damaged by the unlawful conduct described herein.

19  
20 **DEFENDANTS**

21 16. At all times herein relevant, defendants TBS COURIERS, INC. and Does 1  
22 through 100, inclusive (collectively referred to as “TBS” and/or “Defendant[s]”) were business  
23 entities, duly licensed and located and doing business in, but not limited to, the County of Orange,  
24 in the State of California.

25 17. The Representative Plaintiff is informed and believes and, based thereon,  
26 alleges that defendant TBS directly or indirectly employs and, since November 10, 2001, has  
27 employed and/or exercised control over the wages, hours and/or working conditions of the  
28 Representative Plaintiff and Class Members employed by TBS in various California counties,

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3 conduct of TBS is/was commonplace at every facility owned and/or operated thereby.

4 12. As used throughout this Complaint, the terms “Class Members” and/or the  
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6 membership in the Plaintiff Class, as further described and defined below.

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8 as non-exempt employees by TBS employed in courier/driver positions (as defined in paragraph 22  
9 of this Complaint) within the State of California, and who (a) worked shifts exceeding four hours  
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26 alleges that defendant TBS directly or indirectly employs and, since November 10, 2001, has  
27 employed and/or exercised control over the wages, hours and/or working conditions of the  
28 Representative Plaintiff and Class Members employed by TBS in various California counties,

1 including, but not necessarily limited to, Orange County.

2 18. Those defendants identified as Does 1 through 100, inclusive, are and were,  
3 at all relevant times herein-mentioned, officers, directors, partners, and/or managing agents of  
4 some/each of the remaining defendants. The Representative Plaintiff is informed and believes and,  
5 on that basis, alleges that, at all relevant times herein mentioned, each of the defendants identified  
6 as Does 1 through 100, inclusive, employed and/or exercised control over the wages, hours and/or  
7 working conditions of the Representative Plaintiff and Class Members at various California  
8 locations, as identified in the preceding paragraph.

9 19. The Representative Plaintiff is unaware of the true names and capacities of  
10 those defendants sued herein as Does 1 through 100, inclusive and, therefore, sues these defendants  
11 by such fictitious names. The Representative Plaintiff will seek leave of court to amend this  
12 Complaint when same are ascertained. The Representative Plaintiff is informed and believes and,  
13 on that basis, alleges that each of the fictitiously-named defendants is responsible in some manner  
14 for, gave consent to, ratified and/or authorized the conduct herein alleged and that the Representative  
15 Plaintiff's and Class Members' damages, as herein alleged, were proximately caused thereby.

16 20. The Representative Plaintiff is informed and believes and, on that basis,  
17 alleges that, at all relevant times herein mentioned, each of the defendants was the agent and/or  
18 employee of each of the remaining defendants and, in doing the acts herein alleged, was acting  
19 within the course and scope of such agency and/or employment.

20 21. There is no preemption of the claims brought in this Complaint because these  
21 claims are based upon State law. There is no dispute over the terms of any collective bargaining  
22 agreement ("CBA") and there is no need to interpret the terms of any CBA.

23  
24 **CLASS ACTION ALLEGATIONS**

25 22. The Representative Plaintiff brings this action on behalf of himself and as a  
26 class action on behalf of all persons or entities proximately damaged by Defendant's conduct,  
27 including, but not necessarily limited to, the following Plaintiff Class:

28 All persons who are/were employed in any courier/driver positions

1 including, but not necessarily limited to, Orange County.

2 18. Those defendants identified as Does 1 through 100, inclusive, are and were,  
3 at all relevant times herein-mentioned, officers, directors, partners, and/or managing agents of  
4 some/each of the remaining defendants. The Representative Plaintiff is informed and believes and,  
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24 **CLASS ACTION ALLEGATIONS**

25 22. The Representative Plaintiff brings this action on behalf of himself and as a  
26 class action on behalf of all persons or entities proximately damaged by Defendant's conduct,  
27 including, but not necessarily limited to, the following Plaintiff Class:

28 All persons who are/were employed in any courier/driver positions

1 in California by TBS Couriers, Inc. and who (1) did not receive all  
2 uninterrupted, unrestricted meal periods and/or all rest periods due  
3 for each period of work performed thereby at any time since  
4 November 10, 2001 and (2) have not received all  
5 compensation/restitution and associated penalties due as a result  
6 thereof.

