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11 and the Plaintiff Class(es)

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 ROBIN J. TUCKER, individually, and)
15 on behalf of all others similarly situated,)

16 Plaintiffs,)

17 vs.)

18 CASUAL MALE RETAIL GROUP,)
19 INC.)

20 Defendants.)

Case No.:

CLASS/COLLECTIVE ACTION

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

DEMAND FOR JURY TRIAL

21 Representative Plaintiff alleges as follows:

22 **PRELIMINARY STATEMENT**

23 1. This is a class/collective action, seeking unpaid wages, including unpaid overtime
24 compensation and interest thereon, rest and meal period penalties, waiting time penalties, liquidated
25 damages and other penalties, injunctive and other equitable relief and reasonable attorneys' fees and
26 costs, under, *inter alia*, the Fair Labor Standards Act §§ 6 and 7, 29 U.S.C. §§ 206 and 207. This
27 action further invokes the supplemental jurisdiction of this Court to consider claims arising under
28 California law (e.g. Title 8 of the California Code of Regulations, Labor Code §§ 200-203, inclusive,
218.5, 226, 226.7, 512, 1174, 1194, 2698 and 2699, Business and Professions Code §§17200 et seq.
and Code of Civil Procedure § 1021.5).

1 of the provisions of the FLSA provide the Federal Courts with substantial authority to stamp out
2 abuses of child labor, equal pay, portal-to-portal activities as well as the overtime pay provisions at
3 issue in this Complaint.

4 5. According to Congressional findings, the existence of labor conditions detrimental
5 to the maintenance of the minimum standard of living engenders unfair commercial competition,
6 labor disputes and barriers to commerce and the free flow of goods in commerce and interferes with
7 the orderly and fair marketing of goods.

8 6. California's Labor Code and Industrial Welfare Commission Wage Orders provide
9 even more expansive protection to hourly workers, including, but not necessarily limited to
10 entitlements to overtime pay and work performed beyond eight hours per day and substantial
11 penalties for the denial of rest and meal periods.

12 7. Both Federal and California studies have linked long work hours to increased rates
13 of accident and injury and a loss of family cohesion when either or both parents are kept away from
14 home for extended periods of time, on either a daily or weekly basis.

15 8. Since its inception, the Casual Male Big & Tall retail chain (currently owned and
16 operated by defendant CMRG) has offered a wide range of large size apparel, clothing accessories
17 and other merchandise to the public. Representative Plaintiff is informed and believes and, based
18 thereon, alleges that, within the class period, CMRG has operated hundreds of retail facilities
19 throughout the United States. In so doing, CMRG has employed hundreds, if not thousands, of
20 individuals in recent years alone in allegedly-exempt "management" positions, employment positions
21 which have not and currently do not meet any test for exemption from the payment of overtime
22 wages.

23 9. Despite actual knowledge of these facts and legal mandates, CMRG has enjoyed an
24 advantage over its competition and has disadvantaged to its workers by electing not to pay premium
25 (overtime) and/or "penalty" (a.k.a. "waiting time") wages to particular "managers," among other
26 employment positions.

27 10. Representative Plaintiff is informed and believes and, based thereon, alleges that
28 officers of CMRG knew of these facts and legal mandates, yet, nonetheless, repeatedly authorized

1 and/or ratified the violation of the laws cited herein.

2 11. Despite CMRG's knowledge of the Plaintiff Classes' entitlement to premium
3 (overtime) pay, meal and/or rest periods for all applicable work periods, CMRG failed to provide
4 the same to members of the Plaintiff Classes, in violation of the FLSA and California state statutes,
5 Industrial Welfare Commission Orders and Title 8 of the California Code of Regulations. This
6 action is brought to redress and end this long-time pattern of unlawful conduct.

7
8 **JURISDICTION AND VENUE**

9 12. This Court has jurisdiction of this action pursuant to the provisions of the Fair Labor
10 Standards Act of 1938 ("FLSA"), 29 U.S.C. §§201 et seq., including under 29 U.S.C. §§207, 216,
11 and 217. This Court also has jurisdiction in light of the existence of a controversy arising under the
12 laws of the United States (28 U.S.C. §1331) and supplemental jurisdiction to consider claims arising
13 under California state law, pursuant to 28 U.S.C. §1367.

