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on behalf of all others similarly situated

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARIA GARCIA, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

HOLLISTER COMPANY, and DOES 1
through 10, inclusive,

Defendants.

Case No.

CLASS ACTION

COMPLAINT

- 1) Failure to Pay Reporting Time Pay (8 CCR § 11070(5); Labor Code § 558) (On Call Shifts);
- 2) Failure to Pay Minimum Wage (Labor Code §§ 1182.11, 1182.12, 1194, 1194.2, 1197, Wage Order);
- 3) Failure to Maintain Required Business Records (Labor Code §§ 1174, 1174.5; Wage Order);
- 4) Failure to Provide Accurate Itemized Wage Statements (Labor Code §§ 226, 226.3; Wage Order);
- 5) Failure to Pay All Wages Earned at Termination (Labor Code §§200-203);
- 6) Unlawful Business Practices (Bus. & Prof Code §§ 17200, *et seq.*);
- 7) Unfair Business Practices (Bus. & Prof Code §§ 17200, *et seq.*);
- 8) Civil Penalties Under The Private Attorneys General Act (Labor Code §§ 2698, *et seq.*)

1 **PRELIMINARY STATEMENT**

2 COMES NOW, Plaintiff Maria Garcia (“Plaintiff”), individually and on
3 behalf of all others similarly situated, complain and allege against Hollister
4 Company (“Defendant”) the following:

5 1. Plaintiff brings this proposed class action on behalf of herself and all
6 similarly situated individuals, pursuant to Federal Rule of Civil Procedure 23,
7 against Defendant for damages suffered as a result of Defendants' unlawful and
8 unfair employment practices.

9 2. Plaintiff and putative class members were or are employed by
10 Defendant, and were denied minimum wage and reporting time compensation as
11 required by governing wage orders and California law. Moreover, for those
12 employees who no longer work for Defendant, Defendant failed to timely pay
13 those employees all compensation due and owing upon termination or resignation.
14 All of these claims result in additional derivative violations of the California Labor
15 Code. Furthermore, Defendant’s scheduling policies, practices and procedures are
16 unlawful and unfair under California’s Unfair Competition Law (the “UCL”).

17 3. As a result of Defendant’s unlawful and unfair employment practices,
18 Plaintiff seeks monetary and injunctive relief for themselves and the putative class.

19 **PARTIES**

20 4. At all relevant times herein, Plaintiff was and is a resident and citizen
21 of the State of California, County of Los Angeles. From August of 2013 until
22 October of 2014, Plaintiff worked as a retail sales clerk at a Hollister retail store in
23 Los Angeles, California.

24 5. Defendant Hollister Company is a corporation duly organized and
25 existing under the laws of the State of Delaware, with its principal place of
26 business in Ohio. Hollister Company owns and operates Hollister retail clothing
27 stores.

28 6. Defendant suffered or permitted Plaintiff to work and/or exercised

1 control over the wages, hours, or working conditions of Plaintiff and the proposed
2 class members, as alleged herein. Defendant drafted and implemented the written
3 policies and procedures applicable in each retail store described herein, including
4 those policies concerning Call-In scheduling policies.

5 7. Plaintiff does not know the true names or capacities, whether
6 individual, partner, or corporate, of the defendants sued herein as DOE defendants
7 and for that reason, said defendants are sued under such fictitious names, and
8 Plaintiffs pray for leave to amend this complaint when the true names and
9 capacities are known. Plaintiff is informed and believe, and based thereon allege,
10 that each fictitious defendant is responsible in some way for the matters alleged
11 herein and proximately caused and/or contributed the injuries referenced herein.

12 **JURISDICTION AND VENUE**

13 8. The District Court for the Central District of California has
14 jurisdiction over the claims alleged herein, which involve the laws and regulations
15 of the State of California, including alleged violations of the California Labor
16 Code, California Business and Professions Code, and Title 8 of the California
17 Code of Regulations under the Class Action Fairness Act. Specifically, there is
18 minimal diversity between the parties, and Plaintiff's claims, on behalf of the
19 putative class, exceed \$5,000,000.00 in the aggregate.

20 9. Venue is proper in this Court because Defendant regularly conducts
21 business in Los Angeles County, Plaintiff lives in Los Angeles County, and the
22 conduct alleged herein occurred within Los Angeles County.

23 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

24 10. Defendant has established and maintained two scheduling policies that
25 operate in a functionally identical manner. Both scheduling practices apply to
26 Plaintiff and the putative class in the same manner. First, Defendant utilizes a
27 common form of "Show-Up" scheduling, whereby Defendant's employees are
28 scheduled to work, required to report for a scheduled work shift, and report for the

1 scheduled work shift by physically showing up at one of Defendant's stores.

