UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CASE NO.**:** 3:14-CV-00335-RNC

MARK SHALLIN, BRYAN WINSLOW,
JUAN TERRY and MELISSA PENNINGTON

Individually and on behalf of all others similarly situated,

Plaintiffs,

versus

PAYLESS SHOESOURCE, INC.,
COLLECTIVE BRANDS, INC.,
COLLECTIVE BRAND SERVICES, INC.,
PAYLESS SHOESOURCE INC. 401(k) PROFIT SHARING PLAN, and
PAYLESS SHOESOURCE, Inc., as Plan Administrator

Defendants.

PLAINTIFFS' SECOND AMENDED CLASS & COLLECTIVE ACTION COMPLAINT FOR VIOLATION OF ERISA & FLSA

CLASS ACTION | COLLECTIVE ACTION | DEMAND FOR JURY TRIAL

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Summary of the Allegations

FLSA Violation Summary

Defendants in this case made voluntary determinations that managers who do not supervise 2 or more full time employees or their equivalent as required by the FLSA Executive Exemption, should be hourly, non-exempt employees. However, for much of the time within the past decade, Defendants willfully chose to both misclassify this group of employees (titled Store Managers and Store Leaders) as exempt from the overtime wage sections of the Fair Labor Standards Act for many of its stores in the U.S. and its territories. Defendants further willfully refused to compensate these employees for all the hours worked over 40 hours in any work week and/or incorrectly compensate these employees half time under the fluctuating work week method even when they admit and self-determined that they were non-exempt employees. Further, Defendants have a de facto, common practice and unwritten policy of encouraging Store Managers and Store Leaders to work off the clock to willfully avoid having to compensate this class for all hours worked. The decision was uniform and done so the Defendants would not have to pay this class of employees overtime wages. The decision was made at the highest corporate level, was wrong, and the actors had reasons to know it, *e.g.*, because they have faced claims in the past and are aware of the misclassification and the FLSA exemptions. This case involves employees who were both treated as exempt and non-exempt throughout their employment.

Indeed, the Defendants' unlawful pay practice saves them hundreds of millions of dollars. In fact, years of litigation (even if unsuccessful), is more cost effective then

complying with the law due to its rolling statute of limitations.

Defendants know the workings of the FLSA and have faced challenges before. Defendants have self-policed some or all of their stores at certain intervals within the relevant class period of 3 years, transitioning managers/leaders in and out of exempt status for those who did not regularly and customarily supervise 80 hours of subordinate labor. Defendants also place managers into a "flux" period during the years 2010 to 2012 wherein the manager received half-time pursuant to the fluctuating work week method ("FWW") for hours worked in excess of 40, C.F.R. 778.114. However, managers are required to work a mandatory 45 hour workweek and receive non-discretionary bonuses based upon a percentage of the hours and wages earned, and therefore, their compensation is not fixed which destroys their eligibility to receive overtime compensation based upon the FWW. Defendants admittedly agree that the title of store managers and store leaders are interchangeable and are the same position. Defendants admittedly agree and recognize that store managers who do not regularly and customarily supervise 80 or more hours of subordinate labor do not meet any exemption under the FLSA and where recognized, convert the Managers to non-exempt status.

Defendants know that many of its Store Managers then fail the Executive Exemption because they do not regularly and customarily employee and supervise 2 or more full time employees or their equivalent during substantially all of the year.

The class of "store managers" and (now or also known as "store leaders") here in this case, don't act like their titles imply. Indeed, they lack discretion to make meaningful decisions, they do not promulgate or carry out corporate policy, and they primarily work the store as a sales clerk, working alone in the store for substantial periods

of their daily shifts, and even on some days, alone. Instead, they primarily perform menial laborious tasks, including, operating cash registers, cleaning, stocking, shelving, and inventory, answering telephones, greeting customers, pricing, handling displays and primarily performing non-management duties as recognized under the FLSA. Defendants have taken this class and transitioned them in and out of exempt status, yet willfully refuses to compensate Managers during the periods of time that Payless recognizes the failure to warrant Managers being treated as an exempt employee. Moreover, many Managers were put on "flux" wherein they received only half time for overtime hours worked despite a mandatory 45 hour workweek. Defendants have incorrectly paid "flux" managers under the FWW because the managers work week does not fluctuate and the managers receive a non-discretionary bonus tied to their income resulting in a non-fixed income. This bonus structure destroys the potential use of the FWW.

