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ALAMEDA COUNTY

1 Edward J. Wynne, Esq. {165819}
2 J.E.B. Pickett, Esq. {154294}

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3 **RIGHETTI ♦ WYNNE**
4 456 Montgomery Street, 14th Floor
5 San Francisco, CA 94104
6 Tel.(415) 983-0900
7 Fax.(415) 397-9005

CLERK OF THE SUPERIOR COURT
BY BARBARA C. YOUNG, DEPUTY

8 Counsel for Plaintiffs

9 **SUPERIOR COURT OF CALIFORNIA,**
10 **ALAMEDA COUNTY**

11 ROBERT WALKER, THERESE
12 WONNACOTT, LAWRENCE HOULE,
13 on behalf of themselves and on behalf of all
14 others members of the general public similarly
15 situated,

Case No.: RG 04159589
FIRST AMENDED COMPLAINT
[CLASS ACTION]

16 Plaintiffs,

- 1. Violations of Labor Code
- 2. Violation of B&P § 17200

17 vs.

18 SPENCER GIFTS, LLC, and DOES 1 through
19 50, inclusive,

20 Defendants.

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FIRST CAUSE OF ACTION

Representative Plaintiffs bring this challenge to Defendants' lucrative, repressive and unlawful business practices on behalf of themselves and a class of all others similarly situated and for a Cause of Action against Defendants, SPENCER GIFTS LLC and DOES 1-50, inclusive, (hereinafter, "Defendants") and each of them, allege as follows:

THE PARTIES, JURISDICTION AND VENUE

1.

This class action is brought pursuant to Section 382 of the California Code of Civil Procedure. The monetary damages and restitution sought by Plaintiffs exceed the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. The amount in controversy for each class representative, including their claims for compensatory damages and pro rata share of attorney fees, are less than \$75,000.

2.

Venue is proper in Alameda County as at least some of the acts complained of herein occurred in Alameda County as Defendants own and operate retail stores in Alameda County. At all times herein mentioned, Representative Plaintiffs and the class identified herein worked as employees for Defendants in salaried positions in Defendants' retail store locations under the business name "Spencer Gifts." Defendants' salaried store employees covered by this action are not employees which fall into an exception to the California Labor Code Section 1194 and/or California Industrial Welfare Commission Wage Order 7 governing the mercantile industry, applicable to Defendants' business. The acts complained of in this First Cause of Action occurred, at least in part, within three years of the filing of the original complaint in this action up to and including the time that this action is certified as a class action. The Representative Plaintiffs worked in salaried positions at one of Defendants' retail store locations within the State of California.

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3.

Defendant, Spencer Gifts LLC, is a corporation doing business in California. Defendant Spencer Gifts LLC owns, operates, manages and controls retail stores in California.

4.

Plaintiffs are informed and believe and thereon allege that all times herein mentioned Defendants and Does 1 through 50, are and were corporations, business entities, individuals and partnerships, licensed to do business and actually doing business in the State of California, Alameda County. Defendants own and operate an industry, business and establishment in approximately 51 separate geographic locations within the State of California, including within Alameda County, for the purpose of selling general merchandise. As such, and based upon all the facts and circumstances incident to Defendants' business in California, Defendants are subject to California Labor Code § 1194, *et seq.*, California Business and Professions Code § 17200, *et seq.*, (Unfair Practices Act) and IWC Wage Order 7.

5.

Plaintiffs do not know the true names or capacities, whether individual, partner or corporate, of the Defendants sued herein as DOES 1 through 50, inclusive, and for that reason, said Defendants are sued under such fictitious names, and Plaintiffs pray leave to amend this complaint when the true names and capacities are known. Plaintiffs are informed and believe and thereon allege that each of said fictitious Defendants were responsible in some way for the matters alleged herein and proximately caused Plaintiffs and members of the general public and the class to be subject to the illegal employment practices, wrongs and injuries complained of herein.

6.

At all times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter alleged to have been done by the named Defendants; and furthermore, the Defendants, and each of them, were the agents, servants and employees of each of the other

1 Defendants, as well as the agents of all Defendants, and at all times herein mentioned, were
2 acting within the course and scope of said agency and employment.