2 11. Defendant has also established a "Call-In" scheduling policy. Call-In
3 shifts can be scheduled immediately before or after a Show-Up shift, or they are
4 scheduled on days where an employee is not scheduled to work a Show-up shift.
5 Like Show-Up scheduling, Defendant's Call-In scheduling policy requires its
6 employees to be available to work a scheduled shift.

7 12. When an employee is scheduled for a Call-In shift immediately before
8 a Show-Up shift, or on days when the employee is not scheduled for a Show-Up
9 shift, Defendant's employees are required to "call-in" and report for work one hour
10 before the start of the scheduled shift. In making this required phone call,
11 employees must wait for a manager to make a determination as to whether the
12 employee must physically show up, and completing the phone call takes anywhere
13 from five to ten minutes.

14 13. When an employee is scheduled for a Call-In shift immediately after a
15 Show-Up shift, the employee must wait until the end of the Show-Up shift to ask
16 their manager if they will be permitted to work the Call-In shift. When employees
17 report for these Call-In shifts, they do so immediately before, or at the beginning
18 of, the scheduled Call-In shift.

19 14. Call-In shifts are mandatory, and Defendant treats Call-In shifts –
20 both in terms of mandated employee availability and discipline – the same as
21 Show-Up shifts. However, while employees must treat all Call-In shifts as
22 mandatory, Defendant frequently does not allow employees to work a scheduled
23 Call-In shift, thereby depriving the employee of the opportunity to earn wages for
24 the time they have made available to Defendant.

25 15. Regardless of how many days and hours employees are *in fact*
26 permitted to work, employees are required to mold their lives around the
27 possibility that they will work each and every Call-In shift.

28 16. Call-In shifts impose the same restrictions on an employee's personal

1 autonomy as Show-Up shifts. Employees are required to tailor their lives around
2 mandatory Call-In shifts in the same manner as a Show-Up shift. Employees must
3 make preparations for Call-In shifts that are indistinguishable from the
4 preparations required to report for a Show-Up shift. As a result, compliance with
5 Defendants' Call-In policy imposes a global restriction on the employees' ability to
6 plan to use time in which they are scheduled to work for any other purpose,
7 without compensation.

8 17. For example, employees must arrange child and elder care as though
9 they will be working each and every Call-In shift. Employees cannot schedule
10 shifts with other employers when scheduled for Call-In shifts. Employees cannot
11 plan to attend college courses, schedule doctor's appointments, or make plans with
12 friends and family when scheduled for Call-In shifts. Such a scheduling practice
13 also makes it nearly impossible for employees to navigate eligibility requirements
14 for government benefits such as health insurance, child care subsidies, food stamps
15 and housing assistance – all of which are typically based on income, and in the
16 case of child care, hours worked per week.

17 18. Unless employees are permitted to work a Call-In shift, Defendant
18 does not compensate its employees for complying with the Call-In scheduling
19 policy. Employees are not compensated for the time they were required to make
20 available to Defendant, and Defendant does not compensate employees for the
21 time it takes to complete the Call-In inquiry.

22 19. Defendant's failure to compensate its employees for complying with
23 the Call-In policy is unlawful in several respects. When employees "call in" to
24 report for work, they are doing so under Defendant's control. This control requires
25 employees engage in a specified activity at a specified time, and prevents the
26 employee from choosing how he or she will spend that time. Because employees
27 are not permitted to effectively use their time for their own purposes when making
28 the call-in inquiry, under California law, they are entitled to wages.

1 continuing until the time that judgment is entered in this case.

2 Excluded from the Class are Defendant, its owners, directors, officers,
3 executives, and all management personnel whose responsibility it was to maintain
4 and/or enforce the policies, procedures, customs and/or business practices
5 complained of herein.

6 24. **Numerosity**: The members of the Class are so numerous that joinder
7 of all members would be impractical, if not impossible. On information and belief,
8 Plaintiff alleges the proposed class numbers in the thousands.

9 25. **Ascertainability**: The identities of the members of the Class are
10 readily ascertainable by review of Defendant's records, including, but not limited
11 to, payroll records, timekeeping records, schedules, and other documents and other
12 business records that Defendants are required by law to maintain.