Store Managers in this class were mandated to work overtime without being paid a premium, such as being paid time and a half, or incorrectly received half time using the FWW and further are forced to work numerous hours beyond their schedules under coercive tactics and warnings that claiming all hours will negatively affect their scores and future with Payless. Defendants agree that this class of employees is entitled to time and half for their overtime hours when they do not meet the 80 hour supervision requirement, but have underpaid the class by failing to properly calculate the regular rate of pay for the class and failing to pay overtime at the required rate of time and one half for all overtime hours worked. As a result, the class has been grossly underpaid (PAID LESS) and overworked. They seek a declaratory judgment that that the Defendants have

willfully violated the FLSA, and they seek to be paid for all hours worked in excess of 40 per workweek, within the statute of limitations at a rate of one and one half their regular rate of pay including the value of bonuses earned, an equal amount in liquidated damages, plus attorneys' fees and costs.

Thus, the Defendants' failure to pay these employees all the wages due under the law results in all Store Managers and Store Leaders in this class accruing less retirement benefits under their 401(k) accounts than then Plan and ERISA requires.

Summary of the ERISA Violations

But the harm does not stop here. Further the Class has suffered further losses because of Payless and its co-defendants are violating the country's national employee benefits law known as "ERISA" (i.e., "Employment Retirement Income Security Act of 1974).

This is because those that were misclassified under the FLSA are not given credit for earning all the compensation due to them under the law, and thereby were not provided all the retirement benefits that are due to them under ERISA. This is because the Defendants' 401(k) plan calls for it to make employee contributions based on a percentage of the total wages earned in a year. Wages are specifically defined to include overtime.

The Classes ERISA violations can be best summarized by understanding how Defendants' are interpreting and providing benefits under their 401(k) Plan. First, and notwithstanding Defendants failure to pay Plaintiffs, they still earned wages under the law and Plan for their unpaid overtime. Second, the Plan and ERISA dictate that the

wages Plaintiffs earned should have been, according to the Plan terms, tax deferred and deposited into their respective 401(k) accounts. These funds are deposited into a trust. The amount deposited is a percentage, based off their earnings, and elections, as more fully described in the documents. Third, Defendants are required to contribute an equal amount on behalf of Plaintiffs' accounts, "matching" the wages earned and contributed by Plaintiffs. But by failing to credit and pay Plaintiffs all the wages that they earned and are due to them, Defendants' have caused less money to be saved Plaintiffs' for retirement, and they have failed to comply with the terms of the 401(k) Plan by failing to contributed all the benefits promised.

These failures leave employees unsure about their current and future rights under the 401(k) plan. Accordingly, the employees here seek to clarify these rights; compel the Company to maintain proper records; recover all benefits due to them under the law; enjoin any act or practice which violates the FLSA, ERISA or the terms of the 401(k) plan; along with seeking equitable relief to redress such violations and enforcing the plan terms as permitted by ERISA Sec. 502 *et. seq.*

Introduction

Plaintiffs, Mark Shallin, Bryan Winslow, Juan Terry Jr., and Melissa Pennington[1] individually, and on behalf of all others (similarly situated who consent to their inclusion in a collective action within the preceding three years of this action, to and through the date of the final disposition of this action, and on behalf of those similarly situated in the ERISA Class), along with all others who were, are, and will be employed by the

[1] hereinafter referred to as “Plaintiffs” or “Shallin, Winslow, Terry, and Pennington”

Defendants as Store Managers or Store Leaders, at any time within ERISA's applicable statute of limitations, and who participated in the 401(k) plan, through the date of the final disposition of this action), sue Defendants, PAYLESS SHOE SOURCE, INC.; COLLECTIVE BRANDS, INC.; AND COLLECTIVE BRANDS SERVICES, INC..[2] Pursuant to *29 U.S.C. 216(b)*, the Fair Labor Standards Act (the "FLSA"), and ERISA Section 502, and state as follows:

1. Plaintiffs bring this action for violation of federal wage and hour laws by and on behalf of all similarly situated current and former employees of Defendants.

2. Plaintiffs also bring this case as a class action under Fed. R. Civ. Procedure 23, on behalf of themselves individually, and a class of current, future, and past employees of PAYLESS, for violation of federal employee benefit law - for failing to contribute the minimum amount of benefits due under the Plan and ERISA to all participating Store Managers and Store Leaders, for failing to maintain accurate benefit and wage records, leaving its employees in state of confusion about their rights and future rights under the 401(k) plan, and violating ERISA and the Plan's terms.

3. Pursuant to a national common policy and plan, the Plaintiffs and similarly situated current and former employees have been given the title of "Store Manager" or "Store Leader" and unlawfully not compensated at a rate of one and one half their regular rate of pay for their overtime hours.

4. At some point, Defendants instituted a process of "looking back" at the labor hours Store Managers and Leaders supervised over a preceding several month period of time, and then reclassifying these employees as non-exempt managers, adding a

[2] hereinafter collectively referred to as "Defendants" or "Payless" or the "Company"

label of FLUX manager; likely synonymous with the FLSA reference to the FWW, CFR 78.114. However, during the look back period of time these employees failed to meet the requisite supervision of 80 hours of subordinate labor as set forth in the Execute Exemption. Payless willfully refused to pay these employees the overtime wages for the time they were on salary and improperly treated as exempt. Furthermore, managers converted to FLUX received half time for their overtime hours despite receiving non-discretionary bonuses based upon a percentage of their gross earnings.

