

APR 17 2008

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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **IN AND FOR THE COUNTY OF SAN MATEO**

11 BETTE INGRAHAM, individually;
HELENA MCCALL, BENJAMIN
12 FREEMAN, individually, and on behalf
of all others similarly situated,

13 Plaintiffs,

14 vs.

15 ORCHARD SUPPLY HARDWARE,
16 CORP., and DOES 1 through 25,
inclusive,

17 Defendants.

Case No.: 457004

CLASS ACTION

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

Demand for Jury Trial

19 Representative Plaintiffs allege as follows:

21 **PRELIMINARY STATEMENT**

22 1. This is a class action, under Code of Civil Procedure § 382, brought on behalf of
23 Plaintiff, Bette Ingraham, individually, and Representative Plaintiffs Helena McCall and Benjamin
24 Freeman on behalf of themselves and all other persons who are or have been employed by defendant
25 Orchard Supply Hardware Corp., and DOES 1 through 25 inclusive (collectively "Orchard" and/or
26 "Defendant"), in any of Defendant's retail stores in the State of California, at any time after the
27 commencement of the pay period including August 16, 2002 who (1) have been forced by Orchard
28 to maintain Orchard issued uniforms as a term and condition of their employment with Orchard, in

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1 violation of Title 8 California Code of Regulations, § 11070, subdivision 9(A), which provides:

2 “When uniforms are required by the employer to be worn by the employee
3 as a condition of employment, such uniforms shall be provided and
4 maintained by the employer”

5 and (2) who, as such, have been denied compensation for all hours worked, the legally-mandated
6 minimum wage, statutorily mandated meal and rest periods and related penalties.

7 2. Plaintiffs seek reimbursement of monies expended pursuant to Defendant’s directives
8 that they maintain a uniform required to be worn by Orchard’s employees during all working times,
9 as set forth herein. Additionally, Plaintiffs are seeking unpaid wages, including unpaid overtime
10 compensation and interest thereon, meal and rest period compensation, waiting time penalties,
11 liquidated damages and other penalties, injunctive and other equitable relief and reasonable
12 attorneys’ fees and costs, under, *inter alia*, Labor Code §§ 201, 202, 203, 226, 226.7, 510, 512, 558,
13 1174 and 1194, and CCP § 1021.5. Plaintiffs also seek penalties pursuant to California Labor Code
14 §§ 2698 and 2699 (the Labor Code Private Attorneys General Act of 2004) injunctive relief and
15 restitution of all benefits Orchard has enjoyed from its violations of Business and Professions Code
16 §§ 17200-17208. In some circumstances, these violations also resulted in minimum wage violations,
17 pursuant to California Labor Code § 1197.

18 3. The “Class Period” is designated as the time from at least the commencement of the
19 pay period including August 16, 2002 through the conclusion of trial on all issues presented in this
20 action, based upon the allegation that Orchard’s violations of California wage and hour laws, as
21 described more fully below, have been ongoing since at least this date. During the Class Period,
22 Orchard has had a consistent policy of requiring its retail employees, including Plaintiffs and
23 members of the Class to wear vests, which the employees are required to maintain as a term and
24 condition of their employment with Orchard, without reimbursing them for amounts expended in
25 performing that maintenance. Additionally, Orchard has required its employees to perform labor for
26 Orchard’s benefit in the form of maintaining their uniforms (1) without paying them straight time
27 and/or overtime compensation as required by California wage and hour laws; (2) while unlawfully
28 denying Plaintiffs and Class Members statutorily-mandated meal and rest periods; (3) while willfully
failing to pay compensation (including unpaid overtime) owing in a prompt and timely manner to

1 the Plaintiffs and/or those Class Members whose employment with Orchard was terminated; and
2 (4) while willfully failing to provide Plaintiffs and the Class Members with accurate semimonthly
3 itemized wage statements of the total number of hours each of them worked, the applicable
4 deductions and the applicable hourly rates in effect during the pay period.

5
6 **JURISDICTION AND VENUE**

7 4. This Court has jurisdiction over Plaintiffs' and Class Members' claims under
8 California Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 450, 510, 512, 558, 1174, 1194, 1197,
9 2698, 2699, 2802 and Title 8 California Code of Regulations § 11070(9)(a).

10 5. This Court also has jurisdiction over Plaintiffs' and Class Members' claims for
11 injunctive relief and restitution of ill-gotten benefits arising from defendant Orchard's unfair,
12 unlawful and/or fraudulent business practices under Business & Professions Code §§ 17203 and
13 17204.