13 26. **Commonality/Predominance**: There are predominant common
14 questions of law and fact and a coherent community of interest between Plaintiff
15 and the claims of the Class, concerning Defendant's treatment of them, including,
16 but not limited to:

- 17 a. Whether Defendant lacked a written policy regarding the Reporting
18 Time Pay required under the applicable Wage Order;
- 19 b. Whether Defendant maintained a custom and business practice of
20 failing to pay Reporting Time Pay;
- 21 c. Whether Defendant failed to pay premium wages required by the
22 Wage Order's Reporting Time Pay regulations;
- 23 d. Whether Defendant failed to record all time worked by class
24 members;
- 25 e. Whether Defendant failed to pay for all time worked by class
26 members;
- 27 f. Whether Defendant failed to pay all earned wages at the time of
28 termination of employment of those included in the Separated

1 Employee Subclass;

2 g. Whether Defendant failed to provide class members with accurate
3 itemized pay statements;

4 h. Whether the Defendant's actions, as alleged herein, were unlawful
5 and constitute unfair and/or unlawful business practices;

6 27. **Typicality**: Plaintiff's claims are typical of the claims of all members
7 of the Class. Plaintiff, herself, has suffered and been damaged by the violations of
8 the Labor Code, Wage Order, and Bus. & Prof. Code alleged herein.

9 28. **Adequacy of Representation**: Plaintiff is fully prepared to take all
10 necessary steps to represent, fairly and adequately, the interests of the above-
11 defined Class. Plaintiff's attorneys are ready, willing, and able to fully and
12 adequately represent the Class and individual Plaintiff. Plaintiff's attorneys have
13 prosecuted and settled wage-and-hour class actions in the past and currently have a
14 number of wage-and-hour class actions pending in the California state and federal
15 courts, as well as elsewhere in the United States.

16 29. **Superiority**: A class action is the superior means of litigating the
17 Class' claims. The claims set forth herein are based on Defendant's systemic
18 treatment of the Class members and, as such, the same body of evidence necessary
19 to prove one claim would be accessed to prove each Class member's claim. Proof
20 of Defendant's wrongdoing may be shown by a common body of evidence. It is
21 preferable, from an efficiency and case management standpoint, that the claims of
22 all of the Class members be litigated as a single litigation, rather than as thousands
23 of individual claims.

24 **FIRST CAUSE OF ACTION**

25 **FOR FAILURE TO PAY REPORTING TIME PAY FOR**

26 **(CALL-IN SHIFTS)**

27 **(8 CCR § 11070(5); Labor Code § 558)**

28 30. Plaintiff hereby incorporates by reference the preceding paragraphs of

1 this complaint as though set forth in full at this point.

2 31. The applicable Wage Order requires that on each workday that an
3 employee reports for work, as scheduled, but is not put to work or is furnished less
4 than half of the employee's usual or scheduled day's work, the employee shall be
5 paid for half the usual or scheduled day's work, but in no event for less than two
6 (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which
7 shall not be less than the minimum wage. The applicable Wage Order denominates
8 this as "Reporting Time Pay."

9 32. For Call-In shifts, Defendant's employees are scheduled to work,
10 required to report for work, and do, in fact, report for work when scheduled. This
11 occurs in one of two ways. First, when employees are scheduled for a Call-In shift
12 immediately before a Show-Up shift, or on days when the employee is not
13 scheduled for a Call-In shift, the employee reports for work by calling their
14 manager two hours before the start of the shift to determine if they will be
15 permitted to work the shift. Second, when Call-In shifts are scheduled immediately
16 after a Show-Up shift, employees who are already present at the store report for
17 work by waiting until the beginning of the Call-In shift to inquire with their
18 manager if they will be permitted to work the Call-In shift.

19 33. Like show-up shifts, call-in shifts are mandatory and employees must
20 tailor their lives around the call-in schedule. Employees are operating under
21 Defendant's control when making the Call-In inquiry. Employees must be
22 available to work a call-in shift, or face discipline. Indeed, employees are
23 instructed to treat Call-In shifts the same as Show-Up shifts.

24 34. As a uniform practice, Defendant does not compensate its employees
25 in any manner when they report for a Call-In shift, but are not permitted to work
26 the shift.

27 35. Repeatedly over the course of their employment, on dates and
28 occasions known better to Defendant and as will be reflected in Defendant's

1 business records, Plaintiff (and, on information and belief, the proposed class
2 members), have reported for work at their scheduled start time, as required by
3 Defendant, but have not been put to work or were furnished work for less than half
4 of their scheduled shifts.

5 36. Defendant's failure to pay Plaintiff and proposed Class members
6 pursuant to the Wage Order is unlawful.

7 37. Plaintiff and the proposed Class members are entitled to recover the
8 premium wages prescribed by the Wage Order (for each scheduled or regular shift
9 where they reported for work, as required, but were not permitted to work or for
10 which they worked less than half of the regular or scheduled shift) in an amount of
11 no less than two hours, nor greater than four, whichever is greater, for each such
12 occurrence, for each member of the Class.