14 13. Venue as to Defendant is proper in this judicial district, pursuant to 28 U.S.C. §1391.
15 Defendant CMRG maintains retail stores and offices in the Northern District of California, and
16 transacts business, has agents, and is otherwise within this Court's jurisdiction for purposes of
17 service of process. The unlawful acts alleged herein have a direct effect on Representative Plaintiff
18 and those similarly situated within the State of California and within this judicial district. Defendant
19 CMRG operates said retail establishments and has employed numerous Class Members in this
20 judicial district as well as throughout the State of California.

21
22 **PLAINTIFFS**

23 14. Representative Plaintiff Robin J. Tucker is a natural person and was, during the
24 relevant time period identified herein, employed by defendant CMRG as an allegedly-overtime
25 exempt "manager," an employment position which was mis-classified as salaried/exempt from
26 overtime pay.

27 15. In said position, the Representative Plaintiff was repeatedly paid a substandard wage
28 insofar as he was denied full pay for all hours worked, including overtime pay and was frequently

1 permitted to work, and did work during the Class Period, shifts exceeding four hours or a major
2 fraction thereof (of at least three and one-half hours), without being afforded ten minute rest periods
3 and without being afforded mandatory meal periods. The Representative Plaintiff is informed and
4 believes, and based thereon, alleges that this conduct of CMRG is/was commonplace at every
5 location owned and operated thereby.

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

9 17. At all times herein relevant, the Representative Plaintiff was and now is a person
10 within each of the Classes of persons further described and defined herein.

11
12 **DEFENDANTS**

13 18. At all times herein relevant, defendant Casual Male Retail Group, Inc. (collectively
14 referred to as “CMRG” and/or “Defendant”) is/was a corporation or other business entity, duly
15 licensed, located and doing business in, but not limited to, the Counties of Alameda and Santa Clara,
16 in the State of California.

17 19. Representative Plaintiff is informed and believes and, on that basis, alleges that
18 CMRG directly and/or indirectly employs and, since May 14, 2002, has employed and/or exercised
19 control over the wages, hours and working conditions of the Representative Plaintiff and Class
20 Members at CMRG’s Casual Male Big & Tall retail stores in numerous California counties,
21 including Alameda and Santa Clara Counties.

22
23 **CLASS ACTION ALLEGATIONS**

24 20. Representative Plaintiff brings this action individually and as a class action on behalf
25 of all persons similarly situated and proximately damaged by CMRG’s conduct, including, but not
26 necessarily limited to, the following Plaintiff Classes:

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FLSA Class:

All persons who are/were employed as “managers,” including, but not necessarily limited to Store Managers and/or General Managers by Casual Male Big & Tall stores and/or by Defendant Casual Male Retail Group, Inc., in one ore more United States “Casual Male Big & Tall” retail store(s) and were classified thereby as overtime-exempt employees who (1) worked in excess of forty (40) hours per workweek at any time during the Class Period, and (2) did not receive premium (overtime) pay for all excess hours worked in any given workday/workweek.

California Class:

All persons who are/were employed as “managers,” including, but not necessarily limited to Store Managers and/or General Managers by Casual Male Big & Tall stores and/or Casual Male Retail Group, Inc., in one or more California “Casual Male Big & Tall” retail store(s) and were classified thereby as overtime-exempt employees, who: (1) worked in excess of eight (8) hours per workday and/or in excess of forty (40) hours per workweek at any time during the class period, and (2) did not receive premium (overtime) pay for all excess hours worked in any given workday/workweek and/or (3) did not receive each rest and/or meal period due.