14 6. Venue as to Defendant is proper in this judicial district, pursuant to Code of Civil
15 Procedure § 395(a). Orchard is a corporation, maintaining offices and doing business in San Mateo
16 County, and is otherwise within this Court's jurisdiction for purposes of service of process. The
17 unlawful acts alleged herein have a direct effect on Plaintiffs and those similarly situated within the
18 State of California and within San Mateo County. Defendant Orchard employed Plaintiffs and
19 numerous Class Members in San Mateo County during the class period.

20
21 **PLAINTIFFS**

22 7. Plaintiff Bette Ingraham, suing in her individual capacity, and Representative
23 Plaintiffs Helena McCall and Benjamin Freeman are natural persons and were, during the relevant
24 time period identified herein, employed by defendant Orchard at one or more of Defendant's
25 California retail stores.

26 8. As used throughout this Complaint, the terms "Plaintiffs" and/or "Class" refer to the
27 named Plaintiffs herein as well as each and every person eligible for membership in the Plaintiff
28 Class, as further described and defined below.

CLASS ACTION ALLEGATIONS

1
2 15. Representative Plaintiffs Helena McCall and Benjamin Freeman bring this action on
3 their own behalf individually and as a class action on behalf of all persons similarly situated and
4 proximately damaged by Orchard's conduct as set forth herein, including, but not necessarily limited
5 to the following Class:

6 All persons who are/were employed as non-exempt retail employees by
7 Orchard Hardware Supply Corporation, in one or more of Orchard's
8 California retail stores and who were required to maintain Orchard issued
9 uniforms at any time between August 16, 2002 and the present.

10 16. Defendant, its officers and directors are excluded from the Class.

11 17. This action has been brought and may properly be maintained as a class action under
12 Code of Civil Procedure § 382 because there is a well-defined community of interest in the litigation
13 and the proposed class members are easily ascertainable.

14 a. Numerosity: A class action is the only available method for the fair and
15 efficient adjudication of this controversy. The members of the class are so
16 numerous that joinder of all members is impractical, if not impossible, insofar
17 as Representative Plaintiffs are informed and believe and, on that basis,
18 allege that the total membership in the class is in the thousands of
19 individuals. Membership in the Class will be determined upon analysis of
20 employee and payroll, among other, records maintained by Orchard.

21 b. Commonality: The Representative Plaintiffs and the Class Members share a
22 community of interests in that there are numerous common questions and
23 issues of fact and law which predominate over any questions and issues solely
24 affecting individual members, including, but not necessarily limited to:

- 25 1. whether Defendant has violated California law, including California's
26 Unfair Competition laws (B&P §§ 17200, et seq.) and/or California
27 Labor Code § 2802 and Title 8 California Code of Regulations §
28 11070(9)(A);
2. whether Defendant has violated Labor Code §§ 201, 204, and 221 by
withholding wages from Plaintiffs and the Class in furtherance of
Defendant's unlawful uniform policies;
3. whether Defendant's illegal labor policies and practices, as described
herein, constitute intentional or reckless violations of California law;
4. whether defendant Orchard violated the California laws by failing to
pay compensation to Orchard employees for time worked maintaining
Orchard's uniforms;

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5. whether defendant Orchard violated California laws by failing to pay overtime compensation to Orchard's employees who performed labor in the form of maintaining uniforms and, resultantly, worked in excess of 40 hours per week and/or eight (8) hours a day;
 6. whether defendant Orchard violated California Business and Professions Code § 17200 by failing to pay straight time and/or overtime compensation to Orchard's employees for time worked in the form of maintaining uniforms;
 7. whether defendant Orchard violated California Labor Code §§ 226.7 and/or 512 by failing to consistently provide statutorily mandated meal and rest periods to its employees;
 8. whether defendant Orchard failed, and continues to fail, to provide statutorily mandated meal and rest periods to the Plaintiffs and the Class Members in violation of Section 11 of the applicable California Wage Orders;
 9. whether defendant Orchard violated California Labor Code § 1174 by failing to keep accurate records of employees' hours of work;
 10. whether defendant Orchard violated California Labor Code § 226 by failing to provide the semimonthly itemized wage statements to Class Members of total hours worked by each, and all applicable hourly rates in effect during the pay period;
 11. whether Representative Plaintiffs and Class Members are entitled to "waiting time" penalties/wages pursuant to California Labor Code § 203; and
 12. whether Plaintiffs and Class Members are entitled to seek recovery of penalties for the California Labor Code and Wage Order violations alleged herein, pursuant to Labor Code §§ 2698 and 2699 and, if so, for what time period.
- c. Typicality: The Representative Plaintiffs' claims are typical of the claims of the Class. The Representative Plaintiffs and all members of the Class sustained injuries and damages arising out of and caused by defendant Orchard's common course of conduct in violation of law, as alleged herein.
- 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 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 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 protect their interests.
- e. Adequacy of Representation: The Representative Plaintiffs in this class action are each individually adequate representatives of the Class, in that the