13 38. In addition to the recovery of the premium wages under the Wage
14 Order, Plaintiff and the proposed Class members are entitled to recover a civil
15 penalty under Labor Code section 558, against the Defendants, for their violation
16 of the Wage Order, in an amount equal to \$50 for the first such violation and \$100
17 for each subsequent violation, for each employee suffering the violation.

18 **SECOND CAUSE OF ACTION**

19 **Failure to Pay Minimum Wage**

20 **(Cal. Lab. Code §§ 1182.11, 1182.12, 1194, 1194.2, 1197; Wage Order)**

21 39. Plaintiff repeats and realleges by reference the allegations set forth
22 above, as though set forth herein in full.

23 40. Defendant failed to pay at least the minimum wage to Plaintiff and
24 other members of the class, in violation of California Labor Code sections 1182.11,
25 1182.12, 1194, and 1197, as well as the applicable Wage Order (8 CCR
26 § 11070(4)).

27 41. Under California law, "hours worked" is defined as "the time during
28 which an employee is subject to the control of an employer, and includes all the

1 time the employee is suffered or permitted to work, whether or not required to do
2 so.”

3 42. Pursuant to Defendant's Call-in Scheduling Policy, Plaintiff reports to
4 work by calling Defendant one hour before the scheduled start of her shift. This
5 process universally requires Plaintiff and other calling employees be placed on
6 hold while a manager determines if the employee should physically show up for a
7 scheduled shift. Plaintiff, and on information and belief, the putative class
8 members, expend anywhere from five to ten minutes to complete the call and
9 determine if they should physically show up for the scheduled shift.

10 43. When Plaintiff and putative class members make this call to determine
11 if they should physically show up for a scheduled shift, they are doing so pursuant
12 to Defendant's mandatory employment policies, and these employees are subject to
13 Defendant's control when they make this call. Plaintiff and the putative class
14 members are not compensated with any wages for the time in which they are
15 required to make this call and determine whether they should physically show up
16 for a scheduled shift.

17 44. Accordingly, Defendant was required to compensate Plaintiff with at
18 least the minimum wage for all hours worked. Defendant failed to do so, and
19 pursuant to California Labor Code section 1194(a), Plaintiff and all similarly
20 affected employees are now entitled to recover “the unpaid balance of the full
21 amount of this minimum wage or overtime compensation, including interest
22 thereon, reasonable attorney's fees, and costs of suit.”

23 45. Pursuant to California Labor Code section 1194.2(a), Plaintiff and all
24 similarly affected employees are now “entitled to recover liquidated damages in an
25 amount equal to the wages unlawfully unpaid and interest thereon.”

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1 **THIRD CAUSE OF ACTION**

2 **FAILURE TO KEEP REQUIRED RECORDS**

3 **(Labor Code §§ 1174, et seq.; Wage Order)**

4 46. Plaintiff repeats and realleges by reference the allegations set forth
5 above, as though set forth herein in full.

6 47. The Labor Code and applicable Wage Order require employers to
7 keep certain accurate business records, including each employee's daily hours
8 worked (when each employee began and ended each work period, the start and end
9 of meal periods, total daily hours worked, total hours worked in the pay period). In
10 addition, the employer is required to accurately record and report the information
11 required to be provided with each pay check, pursuant to Labor Code section 226,
12 including all applicable rates of pay and the number of hours worked at each
13 applicable rate.

14 48. Any employer who fails to maintain such records or to accurately
15 maintain such records is subject to a civil penalty, under Labor Code section
16 1174.5 and under the Wage Order.

17 49. Plaintiff alleges that Defendant failed to keep accurate payroll and
18 timekeeping records, as required by law. Specifically, Plaintiff alleges that
19 Defendant failed to keep accurate records of all time worked, including time spent
20 completing the call-in inquiry and the rates and premium wages due to them as
21 Reporting Time Pay.

22 50. Plaintiff and putative class members are entitled to the civil penalties
23 imposed by the Labor Code and the applicable Wage Order.

24 **FOURTH CAUSE OF ACTION**

25 **FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS**

26 **(Labor Code §§ 226, 226.3; Wage Order)**

27 51. Plaintiff repeats and realleges by reference the allegations set forth
28 above, as though set forth herein in full.

1 Labor Code § 203 provides that if an employer willfully fails to timely pay such
2 wages the employer must, as a penalty, continue to pay the employee's daily wage
3 until the back wages are paid in full or an action is commenced. The penalty
4 cannot exceed 30 days of wages.