21. Defendants, their officers and directors are excluded from each of the Classes.

22. This action has been brought and may properly be maintained as a class/collective action under FRCP, Rule 23 and 29 U.S.C. § 216 because there is a well-defined community of interest in the litigation and the proposed Classes are easily ascertainable.

a. Numerosity: A class action is the only available method for the fair and efficient adjudication of this controversy. The members of the class are so numerous that joinder of all members is impractical, if not impossible, insofar as Representative Plaintiff is informed and believes and, on that basis, alleges that the total number of Class Members exceeds 750 individuals. Membership in the Plaintiff Classes will be determined upon analysis of employee and payroll, among other, records maintained by CMRG.

b. Commonality: The Representative Plaintiff and the Class Members share a community of interests in that there are numerous common questions and issues of fact and law which predominate over any questions and issues solely affecting individual members, thereby making a class action superior to other available methods for the fair and efficient adjudication of the controversy. Consequently, class certification is proper under FRCP, Rule 23(b)(3) and 29 U.S.C. § 216(b). These common questions include, but are not necessarily limited to:

i. whether defendant CMRG violated the FLSA and/or California laws by failing to pay overtime compensation to CMRG managers who worked in excess of 40 hours per week;

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- ii. Whether defendant CMRG violated California Wage Order Nos. 7-98, 7-2000, 7-2001 and Labor Code § 510 by failing to pay overtime compensation to CMRG “managers” who worked in excess of 40 hours per week and/or eight (8) hours a day.
 - iii. whether defendant CMRG violated California Business and Professions Code § 17200 by failing to pay overtime compensation to “managers” who worked in excess of forty (40) hours per week and/or eight (8) hours a day.
 - iv. whether defendant CMRG violated, and continues to violate, California Labor Code §§ 226.7 and/or 512 by failing to consistently provide meal and/or rest periods to the California Class Members.
 - v. whether defendant CMRG failed, and continues to fail, to provide meal periods to the Representative Plaintiff and the Class Members in violation of Section 11 of the applicable California Wage Orders.
 - vi. Whether defendant CMRG failed, and continues to fail, to provide rest periods to the Representative Plaintiff and the Class Members in violation of Section 12 of the applicable California Wage Orders.
 - vii. whether defendant CMRG violated, and continues to violate, California Labor Code § 1174 by failing to keep accurate records of employees’ hours of work.
 - viii. whether defendant CMRG violated, and continues to violate, California Labor Code §§ 201-203 by failing to pay overtime wages due and owing at the time Class Members’ employment with Defendant terminated.
 - ix. whether Defendant CMRG violated, and continues to violate, California Labor Code § 226 by failing to provide semimonthly itemized statements to Class Members of total hours worked by each, and all applicable hourly rates in effect during the pay period.
 - x. whether the Representative Plaintiff and the Class Members are entitled to “waiting time” penalties/wages pursuant to California Labor Code § 203.
 - xi. whether the Representative Plaintiff and the 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 Plaintiff’s claims are typical of the claims of the Plaintiff Classes. The Representative Plaintiff and all members of the Plaintiff Classes sustained injuries and damages arising out of and caused by defendant CMRG’s common course of conduct in violation of state and federal 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 Class Members to seek redress individually for the wrongful conduct alleged herein. Should separate actions be brought or be required to

1 be brought by each individual Class Member, the resulting multiplicity of
2 lawsuits would cause undue hardship and expense for the Court and the
3 litigants. The prosecution of separate actions would also create a risk of
4 inconsistent rulings, which might be dispositive of the interests of other Class
5 Members who are not parties to the adjudications and/or may substantially
6 impede their ability to adequately protect their interests. Moreover, the
7 Representative Plaintiff is informed and believes, and based thereon alleges,
8 that Defendant, in refusing to pay overtime to the FLSA Class Members and
9 the California Class Members, has acted and refused to act on grounds
10 generally applicable to all claims, thereby making appropriate injunctive and
11 monetary relief for all members of each class. Consequently, Class
12 certification is proper under FRCP, Rule 23(b)(2) and 29 U.S.C. § 216(b).

13
14 e. Adequacy of Representation: The Representative Plaintiff in this class action
15 is an adequate representative of the Plaintiff Classes, in that the
16 Representative Plaintiff's claims are typical of those of the Plaintiff Classes
17 and the Representative Plaintiff has the same interests in the litigation of this
18 case as the Class Members. The Representative Plaintiff is committed to
19 vigorous prosecution of this case, and has retained competent counsel,
20 experienced in litigation of this nature. The Representative Plaintiff is not
21 subject to any individual defenses unique from those conceivably applicable
22 to the Class as a whole. The Representative Plaintiff anticipates no
23 management difficulties in this litigation.