3
4 **7.**

5 At all times herein mentioned, Defendants, and each of them, were members of, and
6 engaged in, a joint venture, partnership and common enterprise, and acting within the course
7 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

8
9 **8.**

10 At all times herein mentioned, the acts and omissions of various Defendants, and each
11 of them, concurred and contributed to the various acts and omissions of each and all of the
12 other Defendants in proximately causing the injuries and damages as herein alleged.

13
14 **9.**

15 At all times herein mentioned, Defendants, and each of them, ratified each and every act
16 or omission complained of herein. At all times herein mentioned, the Defendants, and each of
17 them, aided and abetted the acts and omissions of each and all of the other Defendants in
18 proximately causing the damages as herein alleged. Further, at all times mentioned herein, the
19 wage and hour related compensation policies of Defendants' retail store locations in California
20 are and were dictated by, controlled by, and ratified by the Defendants herein and each of them.

21 **FACTUAL AND CLASS ALLEGATIONS**

22
23 **10.**

24 Pursuant to California Labor Code §§ 218, 218.5, 218.6, 1194 and 2699, Plaintiffs may
25 bring a civil action for overtime wages directly against the employer without first filing a claim
26 with the California Division of Labor Standards Enforcement and may recover such wages,
27 together with interest thereon, penalties, attorney fees and costs.

28
29 **11.**

30 Representative Plaintiffs and all members of the class identified herein were regularly
31 scheduled as a matter of uniform company policy to work and in fact worked as salaried
32 employees in excess of eight hours per workday and/or in excess of forty hours per workweek

1 without receiving straight time or overtime compensation for such overtime hours worked in
2 violation of California Labor Code § 1194 and IWC Wage Order 7. Representative Plaintiffs
3 and the other members of the class were improperly and illegally mis-classified by Defendants
4 as "exempt" employees when, in fact, they were "non-exempt" employees according to
5 California law. Representative Plaintiffs and the class have the right to be compensated by
6 Defendants at the appropriate compensatory wage rate for said work heretofore performed,
7 consisting of the straight time rate plus the appropriate overtime premium as mandated by
8 California law including interest, attorney fees and costs, and civil penalties thereon pursuant to
9 Labor Code §§ 558 and 1197.1.

10
11 **12.**

12 Plaintiffs bring this complaint pursuant to California Code of Civil Procedure § 382 on
13 behalf of a class. All claims alleged herein arise under California law for which Plaintiffs seek
14 relief authorized under California law. The class is comprised of, and defined as:

15 All current and former California based salaried non-exempt retail store
16 personnel who worked and/or are working overtime for Defendants
17 within the last four years of the filing of the original Complaint in this
18 action up to and including the time that this action is certified as a class,
19 yet were not paid overtime.

20 The members of the class are so numerous that joinder of all members would be
21 impractical, if not impossible. The members of the class are readily ascertainable by a review
22 of Defendants' records. Further, the subject matter of this action both as to factual matters and
23 as to matters of law, are such that there are questions of law and fact common to the class
24 which predominate over questions affecting only individual members including, among other
25 things, the following:

26 a. Statistically, one hundred percent of the class members were paid on a salary
27 basis with no overtime compensation paid for work accomplished in excess of forty hours per
28 week, or eight hours per day. Plaintiffs are informed and believe and based thereon allege that
Defendants and each of them have failed to meet the requirements for establishing the

1 exemption because all class members (1) regularly spent a majority of their time performing
2 non-exempt work, (2) did not customarily and regularly exercise discretion and independent
3 judgment, (3) did not have the authority to hire or fire or make meaningful recommendations
4 regarding same, and, (4) did not customarily and regularly supervise at least two employees or
5 the equivalent. In primarily engaging in non-exempt work, Representative Plaintiffs and the
6 class, at all times relevant, met the realistic expectations of Defendants and each of them. Thus,
7 Representative Plaintiffs and the class members were not exempt from the overtime
8 requirements of California law for these reasons.

9
10 b. Defendants have a uniform and consistent policy and practice concerning duties
11 and responsibilities of the class members which required that the class members both work
12 overtime without pay and regularly spend a majority of their time performing non-exempt
13 tasks. Further, Defendants dispensed misinformation amongst the class members to the effect
14 that salaried employees are not entitled to overtime compensation under Defendants' labor
15 policies and practices and under California law.