5 58. Plaintiff was separated from Defendant's employ in October of 2014.
6 Plaintiff and Subclass members were not paid for all earned wages at the time of
7 their separation from Defendant's employ. Plaintiff alleges that Defendant's
8 custom, practice, and/or policy was not to pay for previously earned Reporting
9 Time Wages or unrecorded time spent under Defendant's control, at the time that
10 final wages were paid.

11 59. More than 30 days have passed since Plaintiff and Subclass members
12 terminated from their employment with Defendant. Defendant has not paid
13 Plaintiff and each Subclass member, whose employment has ended, all wages
14 owed. As a consequence of Defendant's willful conduct in not paying Plaintiff and
15 each Subclass member all earned wages at the time their employment with
16 Defendant ended, Plaintiff and each terminated Subclass member is entitled to 30
17 days' wages as a penalty under Labor Code § 203.

18 **SIXTH CAUSE OF ACTION**

19 **UNLAWFUL BUSINESS PRACTICES**

20 **(Bus. & Prof. Code §§ 17200, *et seq.*)**

21 60. Plaintiff repeats and realleges by reference the allegations set forth
22 above, as though set forth herein in full.

23 61. Section 17200 of the California Business and Professions Code
24 prohibits any unlawful business act or practice.

25 62. Plaintiff brings this cause of action in a representative capacity on
26 behalf of the general public and the persons affected by the unlawful conduct
27 described herein. Plaintiff and putative class members have suffered and continue
28 to suffer injury in fact and deprivation of wages and monies as a result of

1 Defendant's actions.

2 63. The actions of Defendant, as herein alleged, amount to conduct which
3 is unlawful and a violation of law. As such, said conduct constitutes unlawful
4 business practices, in violation of Bus. & Prof. Code §§ 17200 et. seq.

5 64. Defendant's conduct as herein alleged has damaged Plaintiff and
6 putative class members by denying them wages due and payable, and by failing to
7 provide proper wage statements. Defendant's actions are thus substantially
8 injurious to Plaintiff and putative class members, causing them injury in fact and
9 loss of money.

10 65. As a result of such conduct, Defendant has unlawfully obtained
11 monies owed to Plaintiff and putative class members.

12 66. All members of the Class can be identified by reference to payroll and
13 related records in the possession of the Defendant. The amount of wages due to
14 Plaintiff and members of the Class can be readily determined from Defendant's
15 records and/or proper scientific and/or expert evidence. The members of the
16 proposed class are entitled to restitution of monies due and obtained by Defendant
17 during the Class Period as a result of Defendant's unlawful conduct.

18 67. Defendant's course of conduct, acts, and practices in violation of the
19 California laws and regulations, as mentioned in each paragraph above, constitute
20 distinct, separate and independent violations of Sections 17200 et seq. of the
21 Business and Professions Code.

22 **SEVENTH CAUSE OF ACTION**

23 **UNFAIR BUSINESS PRACTICES**

24 **(Bus. & Prof. Code §§ 17200 et seq.)**

25 68. Plaintiff repeats and realleges by reference the allegations set forth
26 above, as though set forth herein in full.

27 69. When Defendant schedules Plaintiff and the proposed Class members
28 for future shifts, they include Call-In shifts. Whenever a Call-In shift appears on

1 an employee's schedule, the worker is required to call his or her manager or
2 supervisor two hours in advance of the Call-In shift to determine if he or she needs
3 to report to work for the hours encompassed by the Call-In shift. Plaintiff has
4 routinely been subjected to the Call-In schedule.

5 70. Plaintiff and the Class members have been instructed by Defendant to
6 treat the Call-In shifts as actual, scheduled work time. Defendant has told Plaintiff
7 and putative class members that failure to report for a Call-In shift is treated as
8 tardiness and/or absence, just as with a Show-Up shift, and subject to discipline
9 just the same as a Show-Up shift.

10 71. Call-In shifts may be scheduled before a Show Up or after it, or they
11 may be scheduled with no other Show Up shift also scheduled for the particular
12 day.

13 72. When Call-In scheduling and Show-Up scheduling are aggregated,
14 employees may be, for example, scheduled to work upwards of four days per
15 week, even though they may only be permitted to earn wages for one day per
16 week. Employees have no way of knowing whether they will *in fact* be permitted
17 to work until two hours before the beginning of the Call-In shift.