14 COMMON FACTUAL ALLEGATIONS

15 23. As described herein, CMRG has, for years, knowingly failed to adequately
16 compensate those "managers" within the class definitions identified above for premium (overtime)
17 wages due under the FLSA (29 U.S.C. §§ 206 and 207), California Labor Code §§ 510 and
18 applicable California Wage Orders. Moreover, CMRG has knowingly failed to provide said workers
19 with mandatory meal and rest periods, thereby enjoying a significant competitive edge over other
20 retail chains. Among other means, CMRG engaged in unlawful business practices requiring
21 managers to work numerous hours of overtime on a daily and/or weekly basis and prevented
22 managers from taking rest and meal breaks.

23 24. Even upon the termination or resignation of the employment of Representative
24 Plaintiff and numerous California Class Members during the Class Period, CMRG declined to pay
25 these wages, in blatant violation of California Labor Code §§201 and/or 202.

26 25. In misclassifying Plaintiff and the Class Members as exempt employees, CMRG has
27 also incorrectly and unlawfully treated said Class Members as exempt from the meal and rest period
28 requirements established by California Labor Code §§ 226.7 and 512 and §§ 11 and 12 of the

1 applicable California Wage Orders. Representative Plaintiff and the California Class Members were,
2 and are, unlawfully denied meal breaks and rest periods required by law.

3 26. Moreover, California Labor Code §§ 201 and 202 require defendant CMRG to pay
4 all wages due to members of the California Class immediately upon discharge. California Labor
5 Code § 203 provides that, if an employer willfully fails to timely pay such wages, the employer must,
6 as a penalty, continue to pay the subject employees' wages until the back wages are paid in full or
7 an action is commenced, for a period not to exceed 30 days of wages.

8 27. Furthermore, despite its knowledge of the Representative Plaintiff's and the
9 Class Members' entitlement to premium (overtime) pay for excess hours worked, CMRG violated
10 California Labor Code § 1174[d] by failing to provide or require the use, maintenance or submission
11 of time records by members of the California Class. CMRG also failed to provide Representative
12 Plaintiff and members of the California Class with accurate semimonthly itemized statements of the
13 total number of hours worked by each, and all applicable hourly rates in effect during the pay period,
14 in violation of California Labor Code § 226. In so doing, CMRG has not only failed to pay its
15 workers the full amount of compensation due, it has, until now, effectively shielded itself from its
16 employees' scrutiny for its unlawful conduct by concealing the magnitude (the full number of hours
17 worked) and financial impact of its wrongdoing.

18 28. Representative Plaintiff and all persons similarly situated in the California Class are
19 entitled to unpaid compensation, yet, to date, have not received such compensation despite their
20 termination of their employment with CMRG's employ.

21 29. More than 30 days have passed since Representative Plaintiff and certain California
22 Class Members have left defendant CMRG's employ.

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

26 31. As a direct and proximate result of CMRG's unlawful conduct, as set forth herein,
27 Representative Plaintiff and Class Members have sustained damages, as described above, including
28 loss of earnings for hours of overtime worked on behalf of Defendant, in an amount to be established

1 at trial. As a further direct and proximate result of Defendant’s unlawful conduct, as set forth herein,
2 Representative Plaintiff and many Class Members herein are entitled to recover “waiting time”
3 penalties/wages (pursuant to California Labor Code § 203) and penalties for failure to provide
4 semimonthly statements of hours worked and all applicable hourly rates (pursuant to Labor Code
5 § 226) in an amount to be established at trial. As a further direct and proximate result of Defendant’s
6 unlawful conduct, as set forth herein, Representative Plaintiff and Class Members are entitled to
7 recover attorneys’ fees and costs, pursuant to 29 U.S.C. § 216(b), California Labor Code §§ 218.5
8 and 1194 and/or California Civil Code § 1021.5, among other authorities.