16 c. Defendants have a uniform and consistent policy and practice concerning duties
17 and responsibilities of the class members such that members do not regularly and customarily
18 exercise discretion and independent judgment.

19 d. The duties and responsibilities of the salaried employees at Defendants' retail
20 store locations were substantially similar from store to store, and, employee to employee.
21 Further, any variations in job activities between the different individuals in these positions are
22 legally insignificant to the issues presented by this action since the central facts remain, to wit,
23 these employees performed non-exempt work in excess of 50% of the time in their workday,
24 these employees did not regularly exercise discretion and independent judgment, these
25 employees' work routinely included work in excess of 40 hours per week and/or 8 hours per
26 day and they were not, and have never been, paid overtime compensation for their work.
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13.

There are predominant common questions of law and fact and a community of interest amongst Plaintiff and the claims of the absent class members concerning whether Defendants' regular business custom and practice of requiring substantial "overtime" work and not paying for said work according to the overtime mandates of California law is, and at all times herein mentioned was, in violation of California Labor Code § 1194, *et seq.*, the Unfair Practices Act and IWC Wage Order 7. Defendants' employment policies and practices wrongfully and illegally failed to compensate salaried employees for substantial overtime compensation earned as required by California law.

14.

Representative Plaintiffs' claims are typical of the claims of all members of the class. Plaintiffs, as representative parties, will fairly and adequately protect the interests of the class by vigorously pursuing this suit through attorneys who are skilled and experienced in handling civil litigation of this type.

15.

The California Labor Code and Wage Order provisions upon which Plaintiffs assert these claims are broadly remedial in nature. These laws and labor standards serve an important public interest in establishing minimum working conditions and standards in California. These laws and labor standards protect the average working employee from exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting onerous terms and conditions of employment. The nature of this action and the format of laws available to Representative Plaintiffs and members of the class identified herein make the class action format a particularly efficient and appropriate procedure to redress the wrongs alleged herein. If each employee were required to file an individual lawsuit, the corporate Defendants would necessarily gain an unconscionable advantage since they would be able to exploit and overwhelm the limited resources of each individual class member with their vastly superior financial and legal resources. Requiring each class member to pursue an individual remedy

1 would also discourage the assertion of lawful claims by employees who would be disinclined to
2 file an action against their current or former employer for real and justifiable fear of retaliation
3 and permanent damage to their careers at subsequent employment.

4 **16.**

5 The prosecution of separate actions by the individual class members, even if possible,
6 would create a substantial risk of (1) inconsistent or varying adjudications with respect to
7 individual class members against the Defendants and which would establish potentially
8 incompatible standards of conduct for the Defendants, and/or (2) adjudications with respect to
9 individual class members which would, as a practical matter, be dispositive of the interests of
10 the other class members not parties to the adjudications or which would substantially impair or
11 impede the ability of the class members to protect their interests. Further, the claims of the
12 individual members of the class are not sufficiently large to warrant vigorous individual
13 prosecution considering all of the concomitant costs and expenses.
14

15 **17.**

16 Such a pattern, practice and uniform administration of corporate policy regarding illegal
17 employee compensation, as described herein, is unlawful and creates an entitlement to recovery
18 by Representative Plaintiffs and the class identified herein, in a civil action, for the unpaid
19 balance of the full amount of the straight time compensation and overtime premiums owing,
20 including interest thereon, penalties, reasonable attorneys fees, and costs of suit according to
21 the mandate of California Labor Code § 1194, et seq.

22 **18.**

23 Proof of a common business practice or factual pattern, of which the named Plaintiffs'
24 experience are representative, will establish the right of each member of the plaintiff class to
25 recovery on the causes of action alleged herein.

26 **19.**

27 The plaintiff class is entitled in common to a specific fund with respect to the overtime
28 compensation monies illegally and unfairly retained by Defendants. The plaintiff class is

1 entitled in common to restitution and disgorgement of those funds being improperly withheld
2 by Defendants. This action is brought for the benefit of the entire class and will result in the
3 creation of a common fund.