18 73. Regardless of how many days employees are *in fact* permitted to
19 work, employees are required to mold their lives around the possibility that they
20 will work four days a week. For example, employees cannot schedule shifts with
21 other jobs during those scheduled hours, even though there is a substantial
22 likelihood employees will not be permitted to work a Call-In shift. Employees
23 cannot plan to attend college courses, schedule doctor's appointments, or make
24 plans with friends and family during those hours. Employees with children may
25 have to arrange child care for those four days a week, even though they ultimately
26 will not be permitted to earn wages. For employees who require government
27 assistance, Defendant's Call-In scheduling policy may make it exceedingly
28 difficult, if not impossible, for employees to navigate eligibility requirements for

1 government benefits such as health insurance, child care subsidies, food stamps
2 and housing assistance.

3 74. In summary, as a result of Defendant's Call-In scheduling policy,
4 employees suffer a global restriction of their personal autonomy and their ability to
5 plan any personal pursuits for the time in which they are scheduled to work a Call-
6 In shift. However, Defendant's employees are not permitted to earn wages or
7 otherwise compensated for the significant sacrifice implicit in complying with
8 Defendant's Call-In scheduling policy. Moreover, due to the unpredictable nature
9 of Defendant's Call-In policy, employees can never know if they will be able to
10 meet their budgetary needs.

11 75. California's wage and hour laws reflect the strong public policy
12 favoring protection of workers' general welfare and society's interest in a stable job
13 market. For all the reasons discussed herein, Defendant's Call-In scheduling policy
14 wholly undermines California's long-standing interest in promoting workers'
15 general welfare. The restrictions placed on employee personal autonomy, without
16 compensation, have serious effects on the welfare of Defendant's employees, as
17 well as their families. Stated differently, and for all the reasons discussed herein,
18 Defendant's Call-In scheduling policy is immoral, unethical, oppressive,
19 unscrupulous and otherwise is substantially injurious to its employees.

20 76. There is no utility to Defendant's Call-In scheduling policy. The
21 purpose of the Call-In scheduling policy is to maximize Defendant's profits at the
22 expense of its employees' welfare and a stable job market in the State of California.
23 The gravity of harm to Defendant's employees, on the other hand, for all the
24 reasons discussed herein, is substantial. Thus, the gravity of harm to Defendant's
25 employees substantially outweighs any utility of the Call-In scheduling policy.
26 Stated differently, Defendant's Call-In scheduling policy negatively impacts its
27 employees in a manner that outweighs any reasons, justifications, and motives
28 Defendant can provide.

1 77. Section 5 of the Wage Order, providing for reporting time pay, is
2 intended to guarantee compensation for employees who tailor their lives around a
3 work schedule, but are not permitted to earn wages due to inadequate scheduling or
4 lack of proper notice by the employer. Viewed from a remedial perspective,
5 reporting time laws exist not only to compensate employees, but also are intended
6 to shape employer conduct by encouraging proper scheduling practices.

7 78. In addition to promoting proper notice and scheduling practices, the
8 underlying intent, policy, and purpose of Section 5 of the Wage Order, as stated by
9 both the Industrial Welfare Commission (the "IWC"), the organization responsible
10 for setting the working conditions of California employees, as well as the Division
11 of Labor Standards Enforcement (the "DLSE"), the organization responsible for
12 enforcing California employment laws, is to compensate employees when they are
13 required to be available to work, make themselves available to work, but are not
14 afforded the opportunity to earn wages. Indeed, the DLSE has specifically noted
15 that an employee should be compensated with reporting time pay "for at least a
16 portion of the time [the employee] makes [herself] available to the proposed
17 employer."

18 79. Defendant's Call-In scheduling policy globally undermines the
19 purposes of Section 5. Like the more familiar form of Show-Up scheduling,
20 Defendant's Call-In scheduling policy requires employees to conform their lives
21 around a mandatory work schedule. Employees are scheduled to work, expect to
22 work – indeed, employees are *required* to expect to work, or face discipline – and
23 report to work by calling in immediately before a shift begins. Frequently,
24 however, employees are not permitted to work a scheduled Call-In shift. When this
25 occurs, employees are never compensated for the sacrifices they must make in
26 order to report for a scheduled Call-In shift. This is the precise wrong sought to be
27 remedied by Section 5: an improper scheduling practice that fails to properly
28 compensate employees who adapt their lives around a work schedule.

1 80. Defendant's Call-In scheduling policy is further unfair, and
2 simultaneously, undermines fair competition, by shifting the risks implicit in
3 scheduling to its employees – all while undermining the purposes of Section 5.
4 Specifically, in a competitive marketplace, retail scheduling practices represent one
5 of many components to maximizing profit. These scheduling practices represent a
6 balancing act between the need to maximize sales, i.e., having optimal sales floor
7 coverage with its employees, and the need to minimize employee overhead costs.
8 Sometimes, retailers are overleveraged and realize greater than optimal employee
9 overhead costs. Other times, retailers are underleveraged and cannot maximize
10 sales.