9 32. Representative Plaintiff also brings this action on behalf of himself and the
10 California Class Members pursuant to California Labor Code §§ 2698 and 2699 and seeks recovery
11 of all civil penalties resulting from the violations alleged herein as follows:

12 a. Where civil penalties are specifically provided in the Labor Code for each of
13 the violations alleged herein, Plaintiff seeks recovery of such penalties; and

14 b. Where civil penalties are not established in the Labor Code for each of the
15 violations alleged herein, Plaintiffs seek recovery of penalties as set forth in Labor Code § 2699.

16
17 **FIRST CAUSE OF ACTION**
18 **UNLAWFUL FAILURE TO PAY OVERTIME WAGES TO FLSA CLASS**
(Violation of Fair Labor Standards Act)

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

22 34. At all relevant times hereto, CMRG has been, and is, an employer engaged in
23 commerce, as those terms are defined in 29 U.S.C. §203(b), (d). As such, CMRG employed, as
24 managers, members of the FLSA Class, employment which engaged the employees in commerce,
25 as those terms are defined in 29 U.S.C. §§203(b), (e), (g) and 29 U.S.C. §207(a)(1). At all times
26 relevant hereto, CMRG has been an “enterprise engaged in commerce or in the production of
27 goods for commerce,” as defined under 29 U.S.C. §203(s)(1).

28 35. Representative Plaintiff is informed and believes, and thereon alleges, that CMRG

1 has required the FLSA Class Members, as part of their employment, to work without additional
2 compensation, such as overtime, in excess of the forty hour per week maximum under 29 U.S.C.
3 §207(a)(1). That Section provides the following:

4 Except as otherwise provided in this section, no employer shall
5 employ any of his employees...for a workweek longer than forty
6 hours unless such employee receives compensation for his
7 employment in excess of the hours above specified at a rate which
8 is not less than one and one-half times the regular rate at which he
9 is employed.

10 36. Indeed, in the performance of their duties for Defendant, members of the FLSA
11 Class often did work over forty hours per week, yet did not receive overtime compensation as
12 required by the FLSA, 29 U.S.C. §§ 206 and 207 for the work, labor and services they provided
13 to CMRG. The precise number of unpaid overtime hours will be proven at trial.

14 37. Representative Plaintiff proposes to undertake appropriate proceedings to have
15 such FLSA Class Members aggrieved by Defendant's unlawful conduct notified of the pendency
16 of this action and join this action as plaintiffs, pursuant to 29 U.S.C. § 216(b), by filing written
17 consents to joinder with the Court.

18 38. Defendant's violations of the FLSA were willful.

19 39. As a result of the foregoing, Representative Plaintiff seeks judgment against
20 Defendant on his own behalf, and on behalf of those FLSA Class Members similarly situated
21 who file written consents to joinder in this action, for all unpaid wages, including overtime
22 wages owed by Defendant to the Representative Plaintiff and the FLSA Class, pursuant to 29
23 U.S.C. §§ 206, 207, together with an award of an additional equal amount as liquidated damages,
24 and costs, interest, and reasonable attorneys' fees, as provided for under 29 U.S.C. § 216(b).

25 **SECOND CAUSE OF ACTION**
26 **UNLAWFUL FAILURE TO PAY OVERTIME WAGES TO CALIFORNIA CLASS**
27 **(California Labor Code §§ 510, 1194 and 1198)**

28 40. 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

1 herein.

2 41. During the Class Period, Representative Plaintiff and the California Class
3 Members worked in excess of eight (8) hours in a workday and/or forty (40) hours in a
4 workweek. The precise number of overtime hours will be proven at trial.

5 42. During said time period, defendant CMRG refused to compensate Representative
6 Plaintiff and the California Class Members for some and/or all of the overtime wages earned in
7 violation of applicable Wage Order(s) and the provisions of the California Labor Code.