5. Defendants admit and recognize that no exemption applies, not the administrative and not the executive exemption if the Manager or Leader did not regularly and customarily direct the work of 2 full time employees or the equivalent. However, after recognizing that such employees should then be converted to hourly employees, Payless again, willfully refused to pay these employees the overtime wages owed for the look back period. Defendants used various look back periods of monthly, quarterly, and semi-annual.

6. Defendants have improperly and willfully misclassified the salaried managers as exempt employees who failed the 80 hours of supervision during the look back periods. What is uncertain is whether the Defendants are looking back at weeks, months or semi-annually to make the determination and just what Defendants used as a benchmark percentage of the weeks (80%, 75%, 90%) for determining whether the Manager or Leader "regularly and customarily" directed the work and supervised 2 or more full time employees or the equivalent.

7. On or about December 9, 2012, Defendants abandoned the FWW thereby transitioning all Flux Managers to hourly non-exempt employees who receive time and

one-half for all overtime hours worked. See attached Exhibit "A."

8. Defendants failed to adequately communicate this transition away from the FWW to its Managers who are often still called Flux Managers and are not informed that they are operating as an hourly nonexempt employee.

9. Defendants have also miscalculated the overtime rate and regular rate of pay after converting managers to hourly, nonexempt. Upon information and belief, Plaintiffs, and the class of similarly situated employees, were given pay reductions as a scheme to avoid paying the increased wages owed to these class members now due, as a result of the time and one-half and mandatory 45 hour work schedule.

10. Defendants failed to pay Plaintiffs and similarly situated employees in accordance with the FLSA. Specifically, Plaintiffs and similarly situated employees were not paid time and a half of their regular rate pay for all hours worked in excess of forty (40) hours per week. Plaintiffs and the class of similarly situated employees did not and currently do not perform work that meets the definition of any exemption under the FLSA.

11. In this pleading, the term "Store Manager" herein means any employee with the title of Store Manager or Store Leader (also Flux Manager or Flux Leader) or any other title or position where employees perform substantially the same work as employees with that title (discovery may reveal additional job titles and employees that should be included).

12. In this pleading, "Defendants" means the named Defendants: Payless Shoesource, Inc., Collective Brands, Inc. and Collective Brands Services, Inc., and any other corporation, organization or entity responsible for the employment practices

complained of herein (discovery may reveal additional Defendants that should be included).

13. The allegations in this pleading are made without any admission that, as to any particular allegation, Plaintiffs bear the burden of pleading, proof, or persuasion. Plaintiffs reserve all rights to plead in the alternative.

Jurisdiction & Venue

14. This Court has subject matter jurisdiction over this action pursuant to *28 U.S.C. §1331*, because this action involves a federal questions under the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 216 (b);* and the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 502.*

15. This Court is empowered to issue a declaratory judgment under 28 U.S.C. Secs. 2201 and 2202

16. This Court has personal jurisdiction over this action, because the Defendants operate substantial business in Fairfield County Connecticut and some of the damages at issue occurred in Fairfield County Connecticut.

17. Venue is proper to this Court pursuant to 28 U.S.C. Sec. 1391(b) because the parties reside in this district and because a substantial part of the events giving rise to the claims occurred in this District.

The Parties

The Representative Plaintiffs

18. MARK SHALLIN resides in Wilton, Connecticut. He worked for Payless from September, 2012 until September, 2013 as a Store Manager in Norwalk, Fairfield County, Connecticut.

19. He was an employee of Payless during this time as contemplated by 29 USC Sec. 203.

20. He was also a participant in the Company's 401(k) Plan and contributed to same.

21. BRYAN WINSLOW worked for PAYLESS from November of 2011 until January of 2014 as a Store Leader in store number 5147 in Connecticut.

22. He was an employee of Payless during this time as contemplated by 29 USC Sec. 203.

23. He was also a participant in the Company's 401(k) Plan and contributed to same.

24. JUAN TERRY JR. resides in Waterbury, Connecticut. He worked for Payless from September of 2011 until June of 2013 as a Store Manager at the Trumbull, Connecticut location.

25. He was an employee of Payless during this time as contemplated by 29 USC Sec. 203.

26. He was also a participant in the Company's 401(k) Plan and contributed to same.

27. MELISSA PENNINGTON resides in New Hartford, New York. She worked for Payless from May of 2006 until January of 2013 as a Store Manager, last working as the Store Manager of #5132 at the New Hartford, New York location.