11 81. Defendant's Call-In policy, however, harms fair competition by
12 violating the spirit and purpose of reporting time laws and shifting the risks
13 implicit in scheduling to the employee. Specifically, rather than risk greater than
14 optimal employee overhead – something every retailer must do when complying
15 with the purpose of reporting time laws – Defendant's Call-In policy allows them
16 to *require* an employee report to work any time, but at no time would Defendant
17 have to furnish reporting time pay or provide the employee an opportunity to earn
18 wages, despite the fact that the employee was *required* to be available to work a
19 scheduled Call-In shift. This undermines fair competition because retailers who
20 comply with the purposes of reporting time laws – or as the DLSE has put it, those
21 who compensate their employees "for at least a portion of the time [the employee]
22 makes [herself] available to the proposed employer" – cannot *always* realize
23 optimal employee overhead costs while simultaneously realizing optimal employee
24 presence to maximize sales. By undermining California's reporting time laws,
25 Defendant achieves this anti-competitive advantage. And the only way Defendants
26 are able to enjoy this anti-competitive circumstance is by passing both the risk and
27 the burden of proper notice and scheduling practices onto the employees, in
28 direction contravention of the purpose of Section 5, and at great expense to their

1 employee's welfare.

2 82. As such, Defendants' Call-In scheduling policy constitutes an "unfair"
3 business practice under the UCL.

4 **EIGHTH CAUSE OF ACTION**

5 **CIVIL PENALTIES UNDER THE CALIFORNIA PRIVATE ATTORNEYS**

6 **GENERAL ACT ("PAGA") (Labor Code §§ 2698, *et seq.*)**

7 83. Plaintiff hereby incorporates by reference the preceding paragraphs of
8 this complaint as though set forth in full at this point.

9 84. PAGA permits Plaintiffs to recover civil penalties for the violation(s)
10 of the Labor Code sections enumerated in Labor Code section 2699.5.

11 85. PAGA provides as follows: "[n]otwithstanding any other provision of
12 law, a Plaintiff may as a matter of right amend an existing complaint to add a cause
13 of action arising under this part at any time within 60 days of the time periods
14 specified in this part."

15 86. Defendant's conduct, as alleged herein, violates numerous sections of
16 the California Labor Code including, but not limited to, the following:

17 (a) Violation of Labor Code sections 1194, 1197, and 1197.1 for
18 Defendants' failure to compensate Plaintiffs and all aggrieved employees
19 with at least minimum wages for all hours worked as alleged herein;

20 (b) Violation of Labor Code section 226(a) for failure to provide accurate
21 wage statements to Plaintiffs and other aggrieved employees as alleged
22 herein;

23 (c) Violation of Labor Code section 1174(d) for failing to maintain
24 records as alleged herein;

25 (d) Violation of Labor Code sections 201, 202, and 203 for failure to pay
26 all unpaid wages upon termination as alleged herein; and

27 (e) Violation of Labor Code section 204 for failure to pay all earned
28 wages owed to Plaintiffs and other aggrieved employees during employment

1 as alleged herein.

2 87. California Labor Code section 1198 also makes it illegal to employ an
3 employee under conditions of labor that are prohibited by the applicable wage
4 order. Discussed herein, Defendant’s conduct violates Wage Order number 7,
5 Section 5, requiring reporting time pay for the Call-In Policy.

6 88. California Labor Code section 204 requires that all wages earned by
7 any person in any employment between the 1st and the 15th days, inclusive, of any
8 calendar month, other than those wages due upon termination of an employee, are
9 due and payable between the 16th and the 26th day of the month during which the
10 labor was performed, and that all wages earned by any person in any employment
11 between the 16th and the last day, inclusive, of any calendar month, other than
12 those wages due upon termination of an employee, are due and payable between
13 the 1st and the 10th day of the following month. California Labor Code section 204
14 also requires that all wages earned for labor in excess of the normal work period
15 shall be paid no later than the payday for the next regular payroll period.

16 89. California Labor Code section 210 provides: “In addition to, and
17 entirely independent and apart from, any other penalty provided in this article,
18 every person who fails to pay the wages of each employee as provided in Sections
19 201.3, 204, 204b, 204.1, 204.2, 205, 205.5, and 1197.5, shall be subject to a civil
20 penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for
21 each failure to pay each employee. (2) For each subsequent violation, or any
22 willful or intentional violation, two hundred dollars (\$200) for each failure to pay
23 each employee, plus 25 percent of the amount unlawfully withheld.”