8 43. At all relevant times, Defendant was aware of and was under a duty to comply
9 with the overtime provisions of the California Labor Code, including, but not limited to, the
10 following:

11 a. Labor Code §510: “Any work in excess of eight hours in one workday
12 and any work in excess of 40 hours in any one workweek and the first
13 eight hours worked on the seventh day of work in any one workweek shall
14 be compensated at the rate of no less than one and one-half times the
regular rate of pay for an employee” (*effective at all times herein
relevant*)

15 b. Labor Code § 1194: “Notwithstanding any agreement to work for a
16 lesser wage, any employee receiving less than the legal minimum wage or
17 the legal overtime compensation applicable to the employee is entitled to
18 recover in a civil action the unpaid balance of the full amount of this
19 minimum wage or overtime compensation, including interest thereon,
20 reasonable attorney’s fees, and costs of suit. (*effective at all times herein
relevant*)”

21 c. Labor Code §1198: “[t]he maximum hours of work and the standard
22 conditions of labor fixed by the commission shall be the maximum hours
23 of work and the standard conditions of labor for employees. The
24 employment of any employee for longer hours than those fixed by the
25 order or under conditions of labor prohibited by the order is unlawful.”
(*effective at all times herein relevant*).

26 44. By refusing to compensate Representative Plaintiff and the California Class
27 Members for overtime wages earned, Defendants violated those California Labor Code
28 provisions cited herein, as well as various Industrial Welfare Commission Wage Orders.

45. As a direct and proximate result of Defendant’s unlawful conduct, as set forth
herein, Representative Plaintiff and the California Class Members have sustained damages,
including loss of earnings for hours of overtime worked on behalf of Defendant, in an amount to

1 be established at trial, and are entitled to recover attorneys fees and costs of suit.

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3 **THIRD CAUSE OF ACTION**
4 **FAILURE TO PROVIDE MEAL AND REST PERIODS TO CALIFORNIA CLASS**
5 **(California Labor Code §§ 226.7 and § 512)**

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

9 49. At all relevant times, Defendant was aware of and was under a duty to comply
10 with California Labor Code § 512 and California Labor Code § 226.7.

11 50. California Labor Code § 512 provides:

12 An employer may not employ an employee for a work period of
13 more than five hours per day without providing the employee with
14 a meal period of not less than 30 minutes, except that if the total
15 work period per day of the employee is no more than six hours, the
16 meal period may be waived by mutual consent of both the
17 employer and employee. An employer may not employ an
18 employee for a work period of more than 10 hours per day without
19 providing the employee with a second meal period of not less than
20 30 minutes, except that if the total hours worked is no more than
21 12 hours, the second meal period may be waived by mutual
22 consent of the employer and the employee only if the first meal
23 period was not waived.

24 51. Moreover, California Labor Code § 226.7 provides:

25 (a) No employer shall require any employee to work during any
26 meal or rest period mandated by an applicable order of the
27 Industrial Welfare Commission.

28 (b) If an employer fails to provide an employee a meal period or
rest period in accordance with an applicable order of the Industrial
Welfare Commission, the employer shall pay the employee one
additional hour of pay at the employee's regular rate of
compensation for each work day that the meal or rest period is not
provided.

52. Industrial Wage Commission Wage Order No. 7-2001(11) and (12) also mandate
that employers provide all applicable meal and/or rest periods to their workers.

53. IWC Wage Order No. 7-2001(11) provides:

(A) No employer shall employ any person for a work period of

1 more than five (5) hours without a meal period of not less than 30
2 minutes...

3 (B) An employer may not employ an employee for a work period
4 of more than ten (10) hours per day without providing the
5 employee with a second meal period of not less than 30 minutes...

6 ...
7 (D) If an employer fails to provide an employee a meal period in
8 accordance with the applicable provisions of this order, the
9 employer shall pay the employee one (1) hour of pay at the
10 employee's regular rate of compensation for each workday that the
11 meal period is not provided.

12 54. IWC Wage Order No. 7-2001(12) provides:

13 (A) Every employer shall authorize and permit all employees to
14 take rest periods, which insofar as practicable shall be in the
15 middle of each work period. The authorized rest period time shall
16 be based on the total hours worked daily at the rate of ten (10)
17 minutes net rest time per four (4) hours or major fraction thereof....

18 (B) If an employer fails to provide an employee a rest period in
19 accordance with the applicable provisions of this order, the
20 employer shall pay the employee one (1) hour of pay at the
21 employee's regular rate of compensation for each workday that the
22 rest period is not provided.

23 55. By failing to consistently provide meal and rest periods to Representative Plaintiff
24 and the California Class Members, Defendant violated these California Labor Code and IWC
25 Wage Order provisions.