7 23. Defendant, its officers and directors are excluded from the Plaintiff Class.

8 24. This action has been brought and may properly be maintained as a class action  
9 under Code of Civil Procedure § 382 because there is a well-defined community of interest in the  
10 litigation and the proposed Class is easily ascertainable.

11 A. Commonality: The Representative Plaintiff and the Class Members share a  
12 community of interests in that there are numerous common questions and  
13 issues of fact and law which predominate over any questions and issues  
14 solely affecting individual members, including, but not necessarily limited  
15 to:

- 16 1) whether defendant TBS violated Labor Code §§ 226.7 and/or 512 by  
17 failing to consistently provide meal periods and authorized and  
18 permitted rest periods to its non-exempt employees.
- 19 2) whether defendant TBS violated Labor Code §§ 201-203 by failing  
20 to pay all “wages” and/or penalties due and owing at the time that  
21 certain Class Members’ employment with Defendant terminated.
- 22 3) whether defendant TBS violated Business and Professions Code §  
23 17200 by failing to consistently provide meal and/or rest periods to  
24 its non-exempt employees.

25 B. Typicality: The Representative Plaintiff’s claims are typical of the claims of  
26 the Plaintiff Class. The Representative Plaintiff and all members of the  
27 Plaintiff Class sustained damages arising out of and caused by defendant  
28 TBS’s common course of conduct in violation of law, as alleged herein.

C. Numerosity: A class action is the only available method for the fair and  
efficient adjudication of this controversy. The members of the Plaintiff Class  
are so numerous that joinder of all members is impractical, if not impossible.  
Membership in the Class will be determined upon analysis of employee and  
payroll, among other, records maintained by TBS.

D. Superiority of Class Action: Since the damages suffered by individual Class  
Members, while not inconsequential, may be relatively small, the expense  
and burden of individual litigation by each member makes or may make it  
impractical for members of the Plaintiff Class to seek redress individually for  
the wrongful conduct alleged herein. Should separate actions be brought or  
be required to be brought by each individual member of the Plaintiff Class,  
the resulting multiplicity of lawsuits would cause undue hardship and  
expense for the Court and the litigants. The prosecution of separate actions  
would also create a risk of inconsistent rulings, which might be dispositive  
of the interests of other Class Members who are not parties to the  
adjudications and/or may substantially impede their ability to adequately

1 in California by TBS Couriers, Inc. and who (1) did not receive all  
2 uninterrupted, unrestricted meal periods and/or all rest periods due  
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would also create a risk of inconsistent rulings, which might be dispositive  
of the interests of other Class Members who are not parties to the  
adjudications and/or may substantially impede their ability to adequately

1 protect their interests.

2 E. Adequacy of Representation: The Representative Plaintiff in this class action  
3 is an adequate representative of the Plaintiff Class, in that the Representative  
4 Plaintiff's claims are typical of those of the Plaintiff Class and the  
5 Representative Plaintiff has the same interests in the litigation of this case as  
6 the Class Members. The Representative Plaintiff is committed to vigorous  
7 prosecution of this case and has retained competent counsel, experienced in  
8 conducting litigation of this nature. The Representative Plaintiff is not  
9 subject to any individual defenses unique from those conceivably applicable  
10 to the Plaintiff Class as a whole. The Representative Plaintiff anticipates no  
11 management difficulties in this litigation.

### 12 COMMON FACTUAL ALLEGATIONS

13 25. As described herein, TBS has, for years, knowingly failed to authorize and  
14 permit net ten minute rest periods for work shifts exceeding four hours or a major fraction thereof  
15 (and at least three and one-half hours) and/or uninterrupted, unrestricted meal period of not less than  
16 thirty minutes for work shifts exceeding five hours to those non-exempt employees within the class  
17 definition identified above, thereby enjoying a significant competitive edge over other corporations  
18 within its industry. Even upon termination or resignation of the employment of numerous Class  
19 Members, TBS has declined to compensate these employees therefor, in blatant violation of  
20 California Labor Code §§ 201 and or 202.