24 90. Labor Code section 558(a) provides “[a]ny employer or other person
25 acting on behalf of an employer who violates, or causes to be violated, a section of
26 this chapter or any provision regulating hours and days of work in any order of the
27 Industrial Welfare Commission shall be subject to a civil penalty as follows:
28 (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for

1 each pay period for which the employee was underpaid in addition to an amount
2 sufficient to recover underpaid wages. (2) For each subsequent violation, one
3 hundred dollars (\$100) for each underpaid employee for each pay period for which
4 the employee was underpaid in addition to an amount sufficient to recover
5 underpaid wages. (3) Wages recovered pursuant to this section shall be paid to the
6 affected employee.” Labor code section 558(c) provides “[t]he civil penalties
7 provided for in this section are in addition to any other civil or criminal penalty
8 provided by law.”

9 91. Defendant, at all times relevant to this complaint, were employers or
10 persons acting on behalf of an employer(s) who violated Plaintiff’s and other
11 aggrieved employees’ rights by violating various sections of the California Labor
12 Code as set forth above.

13 92. As set forth above, Defendant has violated numerous provisions of
14 both the Labor Code sections regulating hours and days of work as well as the
15 applicable order of the IWC. Accordingly, Plaintiff seeks the remedies set forth in
16 Labor Code section 558 for herself, the State of California, and all other aggrieved
17 employees.

18 93. Pursuant to PAGA, and in particular California Labor Code sections
19 2699(a), 2699.3, 2699.5 and 558, Plaintiff, acting in the public interest as a private
20 attorney general, seeks assessment and collection of unpaid wages and civil
21 penalties for Plaintiff, all other aggrieved employees, and the State of California
22 against Defendant, in addition to other remedies, for violations of California Labor
23 Code sections 201, 202, 203, 204, 210, 221, 224, 226(a), 226.7, 510, 512(a), 1174,
24 1194, 1197, 1197.1, 1198, 2800 and 2802.

25 94. Plaintiff claims herein all penalties permitted by the Private Attorneys
26 General Act of 2004 (PAGA), Labor Code § 2698, *et seq.*, and has complied with
27 the procedures for bringing suit specified by Labor Code § 2699.3. By letter dated
28 January 7, 2016, Plaintiff gave written notice by certified mail to the Labor and

1 Workforce Development Agency (“LWDA”), and Defendants, of the specific
2 provisions of the Labor Code alleged to have been violated, including the facts and
3 theories to support the alleged violations.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff, on behalf of herself, and on behalf of the members
6 of the Class, prays for judgment against Defendant as follows:

- 7 A. For an order certifying the proposed class;
- 8 B. For the attorneys appearing on the above caption to be named class
9 counsel and for the named Plaintiffs to be appointed class
10 representatives;
- 11 C. For compensatory damages in an amount according to proof with
12 interest thereon;
- 13 D. For economic and/or special damages in an amount according to proof
14 with interest thereon;
- 15 E. For payment of unpaid wages in accordance with California labor and
16 employment law, including, where applicable, liquidated damages;
- 17 F. For payment of penalties in accordance with California law;
- 18 G. For Defendants to be found to have engaged in unfair competition in
19 violation of Bus. & Prof. Code §§ 17200, *et seq.*;
- 20 H. For a permanent injunction against Defendants' Call-In scheduling
21 practice;
- 22 I. For Defendants to be ordered and enjoined to make restitution to
23 Plaintiffs and the Class and disgorgement of profits from their
24 unlawful business practices and accounting, pursuant to Business and
25 Professions Code §§ 17203 and 17204;
- 26 J. For interests, attorneys' fees and cost of suit under Labor Code §§ 226
27 and 1194 and Code of Civil Procedure §1021.5;
- 28 K. For all penalties permitted by California's Private Attorney General's

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Act (PAGA), Labor Code section 2698, *et seq.*

L. For all such other and further relief that the court may deem just and proper.

Respectfully Submitted,

Dated: January 7, 2016

MARLIN & SALTZMAN, LLP

By: /s/ Marcus J. Bradley
Marcus J. Bradley, Esq.
Kiley Lynn Grombacher, Esq.
David C. Leimbach, Esq.

Attorneys for Plaintiff
and the Proposed Class

JURY DEMAND

Plaintiff, on behalf of herself and all others similarly situated, hereby does demand a trial by jury in this case.

Dated: January 7, 2016

MARLIN & SALTZMAN, LLP

By: /s/ Marcus J. Bradley
Marcus J. Bradley, Esq.
Kiley Lynn Grombacher, Esq.
David C. Leimbach, Esq.

Attorneys for Plaintiff
and the Proposed Class