26 56. As a direct and proximate result of Defendant's unlawful conduct, as set forth
27 herein, Representative Plaintiff and the California Class Members have sustained damages,
28 including lost wages, and are entitled to recover such damages, penalties and attorneys' fees and
costs under California law, in an amount to be established at trial.

FOURTH CAUSE OF ACTION
FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE
STATEMENTS TO CALIFORNIA CLASS
(California Labor Code §§ 226, 1174)

57. 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.

1 58. California Labor Code § 226(a) provides:
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3 Each employer shall semimonthly, or at the time of each payment
4 of wages, furnish each of his or her employees either as a
5 detachable part of the check, draft or voucher paying the
6 employee's wages, or separately when wages are paid by personal
7 check or cash, an itemized wage statement in writing showing: (1)
8 gross wages earned; (2) total number of hours worked by each
9 employee whose compensation is based on an hourly wage; (3) all
10 deductions; provided, that all deductions made on written orders of
11 the employee may be aggregated and shown as one item; (4) net
12 wages earned; (5) the inclusive date of the period for which the
13 employee is paid; (6) the name of the employee and his or her
14 social security number; and (7) the name and address of the legal
15 entity which is the employer.
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17 59. The IWC Wage Orders also establish this requirement in § 7(B) thereof (8 Cal.
18 Code Regs. § 11010 et. seq.).
19
20 60. Moreover, California Labor Code § 226(e) provides:
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22 An employee suffering injury as a result of a knowing and
23 intentional failure by an employer to comply with subdivision (a) is
24 entitled to recover the greater of all actual damages or fifty dollars
25 (\$50) for the initial pay period in which a violation occurs and one
26 hundred dollars (\$100) per employee for each violation in a
27 subsequent pay period, not exceeding an aggregate penalty of four
28 thousand dollars (\$4,000), and is entitled to an award of costs and
29 reasonable attorney's fees.
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31 61. Finally, California Labor Code § 1174 provides:
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33 Every person employing labor in this state shall: (d) Keep,
34 at a central location in the state...payroll records showing the hours
35 worked daily by and the wages paid to...employees.... These
36 records shall be kept in accordance with rules established for this
37 purpose by the commission, but in any case shall be kept on file for
38 not less than two years.
39
40 62. Representative Plaintiff seeks to recover actual damages, costs and attorneys' fees
41 under these provisions on behalf of himself and the California Class.
42
43 63. Defendant CMRG failed to provide timely, accurate itemized wage statements to
44 Representative Plaintiff and the California Class in accordance with Labor Code § 226(a) and the
45 IWC Wage Orders. None of the statements provided by Defendant has accurately reflected
46 actual gross wages earned, net wages earned, or the appropriate deductions of such Class
47 Members.

1 SIXTH CAUSE OF ACTION
2 **UNFAIR BUSINESS PRACTICES AS TO THE CALIFORNIA CLASS**
3 **(California Business & Professions Code §§ 17200-17208)**

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

7 71. Representative Plaintiff further brings this cause of action on behalf of the general
8 public, seeking equitable and statutory relief to stop the misconduct of Defendant, as complained
9 of herein, and to seek restitution from Defendant of amounts acquired through the unfair,
10 unlawful and fraudulent business practices described herein.

11 72. The knowing conduct of Defendant, as alleged herein, constitutes an unlawful
12 and/or fraudulent business practice, as set forth in California Business & Professions Code §§
13 17200-17208. Specifically, Defendant conducted business activities while failing to comply with
14 the legal mandates cited herein.

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

19 74. Defendant has clearly established a policy of accepting a certain amount of
20 collateral damage, as represented by the damages to Representative Plaintiff and the California
21 Class herein alleged, as incidental to its business operations, rather than accept the alternative
22 costs of full compliance with fair, lawful and honest business practices ordinarily borne by
23 responsible competitors of Defendant and as set forth in legislation and the judicial record.