1 Representative Plaintiffs' claims are typical of those of the Class and the
2 Representative Plaintiffs have the same interests in the litigation of this case
3 as the Class Members. The Representative Plaintiffs are committed to
4 vigorous prosecution of this case, and have retained competent counsel,
5 experienced in litigation of this nature. The Representative Plaintiffs are not
6 subject to any individual defenses unique from those conceivably applicable
7 to the Class as a whole. The Representative Plaintiffs anticipate no
8 management difficulties in this litigation.

9 COMMON FACTUAL ALLEGATIONS

10 18. As described herein, Orchard has, for years, knowingly failed to reimburse those
11 employees within the class definition identified above for financial expenses incurred in maintaining
12 Orchard's uniforms, thereby enjoying a significant competitive edge over other retail chains.

13 19. Additionally, as described herein, Orchard has, for years, knowingly failed to
14 adequately compensate those employees within the class definition identified above for all wages
15 earned, including premium (overtime) wages, and due under the California Labor Code and
16 applicable California Wage Orders, and has knowingly failed to provide said workers with statutorily
17 mandated meal and rest periods, thereby enjoying a significant competitive edge over other retail
18 chains.

19 20. Even upon termination or resignation of the employment of numerous Class
20 Members, Orchard has declined to pay these wages, in blatant violation of California Labor Code
21 §§ 201 and/or 202.

22 21. Moreover, California Labor Code §§ 201 and 202 require defendant Orchard to pay
23 all Class Members all wages due, immediately upon discharge. California Labor Code § 203
24 provides that, if an employer willfully fails to timely pay such wages, the employer must, as a
25 penalty, continue to pay the subject employee's wages until the back wages are paid in full or an
26 action is commenced, for a period not to exceed 30 days of wages.

27 22. Furthermore, despite its knowledge of Plaintiffs' and the Class Members' entitlement
28 to compensation for all hours worked, Orchard violated California Labor Code § 1174(d) by failing
to provide or require the use, maintenance or submission of time records by members of the Class.
Orchard also failed to provide Plaintiffs and members of the Class with accurate semimonthly
itemized wage statements of the total number of hours worked by each, and all applicable hourly

1 rates in effect during the pay period, in violation of California Labor Code § 226. In so doing,
2 Orchard has not only failed to pay its workers the full amount of compensation due, it has, until now,
3 effectively shielded itself from its employee's scrutiny for its unlawful conduct by concealing the
4 magnitude (the full number of hours worked) and financial impact of its wrongdoing.

5 23. Plaintiffs and all persons similarly situated in the Class are entitled to unpaid
6 compensation, yet, to date, have not received such compensation despite the termination of their
7 employment with Orchard.

8 24. More than 30 days have passed since Plaintiffs and certain Class Members have left
9 defendant Orchard's employ.

10 25. As a consequence of defendant Orchard's willful conduct in not paying compensation
11 for all hours worked, certain Class Members are entitled to 30 days wages as penalty under Labor
12 Code § 203, together with interest thereon and attorneys' fees and costs.

13 26. As a direct and proximate result of Orchard's unlawful conduct, as set forth herein,
14 Plaintiffs and Class Members have sustained damages, as described above, including loss of earnings
15 for hours worked on behalf of Defendant, in an amount to be established at trial. As a further direct
16 and proximate result of Defendant's unlawful conduct, as set forth herein, Plaintiffs and many Class
17 Members herein are entitled to recover "waiting time" penalties/wages (pursuant to California Labor
18 Code § 203) and penalties for failure to provide semimonthly statements of hours worked and all
19 applicable hourly rates (pursuant to Labor Code § 226) in an amount to be established at trial. As a
20 further direct and proximate result of Defendant's unlawful conduct, as set forth herein, Plaintiffs
21 and the Class Members are also entitled to recover costs and attorneys' fees, pursuant to California
22 Labor Code §§ 218.5 and 1194 and/or California Civil Code § 1021.5, among other authorities.

23 27. Furthermore, Plaintiffs bring this action on behalf of themselves and other Class
24 Members pursuant to California Labor Code §§ 2698 and 2699 and seeks recovery of all civil
25 penalties resulting from the violations alleged herein as follows:

26 a. Where civil penalties are specifically provided in the Labor Code for each of
27 the violations alleged herein, Plaintiffs seek recovery of such penalties; and

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1 34. By requiring Plaintiffs and members of the Class to pay for the maintenance of
2 Orchard's uniforms as a condition of employment, Defendant willfully violated California Labor
3 Code § 2802 and Title 8 California Code of Regulations § 11070(9)(A).

