

1 **BLUMENTHAL, NORDREHAUG & BHOWMIK**

2 Norman B. Blumenthal (State Bar #068687)

3 Kyle R. Nordrehaug (State Bar #205975)

4 Aparajit Bhowmik (State Bar #248066)

5 2255 Calle Clara

6 La Jolla, CA 92037

7 Telephone: (858)551-1223

8 Facsimile: (858) 551-1232

9 Website: [www.bamlawca.com](http://www.bamlawca.com)

10 Attorneys for Plaintiff

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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**IN AND FOR THE COUNTY OF ORANGE**

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18 JASON D. FRUDAKIS, an individual, on  
19 behalf of himself and all persons similarly  
20 situated,

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22 Plaintiff,

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24 vs.

25 MERCK SHARP & DOHME CORP.; and  
26 Does 1 through 50,

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29 Defendant.

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CASE No. \_\_\_\_\_

**CLASS AND COLLECTIVE ACTION  
COMPLAINT FOR:**

1. UNFAIR COMPETITION IN  
VIOLATION OF CAL. BUS. & PROF.  
CODE §§ 17200 et seq.;

2. FAILURE TO PAY OVERTIME  
COMPENSATION IN VIOLATION OF  
CAL. LAB. CODE §§ 510, 515.5, 551,  
552, 1194 AND 1198, et seq.;

3. FAILURE TO PROVIDE  
ACCURATE ITEMIZED STATEMENTS  
IN VIOLATION OF CAL. LAB. CODE §  
226; and,

4. FAILURE TO PAY OVERTIME  
COMPENSATION IN VIOLATION OF  
29 U.S.C. §§ 201 et seq.

**DEMAND FOR A JURY TRIAL**

1 Plaintiff Jason D. Frudakis ("PLAINTIFF"), on behalf of himself and all other similarly  
2 situated current and former employees, allege on information and belief, except for his own acts  
3 and knowledge, the following:

4  
5 **THE PARTIES**

6 1. Merck Sharp & Dohme Corp. is one of the seven largest pharmaceutical  
7 companies in the world both by market capitalization and revenue. Merck Sharp & Dohme  
8 Corp. hereinafter also referred to as "MERCK" or "DEFENDANT" discovers, manufacturers  
9 and markets a broad range of innovative healthcare products including vaccines, prescription  
10 products, consumer products, biologic products and animal health products. MERCK operates  
11 in more than 140 countries and employs approximately 100,000 individuals worldwide to  
12 deliver these innovative health solutions. The corporation was founded in 1941 and is  
13 headquartered in Whitehouse Station, New Jersey.

14 2. MERCK maintains its principal place of business in Whitehouse Station, New  
15 Jersey and also serves regional markets throughout the United States promoting its unique blend  
16 of product offerings. The Global Human Health division at MERCK, formally called the United  
17 States Human Health division is responsible in relevant part, for marketing MERCK's products  
18 and ensuring that the products are marketed according to specified MERCK standards.

19 3. As part of MERCK's business, DEFENDANT employs individuals  
20 whose primary job duty is promoting DEFENDANT's pharmaceutical healthcare products.  
21 These employees distribute free samples of DEFENDANT's products to physicians and  
22 encourage physicians to prescribe DEFENDANT's products to patients in order to stimulate the  
23 sales of these products. These employees have the job titles of "Pharmaceutical Sales  
24 Representative" and "Customer Representative." Collectively, all employees in these positions,  
25 with or without a "I, II or III" descriptor, and who perform this job duty are referred to herein  
26 as "Sales Representatives." This Action is brought on behalf of the PLAINTIFF and all those  
27 employees of DEFENDANT in California who worked for DEFENDANT as a Sales  
28 Representative during the CLASS PERIOD ("CLASS" or "Class Members").

1           4.       Plaintiff Jason D. Frudakis ("PLAINTIFF") was employed by DEFENDANT  
2 in California as a "Pharmaceutical Sales Representative" and "Customer Representative"  
3 from June 2006 to September 2010.

4           5.       The position of "Pharmaceutical Sales Representative" and "Customer  
5 Representative" was represented by DEFENDANT to the PLAINTIFF and the other Sales  
6 Representatives as an exempt and a salaried position.

7           6.       For DEFENDANT's business, the Class Members functioned as working  
8 members on DEFENDANT's marketing and sales staff. As defined by DEFENDANT's  
9 comprehensive corporate policies and procedures, the primary job duty of the Class  
10 Members employed by MERCK was and is to promote DEFENDANT's pharmaceutical  
11 healthcare products in accordance with DEFENDANT's established specific procedures and  
12 protocols which govern and control every aspect of the work performed by the Sales  
13 Representatives. The primary job duty of these Class Members was not and is not to make  
14 sales and/or obtain orders or contracts for products. MERCK's standardized procedures  
15 mirror the realities of the workplace evidencing a uniformity of work among the Sales  
16 Representatives and negate any exercise of independent judgment and discretion as to any  
17 matter of significance and any customary and regular engagement in sales-related activity.

18           7.       The work schedule for Sales Representatives was set by DEFENDANT.  
19 Generally, the Class Members work ten (10) to twelve (12) hours each workday and ten (10)  
20 to twenty (20) hours of overtime each workweek.

21           8.       DEFENDANT has not established an alternative workweek election for  
22 Sales Representatives for ten (10) to twelve (12) hour workdays.

23           9.       PLAINTIFF and the other Sales Representatives were not provided with  
24 overtime compensation and other benefits required by law as a result of being classified as  
25 "exempt" by DEFENDANT.

26           10.      PLAINTIFF brings this Class Action on behalf of himself and a California  
27 Class consisting of all individuals who are or previously were employed by Defendant  
28 Merck Sharp & Dohme Corp. promoting pharmaceutical healthcare products in California

1 (the "CALIFORNIA CLASS") during the period beginning on the date four years before the  
2 filing of this Action and ending on the date as determined by the Court (the "CALIFORNIA  
3 CLASS PERIOD").

4 11. As a matter of company policy, practice, and procedure, DEFENDANT  
5 has unlawfully, unfairly and/or deceptively classified every Sales Representative as exempt  
6 based on job title alone, failed to pay the required overtime compensation, and otherwise  
7 failed to comply with all applicable labor laws with respect to these Sales Representatives.

8 12. The true names and capacities, whether individual, corporate, subsidiary,  
9 partnership, associate or otherwise of DEFENDANT Does 1 through 50, inclusive, are  
10 presently unknown to the PLAINTIFF who therefore sues these defendants by such fictitious  
11 names pursuant to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this  
12 Complaint to allege the true names and capacities of Does 1 through 50, inclusive, when  
13 they are ascertained. PLAINTIFF is informed and believes, and based upon that information  
14 and belief alleges, that the defendants named in this Complaint, including Does 1 through  
15 50, inclusive, are responsible in some manner for one or more of the events and happenings  
16 that proximately caused the injuries and damages hereinafter alleged.

17 13. The agents, servants, and/or employees of DEFENDANT and each of them  
18 acting on behalf of DEFENDANT acted within the course and scope of his, her or its  
19 authority as the agent, servant, and/or employee of DEFENDANT, and personally  
20 participated in the conduct alleged herein on behalf of DEFENDANT with respect to the  
21 conduct alleged herein. Consequently, DEFENDANT is jointly and severally liable to the  
22 PLAINTIFF and the other members of the CALIFORNIA CLASS, for the loss sustained as  
23 a proximate result of the conduct of DEFENDANT's agents, servants, and/or employees.

### 24 **THE CONDUCT**

25  
26 14. The primary job duty required of the Sales Representatives is promoting  
27 DEFENDANT's pharmaceutical healthcare products to physicians in order to stimulate the  
28 sales of these products in accordance with established protocol and performing tasks as

1 directed or assigned by DEFENDANT. This primary job duty of the sales representatives is  
2 a non-exempt task.

3 15. PLAINTIFF and the Sales Representatives performed the non-exempt labor  
4 described herein above in accordance with DEFENDANT's comprehensive and uniform  
5 corporate policies, procedures and protocols. In accordance with DEFENDANT's  
6 comprehensive and uniform corporate policies, procedures and protocols, DEFENDANT  
7 instituted a blanket classification policy, practice and procedure by which all of these Sales  
8 Representatives were classified as exempt from overtime compensation, rest breaks and  
9 meal breaks. By reason of this uniform exemption practice, policy and procedure applicable  
10 to the PLAINTIFF and all other Sales Representatives who performed this non-exempt  
11 labor, DEFENDANT committed acts of unfair competition in violation of the California  
12 Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (the "UCL"), by engaging in a  
13 uniform company-wide policy, practice and procedure which failed to properly classify the  
14 PLAINTIFF and the other Sales Representatives and thereby failed to pay them overtime  
15 wages for documented overtime hours worked and provide them with meal and rest breaks.  
16 The proper classification of these employees is DEFENDANT's burden. As a result of  
17 DEFENDANT's intentional disregard of the obligation to meet this burden, DEFENDANT  
18 failed to pay all required overtime compensation for work performed by the members of the  
19 CALIFORNIA CLASS and violated the California Labor Code and regulations promulgated  
20 thereunder as herein alleged. In addition, DEFENDANT failed to provide all of the legally  
21 required off-duty meal and rest breaks to the PLAINTIFF and other Sales Representatives as  
22 required by the applicable Wage Order and Labor Code.