4 **20.**

5 Representative Plaintiffs and members of the class identified herein as former
6 employees were discharged by Defendants or voluntarily quit, and did not have a written
7 contract for employment. The Defendants, in violation of California Labor Code §§ 201 and
8 202, *et seq.*, respectively, had a consistent and uniform policy, practice and procedure of
9 willfully failing to pay the earned and unpaid wages of all such former employees. The
10 Defendants have willfully failed to pay the earned and unpaid wages of such individuals,
11 including, but not limited to, straight time, overtime, vacation time, and other wages earned and
12 remaining uncompensated according to amendment, or proof. Representative Plaintiffs and
13 other members of the class did not secret or absent themselves from Defendants nor refuse to
14 accept the earned and unpaid wages from Defendants. Accordingly, Defendants are liable for
15 waiting time penalties for the unpaid wages pursuant to California Labor Code § 203.
16

17 **21.**

18 As a pattern and practice, in violation of the aforementioned labor laws and wage
19 orders, Defendants knowingly and intentionally did not maintain any records or furnish any
20 records to the class pertaining to when Representative Plaintiffs and the members of the class
21 began and ended each work period, meal period, the total daily hours worked, and the total
22 hours worked per pay period and applicable rates of pay in violation of California Labor Code
23 §§ 226 and 1174 thereby causing injury to the class. Accordingly, Defendants and each of
24 them are liable for civil penalties to Plaintiffs and the class pursuant to Labor Code §§ 226,
25 226.3, 558, 1174.5 and 2699.
26

27 **22.**

28 In violation of Labor Code § 226.7, Defendants failed to provide meal and rest period
breaks in the number, length and manner as required. At no time have Plaintiffs and the class

1 entered into any written agreement with the Defendants expressly or impliedly waiving their
2 right to their meal breaks. Plaintiffs and the class have been injured by Defendants' failure to
3 comply with Labor Code § 226.7 and are thus entitled to the wages set forth in Labor Code §
4 226.7 and penalties per Labor Code §§ 558 and 2699.

5 **23.**

6 Pursuant to Labor Code § 2699, the Private Attorneys General Act of 2004,
7 Representative Plaintiffs bring this action on behalf of themselves and other current and former
8 employees and seek recovery of applicable civil penalties as follows:

9 a. where civil penalties are specifically provided in the Labor Code for each of the
10 violations alleged herein, Plaintiffs seek recovery of such penalties;

11 b. where civil penalties are not established in the Labor Code for each of the
12 violations alleged herein, Plaintiffs seek recovery of the penalties established in Labor Code §
13 2699(e).
14

15 WHEREFORE, Representative Plaintiffs, on their own behalf and on behalf of the
16 members of the class, pray for judgment as hereinafter set forth.

17 **SECOND CAUSE OF ACTION**

18 COMES NOW, Representative Plaintiffs, individually and on behalf of both the class
19 and the general public and as a second, separate and distinct cause of action against
20 Defendants, and each of them, allege as follows:

21 **24.**

22 Plaintiffs herein repeat and re-allege as though fully set forth at length each and every
23 paragraph of this Complaint, excepting those paragraphs which are inconsistent with this cause
24 of action for relief regarding Defendants' violations of California Business and Professions
25 Code § 17200 *et seq.* (Unfair Practices Act).
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25.

At all times herein mentioned Defendants, and each of them, acting as the employer, individually or through officers, directors, agents or employees of another have (1) required or caused Representative Plaintiffs and the class to work for longer hours than those fixed or under conditions prohibited by Industrial Welfare Commission wage orders applicable to Defendants' business, (2) paid or caused to be paid to Plaintiffs and the class less than the minimum fixed by IWC Wage Order 7, and (3) violated, refused, or neglected to comply with any provision of Part 4, Chapter 1 of the Labor Code beginning at § 1171 or any order or ruling of the Industrial Welfare Commission. As a result of the foregoing and the acts complained of herein, Defendants, and each of them, are guilty of violating California Labor Code §§ 204, 216, 1198 and 1199. In addition to the other violations of the law set forth in the First Cause of Action, Defendants' violations of California Labor Code §§ 204, 216, 1198 and 1199 serve as a further basis for Defendants' liability under California Business & Professions Code § 17200, *et seq.*

26.