21 26. In so doing, TBS has not only failed to pay its workers the full amount of  
22 compensation due, it has, until now, effectively shielded itself from its employees' scrutiny for its  
23 unlawful conduct by concealing the magnitude and financial impact of its wrongdoing.

24 27. Moreover, California Labor Code §§ 201 and 202 require defendant TBS to  
25 pay its employees all wages due immediately upon discharge. California Labor Code § 203 provides  
26 that, if an employer willfully fails to timely pay such wages, the employer must, as a penalty,  
27 continue to pay the subject employees' wages until the back wages are paid in full or an action is  
28 commenced. The penalty cannot exceed 30 days of wages.

29 28. The Representative Plaintiff is informed and believes and, on that basis,  
30 alleges that many members of the Plaintiff Class are entitled to unpaid compensation, yet, to date  
31 and despite the termination of their employment with TBS, have not received such compensation.

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35. Moreover, California Labor Code § 512 provides:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not 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 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.

36. By failing to consistently provide uninterrupted and unrestricted meal periods and to authorize and permit uninterrupted rest periods to its non-exempt employees, Defendant violated California Labor Code §§ 226.7 and/or 512.

37. As a direct and proximate result of Defendant’s unlawful conduct, as set forth herein, the Representative Plaintiff and the Class Members have sustained damages, including loss of compensation/wages, in an amount to be established at trial. As a further direct and proximate result of Defendant’s unlawful conduct, as set forth herein, the Representative Plaintiff and the Class Members are entitled to recover various penalties, in an amount to be established at trial, as well as costs and attorneys’ fees, pursuant to statute.

38. Plaintiff is informed and believes, and based thereon alleges, that he was compensated at an hourly rate of \$10.00 per hour during the applicable period covered by this action and, as such, is owed \$20.00 in meal and/or rest period compensation for each of the days he worked for TBS between November 10, 2001 and the date his employment with TBS was terminated.

**SECOND CAUSE OF ACTION  
UNFAIR BUSINESS PRACTICES UNDER THE UNFAIR COMPETITION ACT  
(California Business & Professions Code §§ 17200-17208)**

39. The Representative Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

40. The Representative Plaintiff further brings this cause of action on behalf of

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36. By failing to consistently provide uninterrupted and unrestricted meal periods and to authorize and permit uninterrupted rest periods to its non-exempt employees, Defendant violated California Labor Code §§ 226.7 and/or 512.

37. As a direct and proximate result of Defendant’s unlawful conduct, as set forth herein, the Representative Plaintiff and the Class Members have sustained damages, including loss of compensation/wages, in an amount to be established at trial. As a further direct and proximate result of Defendant’s unlawful conduct, as set forth herein, the Representative Plaintiff and the Class Members are entitled to recover various penalties, in an amount to be established at trial, as well as costs and attorneys’ fees, pursuant to statute.

38. Plaintiff is informed and believes, and based thereon alleges, that he was compensated at an hourly rate of \$10.00 per hour during the applicable period covered by this action and, as such, is owed \$20.00 in meal and/or rest period compensation for each of the days he worked for TBS between November 10, 2001 and the date his employment with TBS was terminated.

**SECOND CAUSE OF ACTION  
UNFAIR BUSINESS PRACTICES UNDER THE UNFAIR COMPETITION ACT  
(California Business & Professions Code §§ 17200-17208)**

39. The Representative Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

40. The Representative Plaintiff further brings this cause of action on behalf of

1 the general public, seeking equitable and statutory relief to stop the misconduct of Defendant, as  
2 complained of herein, and to compel the payment of restitution by Defendant as a result of the  
3 unfair, unlawful and fraudulent business practices described herein.

4 41. The knowing conduct of Defendant, as alleged herein, constitutes an unlawful  
5 and/or fraudulent business practice, as set forth in California Business & Professions Code §§  
6 17200-17208. Specifically, Defendant conducted business activities while failing to comply with  
7 the legal mandates cited herein.