23 16. DEFENDANT, as a matter of law, has the burden of proving that (a)  
24 employees are properly classified as exempt and that (b) DEFENDANT otherwise complies  
25 with applicable laws. Other than the initial classification of the PLAINTIFF and the other  
26 Sales Representatives as exempt from being paid overtime based on job title alone,  
27 DEFENDANT had no business policy, practice, or procedure to ensure that the PLAINTIFF  
28 and the other Sales Representatives were properly classified as exempt, and in fact, as a

1 matter of corporate policy erroneously, unilaterally and uniformly classified all the Class  
2 Members as exempt based on job title alone.

3 17. During their employment with DEFENDANT, the PLAINTIFF and the  
4 other Sales Representatives, primarily performed non-exempt job duties, but were  
5 nevertheless classified by DEFENDANT as exempt from overtime pay and worked more  
6 than eight (8) hours a day, forty (40) hours a week, and/or on the seventh (7th) consecutive  
7 day of a workweek.

8 18. PLAINTIFF and the other Sales Representatives employed by DEFENDANT  
9 were not primarily engaged in work of a type that was or now is directly related to the  
10 making of sales, management or general business operations of the employer's customers,  
11 when giving these words a fair but narrow construction. PLAINTIFF and the other Sales  
12 Representatives employed by DEFENDANT were also not primarily engaged in work of a  
13 type that was or now is performed for the purpose of obtaining orders or contracts for  
14 products for DEFENDANT. PLAINTIFF and the other Sales Representatives employed by  
15 DEFENDANT were also not primarily engaged in work of a type that was or now is  
16 performed more than half the time actually selling, including sales-related activities.  
17 PLAINTIFF and the other Sales Representatives employed by DEFENDANT were also not  
18 primarily engaged in work of a type that was or now is performed at the level of the policy  
19 or management of DEFENDANT. PLAINTIFF and the other Sales Representatives  
20 employed by DEFENDANT were also not primarily engaged in work requiring knowledge  
21 of an advanced type in a field or science or learning customarily acquired by a prolonged  
22 course of specialized intellectual instruction and study, but rather their work primarily  
23 involves the performance of routine mental, manual, and/or physical processes. PLAINTIFF  
24 and the other Sales Representatives employed by DEFENDANT were also not primarily  
25 engaged in work that is predominantly intellectual and varied in character, but rather is  
26 routine mental, manual, mechanical, and/or physical work that is of such character that the  
27 output produced or the result accomplished can be standardized in relation to a given period  
28 of time. The work of a Sales Representative of DEFENDANT was work wherein the

1 PLAINTIFF and members of the CALIFORNIA CLASS were primarily engaged in the day-  
2 to-day operations of promoting DEFENDANT's pharmaceutical healthcare products in strict  
3 accordance with the uniform protocols, policies and operations established by  
4 DEFENDANT.

5 19. The primary job duty of the PLAINTIFF and other Sales Representatives  
6 employed by DEFENDANT was and is promoting DEFENDANT's pharmaceutical  
7 healthcare products for DEFENDANT's benefit. As a result, the PLAINTIFF and other  
8 Sales Representatives employed by DEFENDANT were primarily engaged in work that falls  
9 outside the scope of the "outside salesperson" exemption and should have been properly  
10 classified as non-exempt employees.

11 20. PLAINTIFF and all members of the CALIFORNIA CLASS are and were  
12 uniformly classified and treated by DEFENDANT as exempt at the time of hire and  
13 thereafter, DEFENDANT failed to take the proper steps to determine whether the  
14 PLAINTIFF, and the members of the CALIFORNIA CLASS, were properly classified under  
15 the applicable Industrial Welfare Commission Wage Order (Wage Order 1-2001 and/or  
16 Wage Order 4-2001) and Cal. Lab. Code §§ 510 et seq. as exempt from applicable federal  
17 and state labor laws. Since DEFENDANT affirmatively and wilfully misclassified the  
18 PLAINTIFF and the members of the CALIFORNIA CLASS in compliance with California  
19 labor laws, DEFENDANT's practices violated and continue to violate the law. In addition,  
20 DEFENDANT acted deceptively by falsely and fraudulently telling the PLAINTIFF and  
21 each member of the CALIFORNIA CLASS that they were exempt from overtime pay when  
22 DEFENDANT knew or should have known that this statement was false and not based on  
23 known facts. DEFENDANT also acted unfairly by violating the labor laws of California,  
24 and as a result of this policy and practice, DEFENDANT also violated the UCL. In doing  
25 so, DEFENDANT cheated the competition by paying the CALIFORNIA CLASS less than  
26 the amount competitors paid who complied with the law and cheated the CALIFORNIA  
27 CLASS by not paying them in accordance with California law.

28 21. DEFENDANT failed to provide and still fails to provide the PLAINTIFF and

1 the other Sales Representatives with a wage statement in writing that accurately sets forth  
2 gross wages earned, all applicable hourly rates in effect during the pay period and the  
3 corresponding number of hours worked at each hourly rate by the PLAINTIFF and the other  
4 Sales Representatives. This conduct violates California Labor Code § 226. The paystub  
5 also does not accurately display anywhere PLAINTIFF's and the other Sales  
6 Representatives' overtime hours and applicable rates of overtime pay for the pay period.

7 22. By reason of this uniform conduct applicable to the PLAINTIFF and all  
8 CALIFORNIA CLASS members, DEFENDANT committed acts of unfair competition in  
9 violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (the  
10 "UCL"), by engaging in a company-wide policy and procedure which failed to correctly  
11 classify the PLAINTIFF and the CALIFORNIA CLASS of Sales Representatives as non-  
12 exempt. The proper classification of these employees is DEFENDANT's burden. As a  
13 result of DEFENDANT's intentional disregard of the obligation to meet this burden,  
14 DEFENDANT failed to properly calculate and/or pay all required overtime compensation  
15 for work performed by the members of the CALIFORNIA CLASS and violated the  
16 applicable Wage Order, the California Labor Code and the regulations promulgated  
17 thereunder as herein alleged.

### 18 19 **THE UCL REMEDIES**

20 23. As a result of DEFENDANT's UCL violation, PLAINTIFF, on behalf  
21 of himself and the CALIFORNIA CLASS, seeks restitutionary disgorgement of  
22 DEFENDANT's ill-gotten gains into a fluid fund in order to provide restitution of all the  
23 money that DEFENDANT was required by law to pay, but failed to pay, to the PLAINTIFF  
24 and all the other CALIFORNIA CLASS members. PLAINTIFF also seeks all other relief  
25 available to him and the other Sales Representatives located in California under California  
26 law. PLAINTIFF also seeks declaratory relief finding that the employment practices and  
27 policies of DEFENDANT violate California law.



**THE CALIFORNIA CLASS**

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2           24.     PLAINTIFF brings the First Cause of Action for Unfair, Unlawful and  
3 Deceptive Business Practices pursuant to Cal. Bus. & Prof. Code §§ 17200, et seq. (the  
4 "UCL") as a Class Action, pursuant to California Code of Civil Procedure, Section 382, on  
5 behalf of a California Class, defined as all individuals who are or previously were employed  
6 by Defendant Merck Sharp & Dohme Corp. as a Sales Representative as hereinabove  
7 defined in California during the period beginning on the date four years before the filing of  
8 this Action and ending on the date as determined by the Court (the "CALIFORNIA  
9 CLASS").

10           25.     To the extent equitable tolling operates to toll claims by the CALIFORNIA  
11 CLASS against DEFENDANT, the CALIFORNIA CLASS PERIOD should be adjusted  
12 accordingly.

13           26.     DEFENDANT, as a matter of corporate policy, practice and procedure,  
14 and in violation of the applicable Labor Code, Industrial Welfare Commission ("IWC")  
15 Wage Order Requirements, and the applicable provisions of California law, intentionally,  
16 knowingly, and wilfully, engaged in a practice whereby DEFENDANT unfairly, unlawfully,  
17 and deceptively instituted a practice to ensure that the employees employed in a Sales  
18 Representative position were not properly classified as non-exempt from the requirements of  
19 California Labor Code §§ 510, et seq.

20           27.     DEFENDANT has the burden of proof that each and every employee is  
21 properly classified as exempt from the requirements of the Cal. Lab. Code §§ 510, et seq.  
22 DEFENDANT, however, as a matter of uniform and systematic policy and procedure had in  
23 place during the CALIFORNIA CLASS PERIOD and still has in place a policy and practice  
24 that misclassifies the CALIFORNIA CLASS members as exempt. DEFENDANT's uniform  
25 policy and practice in place at all times during the CALIFORNIA CLASS PERIOD and  
26 currently in place is to systematically classify each and every CALIFORNIA CLASS  
27 member as exempt from the requirements of the California Labor Code §§ 510, et seq. This  
28 common business practice applicable to each and every CALIFORNIA CLASS member can

1 be adjudicated on a class-wide basis as unlawful, unfair, and/or deceptive under Cal.  
2 Business & Professions Code §17200, *et seq.* (the "UCL") as causation, damages, and  
3 reliance are not elements of this claim.