24 RELIEF SOUGHT

25 **WHEREFORE, the Representative Plaintiff**, on behalf of himself and the **Plaintiff**
26 **Classes**, prays for judgment and the following specific relief against **Defendant**, as follows:

27 1. That the Court declare, adjudge and decree that this action is a proper
28 class/collective action and certify the proposed FLSA Class, the California Class and/or any other

1 appropriate subclasses under FRCP, Rule 23 and/or 29 U.S.C. § 216;

2 2. That the Court declare, adjudge and decree that defendant CMRG violated the
3 overtime provisions of the FLSA, the California Labor Code and the Industrial Wage
4 Commission Wage Orders as to the Representative Plaintiff and the Plaintiff Classes;

5 3. That the Court declare, adjudge and decree that defendant CMRG willfully
6 violated its legal duties to pay overtime under the FLSA, the California Labor Code and the IWC
7 Wage Orders;

8 4. That the Court declare, adjudge and decree that a) the representative Plaintiff and
9 the FLSA Class Members were at all times relevant hereto, and are, entitled to be paid overtime
10 for work beyond 40 hours in a week; and b) the amounts to which Representative Plaintiff and
11 the FLSA Class Members are entitled is to be doubled as liquidated damages and awarded
12 thereto;

13 5. That the Court declare, adjudge and decree that defendant CMRG violated
14 California Labor Code §§ 226.7 and 512 and applicable IWC Wage Orders by willfully failing to
15 provide meal periods (including second meal periods) and/or rest periods to California Class
16 Members;

17 6. That the Court declare, adjudge and decree that defendant CMRG violated the
18 record keeping provisions of California Labor Code §§ 226(a) and 1174(d) and section 7 of the
19 Wage Orders as to Representative Plaintiff and the California Class, and willfully failed to
20 provide accurate semimonthly itemized statements thereto;

21 7. That the Court declare, adjudge and decree that defendant CMRG violated
22 California Labor Code §§ 203 by willfully failing to pay all compensation owed at the time of the
23 termination of the employment of Representative Plaintiff and other terminated California Class
24 Members;

25 8. That the Court declare, adjudge and decree that defendant CMRG violated
26 California Business and Professions Code § 17200 et. seq. by failing to pay Representative
27 Plaintiff and California Class Members overtime compensation, failing to provide meal and/or
28 rest periods to said employees, failing to pay all wages due on termination (“waiting time”

1 penalties) and/or by failing to provide Class Members with accurate itemized wage statements;

2 9. That the Court make an award to Representative Plaintiff, the FLSA Class and the
3 California Class of damages for the amount of unpaid overtime compensation, including interest
4 thereon, and penalties in an amount to be proven at trial;

5 10. That the Court make an award to the Representative Plaintiff and the California
6 Class of one (1) hour of pay at each employee's regular rate of compensation for each workday
7 that a meal period was not provided.

8 11. That the Court make an award to the Representative Plaintiff and the California
9 Class of one (1) hour of pay at each employee's regular rate of compensation for each workday
10 that a rest period was not provided.

11 12. That the Court make an award of penalties to Representative Plaintiffs and all
12 California Class Members as authorized by Labor Code §§ 2698 and 2699 (the Labor Code
13 Private Attorneys General Act of 2004).

14 13. That the Court order defendant CMRG to pay restitution to Representative
15 Plaintiff and the California Class due to defendant CMRG's unlawful activities, pursuant to
16 Business and Professions Code §§ 17200-08;

17 14. That the Court further enjoin defendant CMRG, ordering it to cease and desist
18 from unlawful activities in violation of Business and Professions Code § 17200 et. seq.;

19 15. For all other Orders, findings and determinations identified and sought in this
20 Complaint;

21 16. For Interest on the amount of any and all economic losses, at the prevailing legal
22 rate;

23 17. For reasonable attorneys' fees, pursuant to 29 U.S.C. §216(b), California Labor
24 Code §§218.5 and 1194 and/or California Civil Code §1021.5; and

25 18. For costs of suit and any and all such other relief as the Court deems just and
26 proper.

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JURY DEMAND

Representative Plaintiff and the Plaintiff Classes hereby demand trial by jury on all issues triable of right by jury.

Dated: May 1, 2004

SCOTT COLE & ASSOCIATES, APC

By: _____

Scott Edward Cole, Esq.
Clyde H. Charlton, Esq.
Matthew R. Bainer, Esq.

Attorneys for the Representative Plaintiff
and the Plaintiff Class(es)