8 42. Defendant's knowing failure to adopt policies in accordance with and/or  
9 adhere to these laws, all of which are binding upon and burdensome to Defendant's competitors,  
10 engenders an unfair competitive advantage for Defendant, thereby constituting an unfair business  
11 practice, as set forth in California Business & Professions Code §§ 17200-17208.

12 43. Defendant TBS has clearly established a policy of accepting a certain amount  
13 of collateral damage, as represented by the damages to the Representative Plaintiff and the Plaintiff  
14 Class herein alleged, as incidental to its' business operations, rather than accept the alternative costs  
15 of full compliance with fair, lawful and honest business practices ordinarily borne by responsible  
16 competitors of Defendant and as set forth in legislation and the judicial record.

17 44. As a direct and proximate result of Defendant's unlawful conduct, as set forth  
18 herein, the Representative Plaintiff and the Class Members have sustained damages, including loss  
19 of earnings/wages, in an amount to be established at trial, and are entitled to restitution in such an  
20 amount.

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22 **RELIEF SOUGHT**

23 **WHEREFORE, the Representative Plaintiff**, on behalf of himself and the proposed  
24 **Plaintiff Class**, prays for judgment and the following specific relief against **Defendants, and each**  
25 **of them**, jointly and separately, as follows:

26 1. For an Order certifying the proposed Plaintiff Class and/or any other  
27 appropriate subclass(es) under Code of Civil Procedure § 382;

28 2. That defendants are found to have violated Labor Code § 512 for willful

1 the general public, seeking equitable and statutory relief to stop the misconduct of Defendant, as  
2 complained of herein, and to compel the payment of restitution by Defendant as a result of the  
3 unfair, unlawful and fraudulent business practices described herein.

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20 amount.

21  
22 **RELIEF SOUGHT**

23 **WHEREFORE, the Representative Plaintiff**, on behalf of himself and the proposed  
24 **Plaintiff Class**, prays for judgment and the following specific relief against **Defendants, and each**  
25 **of them**, jointly and separately, as follows:

26 1. For an Order certifying the proposed Plaintiff Class and/or any other  
27 appropriate subclass(es) under Code of Civil Procedure § 382;

28 2. That defendants are found to have violated Labor Code § 512 for willful

- 1 failure to provide meal periods;
- 2 3. That defendants are found to have violated Labor Code § 226.7 for willful  
3 failure to authorize and permit rest periods;
- 4 4. That defendants are found to have violated California Labor Code §§ 201 and  
5 202 for willful failure to pay all compensation owed at the time of termination or within 72 hours  
6 of resignation of employment to particular Class Members;
- 7 5. That defendants are found to have violated Business & Professions Code §  
8 17200 by failing to pay the Representative Plaintiff and Class Members all compensation for meal  
9 and/or rest periods denied, and by failing to pay “waiting time” penalties to particular Class  
10 Members;
- 11 6. An award to the Representative Plaintiff and the Plaintiff Class of damages  
12 for the amount of unpaid compensation, including interest thereon, and penalties, in an amount to  
13 be proven at trial;
- 14 7. That defendants be ordered and enjoined to pay restitution to the  
15 Representative Plaintiff and the Plaintiff Class due to Defendants’ unlawful activities, pursuant to  
16 Business & Professions Code §§ 17200-08, et seq.;
- 17 8. That defendants further be enjoined to cease and desist from unlawful  
18 activities in violation of Business & Professions Code § 17200;
- 19 9. For all other Orders, findings and determinations identified and sought in this  
20 Complaint;
- 21 10. For Interest on the amount of any and all economic losses, at the prevailing  
22 legal rate;
- 23 11. For reasonable Attorneys’ Fees, pursuant to California Labor Code §§ 218.5  
24 and/or California Civil Code § 1021.5; and
- 25 12. For Costs of suit and any and all such other relief as the Court deems just and  
26 proper.
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Dated: March 7, 2006

**SCOTT COLE & ASSOCIATES, APC**

By: /s/ Matthew R. Bainer  
Matthew R. Bainer, Esq.  
Attorneys for the Representative Plaintiff  
and the Plaintiff Class

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