4 28. At no time before, during or after the PLAINTIFF's employment with  
5 DEFENDANT was any Sales Representative reclassified as non-exempt from the applicable  
6 requirements of California Labor Code §§ 510, *et seq.* after each CALIFORNIA CLASS  
7 member was initially, uniformly, and systematically classified as exempt upon being hired.

8 29. Any individual declarations of any employees offered at this time purporting  
9 to indicate that one or more Sales Representative may have been properly classified is of no  
10 force or affect absent contemporaneous evidence that DEFENDANT's uniform system did  
11 not misclassify the PLAINTIFF and the other Sales Representatives as exempt pursuant to  
12 Cal. Lab. Code §§ 510, *et seq.* Absent proof of such a contemporaneous system,  
13 DEFENDANT's business practice is uniformly unlawful, unfair and/or deceptive under the  
14 UCL and may be so adjudicated on a class-wide basis. As a result of the UCL violations,  
15 the PLAINTIFF and the CALIFORNIA CLASS members are entitled to compel  
16 DEFENDANT to provide restitutionary disgorgement of their ill-gotten gains into a fluid  
17 fund in order to restitute these funds to the PLAINTIFF and the members of the  
18 CALIFORNIA CLASS according to proof.

19 30. The CALIFORNIA CLASS is so numerous that joinder of all Sales  
20 Representatives, is impracticable.

21 (a) Violating the California Unfair Competition Laws, Cal. Bus. & Prof.  
22 Code § 17200, *et seq.* (the "UCL"), by unlawfully, unfairly and/or  
23 deceptively having in place company policies, practices and procedures  
24 that uniformly misclassified the PLAINTIFF and the members of the  
25 CALIFORNIA CLASS as exempt;

26 (b) Committing an act of unfair competition in violation of the UCL, by  
27 unlawfully, unfairly, and/or deceptively failing to have in place a  
28 company policy, practice and procedure that accurately determined the

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amount of working time spent by the PLAINTIFF and the members of the CALIFORNIA CLASS performing non-exempt labor;

(c) Committing an act of unfair competition in violation of the UCL, by having in place a company policy, practice and procedure that failed to reclassify as non-exempt those members of the CALIFORNIA CLASS whose actual job duties are primarily comprised of non-exempt job functions;

(d) Committing an act of unfair competition in violation of the UCL, by violating Cal. Lab. Code §§510, *et seq.* by failing to pay the correct overtime pay to the PLAINTIFF and members of the CALIFORNIA CLASS who were improperly classified as exempt, and retaining the unpaid overtime to the benefit of DEFENDANT;

(e) Committing an act of unfair competition in violation of the UCL, by failing to provide mandatory meal and/or rest periods to the PLAINTIFF and the Class Members; and,

(f) Committing an act of unfair competition in violation of the UCL, by violating Cal. Lab. Code § 226 by failing to provide the PLAINTIFF and the members of the CALIFORNIA CLASS with an accurate itemized statement in writing showing the gross wages earned, the net wages earned, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

31. This Class Action meets the statutory prerequisites for the maintenance of a Class Action as set forth in California Code of Civil Procedure, Section 382, in that:

(a) The persons who comprise the CALIFORNIA CLASS exceed 100 persons and are therefore so numerous that the joinder of all such persons is impracticable and the disposition of their claims as a class will benefit the parties and the Court;

1 (b) Nearly all factual, legal, statutory, and declaratory relief issues that are  
2 raised in this Complaint are common to the CALIFORNIA CLASS will  
3 apply uniformly to every member of the CALIFORNIA CLASS;

4 (c) The claims of the representative PLAINTIFF are typical of the claims  
5 of each member of the CALIFORNIA CLASS. PLAINTIFF, like all  
6 other members of the CALIFORNIA CLASS, was initially classified as  
7 exempt upon hiring based on the defined corporate policies and  
8 practices and labored under DEFENDANT's systematic procedure that  
9 failed to properly classify the PLAINTIFF and the members of the  
10 CALIFORNIA CLASS. PLAINTIFF sustained economic injury as a  
11 result of DEFENDANT's employment practices. PLAINTIFF and the  
12 members of the CALIFORNIA CLASS were and are similarly or  
13 identically harmed by the same unlawful, deceptive, unfair and  
14 pervasive pattern of misconduct engaged in by DEFENDANT by  
15 deceptively advising all Sales Representatives that they were exempt  
16 from overtime wages based on the defined corporate policies and  
17 practices, and unfairly failing to pay overtime to these employees who  
18 were improperly classified as exempt.

19 (d) The representative PLAINTIFF will fairly and adequately represent and  
20 protect the interest of the CALIFORNIA CLASS, and has retained  
21 counsel who are competent and experienced in Class Action litigation.  
22 There are no material conflicts between the claims of the representative  
23 PLAINTIFF and the members of the CALIFORNIA CLASS that would  
24 make class certification inappropriate. Counsel for the CALIFORNIA  
25 CLASS will vigorously assert the claims of all employees in the  
26 CALIFORNIA CLASS.

27 32. In addition to meeting the statutory prerequisites to a Class Action, this Action  
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1 is properly maintained as a Class Action pursuant to California Code of Civil Procedure,  
2 Section 382, in that:

3 (a) Without class certification and determination of declaratory, statutory  
4 and other legal questions within the class format, prosecution of  
5 separate actions by individual members of the CALIFORNIA CLASS  
6 will create the risk of:

7 1) Inconsistent or varying adjudications with respect to individual  
8 members of the CALIFORNIA CLASS which would establish  
9 incompatible standards of conduct for the parties opposing the  
10 CALIFORNIA CLASS; and/or,

11 2) Adjudication with respect to individual members of the  
12 CALIFORNIA CLASS which would as a practical matter be  
13 dispositive of interests of the other members not party to the  
14 adjudication or substantially impair or impede their ability to  
15 protect their interests.

16 (b) The parties opposing the CALIFORNIA CLASS have acted or refused  
17 to act on grounds generally applicable to the CALIFORNIA CLASS,  
18 making appropriate class-wide relief with respect to the CALIFORNIA  
19 CLASS as a whole in that DEFENDANT uniformly classified and  
20 treated the Sales Representatives as exempt and, thereafter, uniformly  
21 failed to take proper steps to determine whether the Sales  
22 Representatives were properly classified as exempt, and thereby denied  
23 these employees overtime wages as required by law;

24 1) With respect to the First Cause of Action, the final relief on  
25 behalf of the CALIFORNIA CLASS sought does not relate  
26 exclusively to restitution because through this claim the  
27 PLAINTIFF seeks declaratory relief holding that  
28 DEFENDANT's policy and practices constitute unfair

1 competition, along with incidental equitable relief as may be  
2 necessary to remedy the conduct declared to constitute unfair  
3 competition;

4 (c) Common questions of law and fact exist as to the members of the  
5 CALIFORNIA CLASS, with respect to the practices and violations of  
6 California Law as listed above, and predominate over any question  
7 affecting only individual members, and a Class Action is superior to  
8 other available methods for the fair and efficient adjudication of the  
9 controversy, including consideration of:

10 1) The interests of the members of the CALIFORNIA CLASS in  
11 individually controlling the prosecution or defense of separate  
12 actions in that the substantial expense of individual actions will  
13 be avoided to recover the relatively small amount of economic  
14 losses sustained by the individual CALIFORNIA CLASS  
15 members when compared to the substantial expense and burden  
16 of individual prosecution of this litigation;

17 2) Class certification will obviate the need for unduly duplicative  
18 litigation that would create the risk of:

19 A. Inconsistent or varying adjudications with respect to  
20 individual members of the CALIFORNIA CLASS, which  
21 would establish incompatible standards of conduct for  
22 DEFENDANT; and/or,

23 B. Adjudications with respect to individual members of the  
24 CALIFORNIA CLASS would as a practical matter be  
25 dispositive of the interests of the other members not  
26 parties to the adjudication or substantially impair or  
27 impede their ability to protect their interests;

28 3) In the context of wage litigation because as a practical matter a

1 substantial number of individual Class Members will avoid  
2 asserting their legal rights out of fear of retaliation by  
3 DEFENDANT, which may adversely affect an individual's job  
4 with DEFENDANT or with a subsequent employer, the Class  
5 Action is the only means to assert their claims through a  
6 representative; and,

- 7 4) A Class Action is superior to other available methods for the fair  
8 and efficient adjudication of this litigation because class  
9 treatment will obviate the need for unduly and unnecessary  
10 duplicative litigation that is likely to result in the absence of  
11 certification of this Action pursuant to California Code of Civil  
12 Procedure, Section 382.