4 35. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein,
5 Plaintiffs and the Class Members have sustained damages, including loss of earnings, to wit, they
6 have been forced to maintain Orchard's uniforms under the direct and unequivocal threat of losing
7 their jobs if they do not fully comply.

8 36. Plaintiffs and the members of the Class are entitled to recover from Defendant any
9 and all sums expended on the maintenance of Orchard's uniforms as a condition of their
10 employment, any and all civil penalties, pursuant to California Labor Code § 1199 and California
11 Code of Regulations § 11070(20)(A), and costs and attorneys' fees pursuant to statute.

12
13 **SECOND CAUSE OF ACTION**
14 **UNLAWFUL FAILURE TO PAY WAGES DUE**
15 **(Violation of California Wage Orders and Labor Code)**

16 37. Plaintiffs incorporate in this cause of action each and every allegation of the preceding
17 paragraphs, with the same force and effect as though fully set forth herein.

18 38. During the time period beginning August 16, 2002 and continuing through the
19 present, Plaintiffs and the Class Members were employed by and did perform work for Orchard,
20 often times in excess of eight hours in a workday and/or forty hours in a workweek. The precise
21 number of hours will be proven at trial.

22 39. During said time period, Orchard refused to compensate Plaintiffs and the Class
23 Members for some and/or all of the wages, including overtime wages earned and/or the wage level
24 required by the applicable minimum wage laws, in violation of Wage Order No. 7-2001 and the
25 California Labor Code.

26 40. Moreover, during said time period, many of the Class Members herein were employed
27 by and were thereafter terminated or resigned from their positions with Orchard, yet were not paid
28 all wages due upon said termination or within seventy-two (72) hours of said resignation of
employment therefrom. Said non-payment of all wages due was the direct and proximate result of

1 a willful refusal to do so by Defendant.

2 41. At all relevant times, Defendant was aware of and was under a duty to comply with
3 various provisions of the California Labor Code and/or Wage Orders issued by the Industrial Welfare
4 Commission. The more recent versions of these provisions include, but are not limited to:

- 5 a. Labor Code § 203: "If an employer willfully fails to pay, without
6 abatement or reduction, in accordance with Sections 201, 201.5, 202, and
7 205.5, any wages of an employee who is discharged or who quits, the wages
8 of the employee shall continue as a penalty from the due date thereof at the
9 same rate until paid or until an action therefor is commenced; but the wages
10 shall not continue for more than 30 days."
11
12 b. Labor Code § 510: "Any work in excess of eight hours in one workday
13 and any work in excess of 40 hours in any one workweek and the first eight
14 hours worked on the seventh day or work in any one workweek shall be
15 compensated at the rate of no less than one and one-half times the regular rate
16 of pay for an employee. . . ."
17
18 c. Labor Code § 1198: "[t]he maximum hours of work and the standard
19 conditions of labor fixed by the commission shall be the maximum hours of
20 work and the standard conditions of labor for employees. The employment
21 of any employee for longer hours than those fixed by the order or under
22 conditions of labor prohibited by the order is unlawful."
23
24 d. Labor Code § 1199: "Every employer or other person acting either
25 individually or as an officer, agent, or employee of another person is guilty
26 of a misdemeanor and is punishable by a fine of not less than one hundred
27 dollars (\$100) or by imprisonment for not less than 30 days, or by both, who
28 . . . (a) Requires or causes any employee to work for longer hours than those
fixed, or under conditions of labor prohibited by an order of the commission.
...[or] (c) Violates or refuses or neglects to comply with any provision of
this chapter or any order or ruling of the commission."
e. Wage Order 7-2001: "[E]mployees shall be employed more than eight (8)
hours in any workday or more than forty (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 forty (40) hours in the workweek. [. . .]
Employment beyond eight (8) hours in any workday or more than six (6) days
in any workweek is permissible provided the employee is compensated for
such overtime at not less than: (1) One and one-half (1 ½) times the
employee's regular rate of pay for all hours worked in excess of eight (8)
hours up to and including twelve (12) hours in any workday, and for the first
eight (8) hours on the seventh (7th) consecutive day of work in a workweek.
..."

25 42. At all relevant times, Defendant was aware of and was under a duty to comply with
26 various additional provisions of the California Labor Code and/or Wage Orders issued by the
27 Industrial Welfare Commission, as cited and discussed elsewhere in this Complaint.

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