Defendants, and each of them, have engaged in unfair business practices in California by practicing, employing and utilizing the employment practices as outlined herein, to wit, by requiring their salaried retail store employees to perform the labor services without overtime compensation. Defendants' utilization of such unfair business practices constitutes unfair competition and provides an unfair advantage over Defendants' competitors. Representative Plaintiffs, and other similarly situated members of the general public, seek full restitution of monies, as necessary and according to proof, to restore any and all monies withheld, acquired and/or converted by the Defendants by means of the unfair practices complained of herein. Representative Plaintiffs seek, on their own behalf and on behalf of the general public, the appointment of a receiver, as necessary.

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27.

Plaintiffs are informed and believe and on that basis allege that at all times herein mentioned Defendants have engaged in unlawful, deceptive and unfair business practices, as proscribed by California Business and Professions Code § 17200 *et seq.*, including those alleged herein thereby depriving Plaintiffs and other members of the general public the minimum working standards and conditions due to them under the California labor law and Industrial Welfare Commission Wage Orders as specifically described herein.

28.

Representative Plaintiffs, and all persons similarly situated, are further entitled to and do seek a both a declaration that the above-described business practices are unfair, unlawful and/or fraudulent and injunctive relief restraining Defendants from engaging in any of such business practices in the future. Such misconduct by Defendants, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to all members of the class in that the Defendants will continue to violate California law, represented by labor statutes and IWC Wage Orders, unless specifically ordered to comply with same. This expectation of future violations will require current and future employees to repeatedly and continuously seek legal redress in order to gain compensation to which they are entitled under California law. Plaintiffs have no other adequate remedy at law to insure future compliance with the California labor laws and Wage Orders alleged to have been violated herein.

WHEREFORE, Representative Plaintiffs, on their own behalf and on behalf of the members of the class and the general public, pray for judgment as follows:

1. For an order certifying the proposed class;
2. Upon the First Cause of Action, for consequential damages according to proof as set forth in California Labor Code § 1194, *et seq.* (and California Industrial Welfare Commission Wage Order 5) related to overtime wages due and owing;
3. Upon the First Cause of Action, for waiting time penalties according to proof pursuant to California Labor Code § 203;

1 4. Upon the First Cause of Action, for civil penalties pursuant to California Labor
2 Code §§ 226, 226.3, 558, 1174.5, 1197.1 and 2699;

3 5. Upon the First Cause of Action, for wages pursuant to Labor Code § 226.7;

4 6. Upon the Second Cause of Action, that Defendants be ordered to show cause
5 why they should not be enjoined and ordered to comply with IWC Wage Order 7 related to
6 payment of overtime compensation and record keeping for Defendants' salaried retail store
7 employees who are primarily engaged in non-exempt work and work more than 40 hours per
8 week or 8 hours per day; and for an order enjoining and restraining Defendants and their
9 agents, servants and employees related thereto;

10 7. Upon the Second Cause of Action, for a declaratory judgment and a decree
11 adjudging and decreeing that Representative Plaintiffs and the members of the class have
12 regularly worked compensable overtime; further, that the work performed by Representative
13 Plaintiffs and the members of the class is subject to overtime compensation requirements
14 and/or is in excess of 40 hours per week and/or 8 hours a day, and that Representative Plaintiffs
15 and the members of the class are entitled to overtime compensation for said work;

16 8. Upon the Second Cause of Action, for restitution to Representative Plaintiffs
17 and other similarly effected members of the general public of all funds unlawfully acquired by
18 Defendants by means of any acts or practices declared by this Court to be violative of the
19 mandate established by California Business and Professions Code § 17200 *et seq.*;

20 9. For pre-judgment interest as allowed by California Labor Code §§ 1194 and
21 218.6;

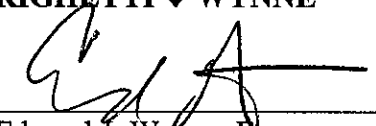
22 10. For reasonable attorneys fees, expenses and costs as provided by California
23 Labor Code §§ 218, 226, 1194, and 2699; and,
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11. For such other and further relief the Court may deem just and proper.

DATED: July 14, 2004

RIGHETTI ♦ WYNNE

By: 
Edward J. Wynne, Esq.

Attorneys for Plaintiffs