13 33. This Court should permit this Action to be maintained as a Class Action  
14 pursuant to California Code of Civil Procedure, Section 382, because:

- 15 (a) The questions of law and fact common to the CALIFORNIA CLASS  
16 predominate over any question affecting only individual members  
17 because DEFENDANT's employment practices were uniform and  
18 systematically applied with respect to the CALIFORNIA CLASS;
- 19 (b) A Class Action is superior to any other available method for the fair  
20 and efficient adjudication of the claims of the members of the  
21 CALIFORNIA CLASS because in the context of employment litigation  
22 a substantial number of individual Class Members will avoid asserting  
23 their rights individually out of fear of retaliation or adverse impact on  
24 their employment;
- 25 (c) The members of the CALIFORNIA CLASS exceed 100 persons and  
26 are therefore so numerous that it is impractical to bring all members of  
27 the CALIFORNIA CLASS before the Court;
- 28 (d) PLAINTIFF, and the other CALIFORNIA CLASS members, will not

1 be able to obtain effective and economic legal redress unless the Action  
2 is maintained as a Class Action;

3 (e) There is a community of interest in obtaining appropriate legal and  
4 equitable relief for the acts of unfair competition, statutory violations  
5 and other improprieties, and in obtaining adequate compensation for the  
6 injuries which DEFENDANT's actions have inflicted upon the  
7 CALIFORNIA CLASS;

8 (f) There is a community of interest in ensuring that the combined assets of  
9 DEFENDANT are sufficient to adequately compensate the members of  
10 the CALIFORNIA CLASS for the injuries sustained;

11 (g) DEFENDANT had acted or refused to act on grounds generally  
12 applicable to the CALIFORNIA CLASS, thereby making final class-  
13 wide relief appropriate with respect to the CALIFORNIA CLASS as a  
14 whole;

15 (h) The members of the CALIFORNIA CLASS are readily ascertainable  
16 from the business records of DEFENDANT. The CALIFORNIA  
17 CLASS consists of all DEFENDANT's Sales Representatives  
18 employed in California during the CALIFORNIA CLASS PERIOD;  
19 and,

20 (i) Class treatment provides manageable judicial treatment calculated to  
21 bring an efficient and rapid conclusion to all litigation of all wage and  
22 hour related claims arising out of the conduct of DEFENDANT as to  
23 the members of the CALIFORNIA CLASS.

24 34. DEFENDANT maintains records from which the Court can ascertain and  
25 identify by name and job title, each of DEFENDANT's employees who have been  
26 systematically, intentionally and uniformly subjected to DEFENDANT's corporate policy,  
27 practices and procedures as herein alleged. PLAINTIFF will seek leave to amend the  
28 Complaint to include any additional job titles of similarly situated employees when they



1 have been identified.

2  
3 **THE CALIFORNIA LABOR SUB-CLASS**

4 35. PLAINTIFF further brings the Second and Third Causes of Action on  
5 behalf of a sub-class which consists of all members of the CALIFORNIA CLASS who were  
6 employed by DEFENDANT during the period beginning on the date three (3) years prior to  
7 the filing of this Action and ending on the date as determined by the Court (CALIFORNIA  
8 LABOR SUB-CLASS PERIOD), who performed work in excess of eight (8) hours in one  
9 day and/or forty (40) hours in one workweek and/or hours on the seventh (7th) consecutive  
10 day of a workweek and did not receive overtime compensation (the "CALIFORNIA  
11 LABOR SUB-CLASS") pursuant to California Code of Civil Procedure, Section 382.

12 36. DEFENDANT, as a matter of corporate policy, practice and procedure,  
13 and in violation of the applicable California Labor Code ("Labor Code"), and Industrial  
14 Welfare Commission ("IWC") Wage Order Requirements intentionally, knowingly, wilfully,  
15 and systematically misclassified the PLAINTIFF and the other members of the  
16 CALIFORNIA CLASS and the CALIFORNIA LABOR SUB-CLASS as exempt from  
17 overtime wages and other labor laws based on DEFENDANT's comprehensive policies and  
18 procedures in order to avoid the payment of overtime wages by misclassifying their  
19 positions as exempt from overtime wages and other labor laws. To the extent equitable  
20 tolling operates to toll claims by the CALIFORNIA LABOR SUB-CLASS against  
21 DEFENDANT, the CLASS PERIOD should be adjusted accordingly.

22 37. DEFENDANT has intentionally and deliberately created a number of job  
23 job titles such as "Pharmaceutical Sales Representative" and "Customer Representative"  
24 which were distributed in order to create the superficial appearance of a number of unique  
25 jobs, when in fact, these jobs are substantially similar and can be easily grouped together for  
26 the purpose of determining whether they were all misclassified. One of DEFENDANT's  
27 purposes in creating and maintaining this multi-title and multi-level job classification  
28 scheme is to create an artificial barrier to discovery and class certification for all employees  
similarly misclassified as exempt. DEFENDANT has uniformly misclassified these

1 CALIFORNIA LABOR SUB-CLASS members as exempt and denied them overtime wages  
2 and other benefits to which non-exempt employees are entitled in order to unfairly cheat the  
3 competition and unlawfully profit.

4 38. DEFENDANT maintains records from which the Court can ascertain and  
5 identify by job title each of DEFENDANT's employees who as CALIFORNIA LABOR  
6 SUB-CLASS members have been systematically, intentionally and uniformly misclassified  
7 as exempt as a matter of DEFENDANT's corporate policy, practices and procedures.  
8 PLAINTIFF will seek leave to amend the Complaint to include these additional job titles  
9 when they have been identified.

10 39. The CALIFORNIA LABOR SUB-CLASS is so numerous that joinder of all  
11 members, which number over 100 Sales Representatives, is impracticable.

12 40. Common questions of law and fact exist as to members of the CALIFORNIA  
13 LABOR SUB-CLASS, including, but not limited, to the following:

- 14 (a) Whether DEFENDANT unlawfully failed to pay overtime  
15 compensation to members of the CALIFORNIA LABOR SUB-CLASS  
16 in violation of the California Labor Code and California regulations and  
17 the applicable California Wage Order;
- 18 (b) Whether the members of the CALIFORNIA LABOR SUB-CLASS are  
19 non-exempt employees entitled to overtime compensation for overtime  
20 hours worked under the overtime pay requirements of California Law;
- 21 (c) Whether DEFENDANT's policy and practice of classifying the  
22 CALIFORNIA LABOR SUB-CLASS members as exempt from  
23 overtime compensation and failing to pay the CALIFORNIA LABOR  
24 SUB-CLASS members overtime violate applicable provisions of  
25 California law;
- 26 (d) Whether DEFENDANT unlawfully failed to keep and furnish  
27 CALIFORNIA LABOR SUB-CLASS members with accurate records  
28 of overtime hours worked;

- 1 (e) Whether DEFENDANT's policy and practice of failing to pay members  
2 of the CALIFORNIA LABOR SUB-CLASS all wages when due within  
3 the time required by law after their employment ended violates  
4 California law; and,
- 5 (f) The proper measure of damages and penalties owed to the members of  
6 the CALIFORNIA LABOR SUB-CLASS.

7 41. DEFENDANT, as a matter of corporate policy, practice and procedure,  
8 erroneously classified all Sales Representatives as exempt from overtime wages and other  
9 labor laws. All Sales Representatives, including the PLAINTIFF, performed the same  
10 primary functions and were paid by DEFENDANT according to uniform and systematic  
11 company procedures, which, as alleged herein above, failed to correctly pay overtime  
12 compensation. This business practice was uniformly applied to each and every member of  
13 the CALIFORNIA LABOR SUB-CLASS, and therefore, the propriety of this conduct can  
14 be adjudicated on a class-wide basis.

15 42. DEFENDANT violated the rights of the CALIFORNIA LABOR SUB-CLASS  
16 under California law by:

- 17 (a) Violating Cal. Lab. Code §§ 510, et seq., by misclassifying and thereby  
18 failing to pay the PLAINTIFF and the members of the CALIFORNIA  
19 LABOR SUB-CLASS the correct overtime pay for a workday longer  
20 than eight (8) hours, a workweek longer than forty (40) hours, and/or all  
21 hours worked on the seventh (7th) consecutive day of a workweek for  
22 which DEFENDANT is liable pursuant to Cal. Lab. Code § 1194;
- 23 (b) Violating Cal. Lab. Code §§ 201, 202 and/or 203, which provides that  
24 when an employee is discharged or quits from employment, the  
25 employer must pay the employee all wages due without abatement, by  
26 failing to tender full payment and/or restitution of wages owed or in the  
27 manner required by California law to the members of the  
28 CALIFORNIA LABOR SUB-CLASS who have terminated their

1 employment;

2 (c) Violating Cal. Lab. Code § 226, by failing to provide the PLAINTIFF  
3 and the members of the CALIFORNIA LABOR SUB-CLASS who  
4 were improperly classified as exempt with an accurate itemized  
5 statement in writing showing the gross wages earned, the net wages  
6 earned, all applicable hourly rates in effect during the pay period and  
7 the corresponding number of hours worked at each hourly rate by the  
8 employee.

9 43. This Class Action meets the statutory prerequisites for the maintenance of a  
10 Class Action as set forth in California Code of Civil Procedure, Section 382, in that:

- 11 (a) The persons who comprise the CALIFORNIA LABOR SUB-CLASS  
12 exceed 100 persons and are therefore so numerous that the joinder of all  
13 such persons is impracticable and the disposition of their claims as a  
14 class will benefit the parties and the Court;
- 15 (b) Nearly all factual, legal, statutory, and declaratory relief issues that are  
16 raised in this Complaint are common to the CALIFORNIA LABOR  
17 SUB-CLASS and will apply uniformly to every member of the  
18 CALIFORNIA LABOR SUB-CLASS;
- 19 (c) The claims of the representative PLAINTIFF are typical of the claims  
20 of each member of the CALIFORNIA LABOR SUB-CLASS.  
21 PLAINTIFF, like all other members of the CALIFORNIA LABOR  
22 SUB-CLASS, was improperly classified as exempt and denied overtime  
23 pay as a result of DEFENDANT's systematic classification practices.  
24 PLAINTIFF and all other members of the CALIFORNIA LABOR  
25 SUB-CLASS sustained economic injuries arising from DEFENDANT's  
26 violations of California law; and,
- 27 (d) The representative PLAINTIFF will fairly and adequately represent and  
28 protect the interest of the CALIFORNIA LABOR SUB-CLASS, and

1 has retained counsel who are competent and experienced in Class  
2 Action litigation. There are no material conflicts between the claims of  
3 the representative PLAINTIFF and the members of the CALIFORNIA  
4 LABOR SUB-CLASS that would make class certification  
5 inappropriate. Counsel for the CALIFORNIA LABOR SUB-CLASS  
6 will vigorously assert the claims of all Class Members.

7 44. In addition to meeting the statutory prerequisites to a Class Action, this Action  
8 is properly maintained as a Class Action pursuant to California Code of Civil Procedure,  
9 Section 382, in that:

- 10 (a) Without class certification and determination of declaratory, statutory  
11 and other legal questions within the class format, prosecution of  
12 separate actions by individual members of the CALIFORNIA LABOR  
13 SUB-CLASS will create the risk of:
- 14 1) Inconsistent or varying adjudications with respect to individual  
15 members of the CALIFORNIA LABOR SUB-CLASS which  
16 would establish incompatible standards of conduct for the parties  
17 opposing the CALIFORNIA LABOR SUB-CLASS; or,
  - 18 2) Adjudication with respect to individual members of the  
19 CALIFORNIA LABOR SUB-CLASS which would as a  
20 practical matter be dispositive of interests of the other members  
21 not party to the adjudication or substantially impair or impede  
22 their ability to protect their interests.
- 23 (b) The parties opposing the CALIFORNIA LABOR SUB-CLASS have  
24 acted or refused to act on grounds generally applicable to the  
25 CALIFORNIA LABOR SUB-CLASS, making appropriate class-wide  
26 relief with respect to the CALIFORNIA LABOR SUB-CLASS as a  
27 whole in that DEFENDANT uniformly classified and treated the Sales  
28 Representatives as exempt and, thereafter, uniformly failed to take

1 proper steps to determine whether the Sales Representatives were  
2 properly classified as exempt, and thereby denied these employees  
3 overtime wages as required by law;

4 (c) Common questions of law and fact predominate as to the members of  
5 the CALIFORNIA LABOR SUB-CLASS, with respect to the practices  
6 and violations of California Law as listed above, and predominate over  
7 any question affecting only individual members, and a Class Action is  
8 superior to other available methods for the fair and efficient  
9 adjudication of the controversy, including consideration of:

10 1) The interests of the members of the CALIFORNIA LABOR  
11 SUB-CLASS in individually controlling the prosecution or  
12 defense of separate actions in that the substantial expense of  
13 individual actions will be avoided to recover the relatively small  
14 amount of economic losses sustained by the individual  
15 CALIFORNIA LABOR SUB-CLASS members when compared  
16 to the substantial expense and burden of individual prosecution  
17 of this litigation;

18 2) Class certification will obviate the need for unduly duplicative  
19 litigation that would create the risk of:

20 A. Inconsistent or varying adjudications with respect to  
21 individual members of the CALIFORNIA LABOR SUB-  
22 CLASS, which would establish incompatible standards of  
23 conduct for DEFENDANT; and/or,

24 B. Adjudications with respect to individual members of the  
25 CALIFORNIA LABOR SUB-CLASS would as a  
26 practical matter be dispositive of the interests of the other  
27 members not parties to the adjudication or substantially  
28 impair or impede their ability to protect their interests;

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- 3) In the context of wage litigation because a substantial number of individual class members will avoid asserting their legal rights out of fear of retaliation by DEFENDANT, which may adversely affect an individual’s job with DEFENDANT or with a subsequent employer, the Class Action is the only means to assert their claims through a representative; and,
- 4) A Class Action is superior to other available methods for the fair and efficient adjudication of this litigation because class treatment will obviate the need for unduly and unnecessary duplicative litigation that is likely to result in the absence of certification of this Action pursuant to California Code of Civil Procedure, Section 382.

45. This Court should permit this Action to be maintained as a Class Action pursuant to California Code of Civil Procedure, Section 382, because:

- (a) The questions of law and fact common to the CALIFORNIA LABOR SUB-CLASS predominate over any question affecting only individual members;
- (b) A Class Action is superior to any other available method for the fair and efficient adjudication of the claims of the members of the CALIFORNIA LABOR SUB-CLASS because in the context of employment litigation a substantial number of individual Class Members will avoid asserting their rights individually out of fear of retaliation or adverse impact on their employment;
- (c) The members of the CALIFORNIA LABOR SUB-CLASS exceed 100 persons and are therefore so numerous that it is impractical to bring all members of the CALIFORNIA LABOR SUB-CLASS before the Court;
- (d) PLAINTIFF, and the other CALIFORNIA LABOR SUB-CLASS members, will not be able to obtain effective and economic legal

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redress unless the Action is maintained as a Class Action;

- (e) There is a community of interest in obtaining appropriate legal and equitable relief for the acts of unfair competition, statutory violations and other improprieties, and in obtaining adequate compensation for the damages and injuries which DEFENDANT’s actions have inflicted upon the CALIFORNIA LABOR SUB-CLASS;
- (f) There is a community of interest in ensuring that the combined assets of DEFENDANT are sufficient to adequately compensate the members of the CALIFORNIA LABOR SUB-CLASS for the injuries sustained;
- (g) DEFENDANT has acted or refused to act on grounds generally applicable to the CALIFORNIA LABOR SUB-CLASS, thereby making final class-wide relief appropriate with respect to the CALIFORNIA LABOR SUB-CLASS as a whole;
- (h) The members of the CALIFORNIA LABOR SUB-CLASS are readily ascertainable from the business records of DEFENDANT. The CALIFORNIA LABOR SUB-CLASS consists of those Sales Representatives who worked overtime hours and who were not paid overtime; and,
- (i) Class treatment provides manageable judicial treatment calculated to bring a efficient and rapid conclusion to all litigation of all wage and hour related claims arising out of the conduct of DEFENDANT.

**JURISDICTION AND VENUE**

46. This Court has jurisdiction over this Action pursuant to California Code of Civil Procedure, Section 410.10. This Action is brought as a Class Action on behalf of similarly situated employees of Merck Sharp & Dohme Corp. pursuant to California Code of Civil Procedure, Section 382. At all relevant times mentioned herein, Merck Sharp & Dohme Corp. conducted and continues to conduct substantial and regular business in this County.





1 for which this Court should issue declaratory, and other equitable relief, pursuant to Cal.  
2 Bus. & Prof. Code § 17203, as may be necessary to prevent and remedy the conduct held to  
3 constitute unfair competition.

4 52. Throughout the CLASS PERIOD, it was also DEFENDANT's uniform policy  
5 and practice to make unavailable mandatory meal and rest breaks to the PLAINTIFF and the  
6 Class Members. DEFENDANT's uniform practice requires PLAINTIFF and the Class  
7 Members to work continuously throughout the workday without being supplied meal and/or  
8 rest periods in accordance with the number of hours they worked. At all relevant times  
9 during the CLASS PERIOD, DEFENDANT failed to provide any compensated work time  
10 for interrupting and/or failing to provide such breaks to the PLAINTIFF and the Class  
11 Members. DEFENDANT's conduct therefore violates Labor Code §§ 226.7 and 512.

12 53. Therefore, PLAINTIFF demands on behalf of himself and on behalf of each  
13 member of the CLASS, one (1) hour of pay for each workday in which an off-duty meal  
14 period was not timely provided for each five (5) hours of work, and/or one (1) hour of pay  
15 for each workday in which a second off-duty meal period was not timely provided for each  
16 ten (10) hours of work.

17 54. PLAINTIFF further demands on behalf of himself and on behalf of each  
18 member of the CLASS, one (1) hour of pay for each workday in which a rest period was not  
19 timely provided as required by law.

20 55. By and through the unfair and unlawful business practices described herein  
21 above, DEFENDANT has obtained valuable property, money, and services from the  
22 PLAINTIFF, and the other members of the CALIFORNIA CLASS, and has deprived them  
23 of valuable rights and benefits guaranteed by law, all to their detriment and to the benefit of  
24 DEFENDANT so as to allow DEFENDANT to unfairly compete. Declaratory and equitable  
25 relief is necessary to prevent and remedy this unfair competition.

26 56. All the acts described herein as violations of, among other things, the  
27 California Labor Code, California Code of Regulations, and the Industrial Welfare  
28 Commission Wage Orders, are unlawful, are in violation of public policy, are immoral,

1 unethical, oppressive, and unscrupulous, and are likely to deceive employees, as herein  
2 alleged, and thereby constitute deceptive, unfair and unlawful business practices in violation  
3 of Cal. Bus. and Prof. Code § 17200 et seq.

4 57. PLAINTIFF, and the other members of the CALIFORNIA CLASS, are further  
5 entitled to, and do, seek a declaration that the above described business practices are  
6 deceptive unfair and/or unlawful.

7 58. The practices herein alleged presently continue to occur unabated. As a result  
8 of the unfair and unlawful business practices described above, PLAINTIFF, and the other  
9 members of the CALIFORNIA CLASS, have suffered legal and economic harm.

10  
11 **SECOND CAUSE OF ACTION**

12 **For Failure To Pay Overtime Compensation**

13 **[Cal. Lab. Code §§ 510, 515.5, 551, 552, 1194 and 1198]**

14 **(By PLAINTIFF and the CALIFORNIA LABOR SUB-CLASS)**

15 59. PLAINTIFF, and the other members of the CALIFORNIA LABOR  
16 SUB-CLASS, reallege and incorporate by this reference, as though fully set forth herein,  
17 paragraphs 1 through 58 of this Complaint.

18 60. Cal. Lab. Code § 510 states in relevant part:

19 Eight hours of labor constitutes a day's work. Any work in excess of eight  
20 hours in one workday and any work in excess of 40 hours in any one  
21 workweek and the first eight hours worked on the seventh day of work in any  
22 one workweek shall be compensated at the rate of no less than one and one-  
23 half times the regular rate of pay for an employee. Any work in excess of 12  
24 hours in one day shall be compensated at the rate of no less than twice the  
25 regular rate of pay for an employee. In addition, any work in excess of eight  
26 hours on any seventh day of a workweek shall be compensated at the rate of  
27 no less than twice the regular rate of pay of an employee.

28 61. Cal. Lab. Code § 551 states that, "Every person employed in any occupation of  
labor is entitled to one day's rest therefrom in seven."

62. Cal. Lab. Code § 552 states that, "No employer of labor shall cause his  
employees to work more than six days in seven."

63. Cal. Lab. Code § 515(d) provides: "For the purpose of computing the

1 overtime rate of compensation required to be paid to a nonexempt full-time salaried  
2 employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly  
3 salary."

4 64. Cal. Lab. Code § 1194 states:

5 Notwithstanding any agreement to work for a lesser wage, any employee  
6 receiving less than the legal minimum wage or the legal overtime  
7 compensation applicable to the employee is entitled to recover in a civil action  
8 the unpaid balance of the full amount of this minimum wage or overtime  
9 compensation, including interest thereon, reasonable attorney's fees, and costs  
10 of suit.

11 65. Cal. Lab. Code § 1198 provides: "The maximum hours of work and the  
12 standard conditions of labor fixed by the commission shall be the maximum hours of work  
13 and the standard conditions of labor for employees. The employment of any employee for  
14 longer hours than those fixed by the order or under conditions of labor prohibited by the  
15 order is unlawful."

16 66. In addition, Labor Code Section 558 provides:

- 17 (a) Any employer or other person acting on behalf of an employer  
18 who violates, or causes to be violated, a section of this chapter or any  
19 provision regulating hours and days of work in any order of the Industrial  
20 Welfare Commission shall be subject to a civil penalty as follows:  
21 (1) For any initial violation, fifty dollars (\$50) for each underpaid  
22 employee for each pay period for which the employee was underpaid in  
23 addition to an amount sufficient to recover underpaid wages.  
24 (2) For each subsequent violation, one hundred dollars (\$100) for each  
25 underpaid employee for each pay period for which the employee was  
26 underpaid in addition to an amount sufficient to recover underpaid wages  
27 (3) Wages recovered pursuant to this section shall be paid to the  
28 affected employee.  
(b) If upon inspection or investigation the Labor Commissioner determines  
that a person had paid or caused to be paid a wage for overtime work in  
violation of any provision of this chapter, or any provision regulating hours  
and days of work in any order of the Industrial Welfare Commission, the  
Labor Commissioner may issue a citation. The procedures for issuing,  
contesting, and enforcing judgments for citations or civil penalties issued by  
the Labor Commissioner for a violation of this chapter shall be the same as  
those set out in Section 1197.1.  
(c) The civil penalties provided for in this section are in addition to any other  
civil or criminal penalty provided by law.

29 67. DEFENDANT has intentionally and uniformly designated certain employees  
30 as " exempt" employees, by their job title and without regard to DEFENDANT's realistic  
31 expectations and actual overall requirements of the job, including the PLAINTIFF and the

1 other members of the CALIFORNIA LABOR SUB-CLASS who worked on the production  
2 side of DEFENDANT's business. This was done in an illegal attempt to avoid payment of  
3 overtime wages and other benefits in violation of the Cal. Lab. Code and Industrial Welfare  
4 Commission requirements.

5 68. For an employee to be exempt as an "outside salesperson," all the following  
6 criteria must be met and DEFENDANT has the burden of proving that:

- 7 (a) The employee's primary duty must be making sales as defined to include any  
8 sale, exchange, contract to sell, consignment sale, shipment for sale, or other  
9 disposition; or
- 10 (b) The employee must obtain orders or contracts for services or for the use of  
11 facilities for which a consideration will be paid by the client or customer; and,
- 12 (c) The employee must customarily and regularly spend more than half the work  
13 time away from the employer's place of business engaged in sales-related  
14 activity; and,
- 15 (d) The employee must be primarily engaged in duties which meet the test of  
16 exemption.

17 No member of the CALIFORNIA LABOR SUB-CLASS was or is an outside salesperson  
18 because they all fail to meet the requirements of being an "outside salesperson" within the  
19 meaning of the applicable Wage Order.

20 69. For an employee to be exempt as a bona fide "executive," all the following  
21 criteria must be met and DEFENDANT has the burden of proving that:

- 22 (a) The employee's primary duty must be management of the enterprise, or of a  
23 customarily recognized department or subdivision; and,
- 24 (b) The employee must customarily and regularly direct the work of at least two  
25 (2) or more other employees; and,
- 26 (c) The employee must have the authority to hire and fire, or to command  
27 particularly serious attention to his or his recommendations on such actions  
28 affecting other employees; and,

1 (d) The employee must customarily and regularly exercise discretion and  
2 independent judgment; and,

3 (e) The employee must be primarily engaged in duties which meet the test of  
4 exemption.

5 No member of the CALIFORNIA LABOR SUB-CLASS was or is an executive because  
6 they all fail to meet the requirements of being an "executive" within the meaning of the  
7 applicable Wage Order.

8 70. For an employee to be exempt as a bona fide "administrator," all of the  
9 following criteria must be met and DEFENDANT has the burden of proving that:

10 (a) The employee must perform office or non-manual work directly related to  
11 management policies or general business operation of the employer; and,

12 (b) The employee must customarily and regularly exercise discretion and  
13 independent judgment; and,

14 (c) The employee must regularly and directly assist a proprietor or an exempt  
15 administrator; or,

16 (d) The employee must perform, under only general supervision, work requiring  
17 special training, experience, or knowledge, or,

18 (e) The employee must execute special assignments and tasks under only general  
19 supervision; and,

20 (f) The employee must be primarily engaged in duties which meet the test of  
21 exemption.

22 No member of the CALIFORNIA LABOR SUB-CLASS was or is an administrator because  
23 they all fail to meet the requirements for being an "administrator" under the applicable  
24 Wage Order.

25 71. The Industrial Welfare Commission, in Wage Order 1-2001 and 4-2001, at  
26 section (1)(A)(3)(h), and Labor Code § 515 also set forth the requirements which must be  
27 complied with to place an employee in the "professional" exempt category. For an  
28 employee to be exempt as a bona fide "professional," all the following criteria must be met

1 and DEFENDANT has the burden of proving that:

2 (a) The employee is primarily engaged in an occupation commonly recognized as  
3 a learned or artistic profession. For the purposes of this subsection, “learned  
4 or artistic profession” means an employee who is primarily engaged in the  
5 performance of:

6 1) Work requiring knowledge of an advanced type in a field or science or  
7 learning customarily acquired by a prolonged course of specialized  
8 intellectual instruction and study, as distinguished from a general  
9 academic education and from an apprenticeship, and from training in  
10 the performance of routine mental, manual, or physical processes, or  
11 work that is an essential part or necessarily incident to any of the above  
12 work; or,

13 2) Work that is original and creative in character in a recognized field of  
14 artistic endeavor, and the result of which depends primarily on the  
15 invention, imagination or talent of the employee or work that is an  
16 essential part of or incident to any of the above work; and,

17 3) Whose work is predominately intellectual and varied in character (as  
18 opposed to routine mental, manual, mechanical, or physical work) and  
19 is of such character cannot be standardized in relation to a given period  
20 of time.

21 (b) The employee must customarily and regularly exercise discretion and  
22 independent judgment; and,

23 (c) The employee earns a monthly salary equivalent to no less than two (2) times  
24 the state minimum wage for full-time employment.

25 No member of the CALIFORNIA LABOR SUB-CLASS was or is a professional because  
26 they all fail to meet the requirements of being a "professional" within the meaning of the  
27 applicable Wage Order.

28 72. PLAINTIFF, and the other members of the CALIFORNIA LABOR

1 SUB-CLASS, do not fit the definition of an exempt outside salesperson, executive,  
2 administrative, or professional employee because:

- 3 (a) They did not work as outside salespeople, executives or administrators; and,
- 4 (b) The professional exemption does not apply to the PLAINTIFF, nor to the other  
5 members of the CALIFORNIA LABOR SUB-CLASS because they did not  
6 meet all the applicable requirements to work under the professional exemption  
7 for the reasons set forth above in this Complaint.

8 73. During the class period, the PLAINTIFF, and the other members of the  
9 CALIFORNIA LABOR SUB-CLASS, worked more than eight (8) hours in a workday, forty  
10 (40) hours in a workweek, and/or worked on the seventh (7th) consecutive day of a  
11 workweek.

12 74. At all relevant times, DEFENDANT failed to pay the PLAINTIFF, and the  
13 other members of the CALIFORNIA LABOR SUB-CLASS, overtime compensation for the  
14 hours they have worked in excess of the maximum hours permissible by law as required by  
15 Cal. Lab. Code §§ 510 and 1198, even though the PLAINTIFF, and the other members of  
16 the CALIFORNIA LABOR SUB-CLASS, were regularly required to work, and did in fact  
17 work, overtime hours.

18 75. By virtue of DEFENDANT's unlawful failure to pay additional compensation  
19 to the PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-CLASS, for  
20 their overtime hours, the PLAINTIFF, and the other members of the CALIFORNIA LABOR  
21 SUB-CLASS, have suffered, and will continue to suffer, an economic injury in amounts  
22 which are presently unknown to them and which will be ascertained according to proof at  
23 trial.

24 76. DEFENDANT knew or should have known that the PLAINTIFF, and the  
25 other members of the CALIFORNIA LABOR SUB-CLASS, were misclassified as exempt  
26 and DEFENDANT systematically elected, either through intentional malfeasance or gross  
27 nonfeasance, not to pay them for their overtime labor as a matter of uniform corporate  
28 policy, practice and procedure.





- 1 (1) gross wages earned,
- 2 (2) total hours worked by the employee, except for any employee whose
- 3 compensation is solely based on a salary and who is exempt from payment of
- 4 overtime under subdivision (a) of Section 515 or any applicable order of the
- 5 Industrial Welfare Commission,
- 6 (3) the number of piecerate units earned and any applicable piece rate if the employee
- 7 is paid on a piece-rate basis,
- 8 (4) all deductions, provided that all deductions made on written orders of the
- 9 employee may be aggregated and shown as one item,
- 10 (5) net wages earned,
- 11 (6) the inclusive dates of the period for which the employee is paid,
- 12 (7) the name of the employee and his or her social security number, except that by
- 13 January 1, 2008, only the last four digits of his or her social security number or an
- 14 employee identification number other than a social security number may be shown on
- 15 the itemized statement,
- 16 (8) the name and address of the legal entity that is the employer, and
- 17 (9) all applicable hourly rates in effect during the pay period and the corresponding
- 18 number of hours worked at each hourly rate by the employee.

19 81. At all times relevant herein, DEFENDANT violated Labor Code § 226, in that  
20 DEFENDANT failed to provide an accurate wage statement in writing that properly and  
21 accurately itemized the number of hours worked by the PLAINTIFF, and the other members  
22 of the CALIFORNIA LABOR SUB-CLASS at the effective regular rates of pay and the  
23 effective overtime rates of pay.

24 82. DEFENDANT knowingly and intentionally failed to comply with Labor Code  
25 § 226, causing damages to the PLAINTIFF, and the other members of the CALIFORNIA  
26 LABOR SUB-CLASS. These damages include, but are not limited to, costs expended  
27 calculating the true hours worked and the amount of employment taxes which were not  
28 properly paid to state and federal tax authorities. These damages are difficult to estimate.  
Therefore, PLAINTIFF, and the other members of the CALIFORNIA LABOR SUB-CLASS  
may elect to recover liquidated damages of \$50.00 for the initial pay period in which the  
violation occurred, and \$100.00 for each violation in subsequent pay period pursuant to  
Labor Code § 226, in an amount according to proof at the time of trial (but in no event more  
than \$4,000.00 for the PLAINTIFF and each respective member of the CALIFORNIA  
LABOR SUB-CLASS herein).

#### **FOURTH CAUSE OF ACTION**

1                   **Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. ("FLSA")**

2                   **(By PLAINTIFF and the COLLECTIVE CLASS against DEFENDANT)**

3           83.     PLAINTIFF, and the other members of the COLLECTIVE CLASS, reallege and  
4 incorporate by this reference, as though fully set forth herein, paragraphs 1 through 82 of this  
5 Complaint.

6           84.     DEFENDANT is engaged in communication, business, and transmission between  
7 the states, and is, therefore, engaged in commerce within the meaning of 29 U.S.C. § 203(b).

8           85.     The PLAINTIFF further brings the Fourth Cause of Action on behalf of a  
9 COLLECTIVE CLASS in accordance with 29 U.S.C. §216 which consists of all Sales  
10 Representatives employed in the United States by DEFENDANT during the period three (3)  
11 years prior to the filing of the complaint and ending on the date as determined by the Court, and  
12 who performed work in excess of forty (40) hours in one week (the "COLLECTIVE CLASS").

13           86.     29 U.S.C. § 255 provides that a three-year statute of limitations applies to willful  
14 violations of the FLSA.

15           87.     29 U.S.C. § 207(a)(1) provides in pertinent part:

16                   Except as otherwise provided in this section, no employer shall employ any of his  
17 employees who in any workweek is engaged in commerce or in the production  
18 of goods for commerce, or is employed in an enterprise engaged in commerce or  
19 in the production of goods for commerce, for a workweek longer than forty hours  
20 unless such employee receives compensation for his employment in excess of the  
21 hours above specified at a rate not less than one and one-half times the regular  
22 rate at which he is employed.

23           88.     Section 213(a)(1) of the FLSA provides that the overtime pay requirement does  
24 not apply to:

25                   any employee employed in a bona fide executive, administrative, or professional  
26 capacity (including any employee employed in the capacity of academic  
27 administrative personnel or teacher in elementary or secondary schools), or in the  
28 capacity of outside salesman (as such terms are defined and delimited from time  
to time by regulations of the Secretary, subject to the provisions of the  
Administrative Procedure Act [5 USCS §§ 551 et seq.] except [that] an employee  
of a retail or service establishment shall not be excluded from the definition of  
employee employed in a bona fide executive or administrative capacity because  
of the number of hours in his workweek which he devotes to activities not  
directly or closely related to the performance of executive or administrative  
activities, if less than 40 per centum of his hours worked in the workweek are  
devoted to such activities).

          89.     DEFENDANT has willfully engaged in a widespread pattern and practice of

1 violating the provisions of the FLSA, as detailed above, by uniformly designating certain  
2 employees as "exempt " employees, by their job title and without regard to DEFENDANT's  
3 realistic expectations and actual overall requirements of the job, including the PLAINTIFF and  
4 the other members of the COLLECTIVE CLASS who worked on the production side of  
5 DEFENDANT's business enterprise. This was done in an illegal attempt to avoid payment of  
6 overtime wages and other benefits in violation of the FLSA and Code of Federal Regulations  
7 requirements.

8 90. Pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the  
9 PLAINTIFF and the other members of the COLLECTIVE CLASS are entitled to overtime  
10 compensation for all overtime hours actually worked, at a rate not less than one and one-half  
11 times their regular rate of pay for all hours worked in excess of forty (40) hours in any  
12 workweek. DEFENDANT's failure to pay overtime wages as required by federal law was  
13 willful and not in good faith.

14 91. 29 C.F.R. 541.2 establishes that a job title alone is insufficient to establish the  
15 exempt status of an employee. The exempt or nonexempt status of any particular employee  
16 must be determined on the basis of whether the employee's salary and duties meet the  
17 requirements of the regulations in this part.

18 92. The exemptions of the FLSA as listed in section 13(a), and as explained by 29  
19 C.F.R. 541.3, do not apply to the PLAINTIFF and the other members of the COLLECTIVE  
20 CLASS, because their work consists of non-management, production line labor performed with  
21 skills and knowledge acquired from on-the-job training, rather than from the prolonged course  
22 of specialized intellectual instruction required for exempt learned professional employees such  
23 as medical doctors, architects and archeologists. Sales Representatives either do not hold an  
24 advanced degree, have not taken any prolonged course of specialization, and/or have attained  
25 the vast majority of the skills they use as employees of DEFENDANT from on-the-job training.

26 93. For an employee to be exempt as a bona fide "executive," all the following  
27 criteria must be met and DEFENDANT has the burden of proving that:

28 (a) The employee's primary duty must be management of the enterprise, or of a

- 1 customarily recognized department or subdivision;
- 2 (b) The employee must customarily and regularly direct the work of at least two (2)
- 3 or more other employees;
- 4 (c) The employee must have the authority to hire and fire, or to command
- 5 particularly serious attention to his or his recommendations on such actions
- 6 affecting other employees; and,
- 7 (d) The employee must be primarily engaged in duties which meet the test of
- 8 exemption.

9 No member of the COLLECTIVE CLASS was or is an executive because they all fail to meet

10 the requirements of being an "executive" under section 13 of the FLSA and 29 C.F.R. 541.100.

11 Moreover, none of the members of the COLLECTIVE CLASS managed the work of two or

12 more other employees in a customarily recognized department or subdivision of the employer,

13 and whose recommendations as to the hiring, firing, advancement, promotion or other change

14 of status of the other employees were given particular weight and therefore, they do not qualify

15 for the executive exemption.

16 94. For an employee to be exempt as a bona fide "administrator," all of the following

17 criteria must be met and DEFENDANT has the burden of proving that:

- 18 (a) The employee must perform office or non-manual work directly related to
- 19 management or general business operation of the employer or the employer's
- 20 customers;
- 21 (b) The employee must customarily and regularly exercise discretion and
- 22 independent
- 23 judgment with respect to matters of significance; and,
- 24 (c) The employee must regularly and directly assist a proprietor or an exempt
- 25 administrator; or,
- 26 (d) The employee must perform under only general supervision, work requiring
- 27 special training, experience, or knowledge; and,
- 28 (e) The employee must be primarily engaged in duties which meet the test of

1 exemption.

2 No member of the COLLECTIVE CLASS was or is an administrator because they all fail to  
3 meet the requirements of for being an "administrator" under section 13(a) of the FLSA and 29  
4 C.F.R. 541.300. Moreover, their primary duty does not include work such as planning,  
5 scheduling, and coordinating activities required to develop systems to solve complex business  
6 or scientific problems of the employer or the employer's customers and therefore, they are not  
7 qualified for the administrative exemption.

8 95. For an employee to be exempt as a bona fide "professional", the  
9 DEFENDANT has the burden of proving that the primary duty of the employee is the  
10 performance of work that:

- 11 (a) Requires knowledge of an advanced type in a field of science or learning  
12 customarily acquired by a prolonged course of specialized intellectual instruction;  
13 or  
14 (b) Requires invention, imagination, originality or talent in a recognized field of  
15 artistic or creative endeavor.

16 No member of the COLLECTIVE CLASS was or is a professional because they all fail to meet  
17 the requirements of being an "professional" within the meaning of 29 CFR 541.300.  
18 Further, the PLAINTIFF and the other Sales Representatives operated under intense scrutiny  
19 from management and are strictly dictated by written guidelines and standardized procedures.

20 96. During the COLLECTIVE CLASS PERIOD, the PLAINTIFF, and other  
21 members of the COLLECTIVE CLASS, worked more than forty (40) hours in a workweek.

22 97. At all relevant times, DEFENDANT failed to pay the PLAINTIFF, and other  
23 members of the COLLECTIVE CLASS, overtime compensation for the hours they have worked  
24 in excess of the maximum hours permissible by law as required by section 207 of the FLSA,  
25 even though the PLAINTIFF, and the other members of the COLLECTIVE CLASS, were  
26 regularly required to work, and did in fact work, overtime hours.

27 98. For purposes of the Fair Labor Standards Act, the employment practices of  
28 DEFENDANT were and are uniform throughout the United States in all respects material to the

1 claims asserted in this Complaint.

2 99. There are no other exemptions applicable to the PLAINTIFF and/or to members  
3 of the COLLECTIVE CLASS.

4 100. As a result of DEFENDANT's failure to pay overtime compensation for  
5 overtime hours worked, as required by the FLSA, the PLAINTIFF and the members of the  
6 COLLECTIVE CLASS were damaged in an amount to be proved at trial.

7 101. Therefore, the PLAINTIFF demands that he and the members of the  
8 COLLECTIVE CLASS be paid overtime compensation as required by the FLSA for every hour  
9 of overtime worked in any workweek for which they were not compensated, plus interest and  
10 statutory costs as provided by law.

11  
12 **PRAYER**

13 WHEREFOR, the PLAINTIFF prays for judgment against each Defendant, jointly  
14 and severally, as follows:

15 1. On behalf of the CALIFORNIA CLASS:

- 16 A) That the Court certify the First Cause of Action asserted by the CALIFORNIA  
17 CLASS as a Class Action pursuant to California Code of Civil Procedure,  
18 Section 382;
- 19 B) An order requiring DEFENDANT to correctly calculate and pay all wages and  
20 all sums unlawfully withheld from compensation due to the PLAINTIFF and  
21 the other members of the CALIFORNIA CLASS; and,
- 22 C) Restitutionary disgorgement of DEFENDANT's ill-gotten gains into a fluid  
23 fund for restitution of the sums incidental to DEFENDANT's violations due to  
24 the PLAINTIFF and to the other members of the CALIFORNIA CLASS  
25 according to proof.
- 26 D) An order temporarily, preliminarily, and permanently enjoining and restraining  
27 DEFENDANT from engaging in similar unlawful conduct as set forth herein.

28 2. On behalf of the CALIFORNIA LABOR SUB-CLASS:

- 1           A)    That the Court certify the Second and Third Causes of Action asserted by the  
2                    CALIFORNIA LABOR SUB-CLASS as a Class Action pursuant to California  
3                    Code of Civil Procedure, Section 382;
- 4           B)    Compensatory damages, according to proof at trial, including compensatory  
5                    damages for overtime compensation due to the PLAINTIFF and the other  
6                    members of the CALIFORNIA LABOR SUB-CLASS, during the applicable  
7                    CALIFORNIA CLASS PERIODS plus interest thereon at the statutory rate;
- 8           C)    The wages of all terminated employee from the CALIFORNIA LABOR SUB-  
9                    CLASS as a penalty from the due date thereof at the same rate until paid or  
10                    until an action therefore is commenced, in accordance with Cal. Lab. Code §  
11                    203; and,
- 12           D)    The greater of all actual damages or fifty dollars (\$50) for the initial pay  
13                    period in which a violation occurs and one hundred dollars (\$100) per each  
14                    member of the CALIFORNIA LABOR SUB-CLASS for each violation in a  
15                    subsequent pay period, not exceeding an aggregate penalty of four thousand  
16                    dollars (\$4,000), and an award of costs for violation of Cal. Lab. Code § 226.
- 17 3.    On behalf of the COLLECTIVE CLASS:
- 18           A)    That the Court certify the Fourth Cause of Action asserted by the  
19                    COLLECTIVE CLASS as an opt-in Class Action under 29 U.S.C. § 216(b);
- 20           B)    Issue a declaratory finding that DEFENDANT’s acts, policies, practices and  
21                    procedures complained of herein violated provisions of the Fair Labor  
22                    Standards Act;
- 23           C)    That the PLAINTIFF and the other members of the COLLECTIVE CLASS  
24                    recover compensatory damages and an equal amount of liquidated damages as  
25                    provided under the law and in 29 U.S.C. § 216(b).
- 26 4.    On all claims:
- 27           A)    An award of interest, including prejudgment interest at the legal rate;
- 28           B)    An award of penalties and cost of suit, as allowable under the law. Neither



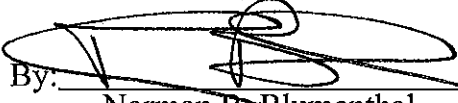
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this prayer nor any other allegation or prayer in this Complaint is to be construed as a request, under any circumstance, that would result in a request for attorneys' fees or costs available under Cal. Lab. Code § 218.5; and,

C) Such other and further relief as the Court deems just and equitable.

Dated: December 10, 2010

BLUMENTHAL, NORDREHAUG & BHOWMIK

By:   
Norman B. Blumenthal  
Attorneys for Plaintiff

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**DEMAND FOR JURY TRIAL**

PLAINTIFF demands a jury trial on issues triable to a jury.

Dated: December 10, 2010

BLUMENTHAL, NORDREHAUG & BHOWMIK

By: 

Norman B. Blumenthal  
Attorneys for Plaintiff