28. She was an employee of Payless during this time as contemplated by 29 USC Sec. 203.

29. She was also a participant in the Company's 401(k) Plan and contributed to same.

The Defendants

30. Defendant, PAYLESS SHOESOURCE, INC. (hereinafter PAYLESS) is a Foreign Profit Corporation and a wholly owned subsidiary of Defendant, COLLECTIVE BRANDS, INC. with its principal place of business at 3231 SE 6TH Avenue, Topeka, KS 66607. Defendant, Payless may be served through its registered agent for service of process, Corporation Service Company, at One Corporate Center Hartford, CT 06103. Upon information and belief, this Defendant controls many of the Payless shoe stores in the U.S. Payless, although an employer, is inextricably intertwined with the administration of the 401k Plan and has control over part of the Plan as a result.

31. Defendant, COLLECTIVE BRANDS SERVICES, INC., is a wholly owned subsidiary corporation of COLLECTIVE BRANDS INC.; a Delaware corporation with its principal place of business located at 3231 SE 6TH Avenue, Topeka, KS 66607. Upon information and belief, this Defendant controls a number of the Payless stores. Unless expressly said otherwise, and because the employer defendants act as one, for the purposes of this Complaint all Defendants are hereinafter referred to as "Defendants" or

"Payless". Further, Collective Brands Services Inc., is inextricably intertwined with the administration of the 401k Plan and has control over part of the Plan as a result.

32. Defendant, COLLECTIVE BRANDS INC., is a FORTUNE 500 company, incorporated in Delaware, with primary corporate offices in Topeka, Kansas. It is publicly traded on the New York Stock Exchange. It had sales of $50.5 billion and net earnings of $2.0 billion in 2012. It is also the Plan Sponsor of the 401(k) Plan that Mr. Shallin, Mr. Winslow, Mr. Terry, and Ms. Pennington participate in. Unless expressly said otherwise, and because the employer Defendants act as one, for the purposes of this Complaint all Defendants are hereinafter referred to as "Defendants" or "Payless". Further, Collective Brands Inc., is inextricably intertwined with the administration of the 401k Plan and has control over part of the Plan as a result.

33. Defendant, PAYLESS SHOESOURCE, Inc., is a 401(k) Profit Sharing Plan, herein the "Plan" or "401k Plan." The Plan is a qualified deferred compensation Plan.[3] It is subject to ERISA. The Plan says that Defendant, PAYLESS SHOESOURCE, Inc., is the Plan Administrator and Plan Sponsor. Accordingly, the Plan is sued through its Plan Administrator and name.

General Factual Allegations

34. This collective action arises from an ongoing wrongful scheme by PAYLESS to a) willfully misclassify, b) willfully underpay, and c) willfully refuse to pay overtime wages to a large class of its Store Managers and Store Leaders in the United States and its territories who did not regularly and customarily supervise 2 or more full

[3] ERISA 502(d)(1) allows for a plan to sue or be sued as an entity.

time employees or their equivalent as required under the FLSA.

35. Plaintiffs bring this suit on behalf of one collective class of similarly situated employees and up to the possibility of three sub classes of similarly situated persons composed of the following Class members which Plaintiffs may seek class certification on some or all of:

A. All Store Managers and Store Leaders who are currently employed or were previously employed with PAYLESS SHOESOURCE within the U.S. and its territories, within the past three years preceding this lawsuit who did not customarily and regularly each week while employed or for the totality of their time employed, direct the work of 2 or more full time employees or their equivalent of eighty (80) hours of subordinate employees and who elect to opt into this action pursuant to FLSA 29 U.S.C. Section 216(b).

Subclass 1. All Store Managers and Store Leaders who are currently employed or were previously employed with PAYLESS SHOESOURCE within the U.S. and its territories, within the past three years preceding this lawsuit who were treated as non-exempt employees at any time and who worked off the clock and who elect to opt into this action pursuant to FLSA 29 U.S.C. Section 216(b).

Subclass 2. All Store Managers and Store Leaders who are currently employed or were previously employed with PAYLESS SHOESOURCE within the U.S. and its territories, within the past three years preceding this lawsuit who did not in all weeks worked, regularly and customarily direct the work of 2 full time employees or the equivalent, who were treated as salaried exempt employees at any time and who worked off the clock and who elect to opt into this action pursuant to FLSA 29 U.S.C. Section 216(b).

Subclass 3. All Store Managers and Store Leaders who are currently employed or were previously

> employed with PAYLESS SHOESOURCE within the U.S. and its territories, within the past three years preceding this lawsuit who were treated as non-exempt employees and paid half time pursuant to the FWW, CFR 778.114 for all overtime hours worked in excess of 40, and who elect to opt into this action pursuant to FLSA 29 U.S.C. Section 216(b).

36. Shallin, Winslow, Terry, and Pennington are able to protect and represent the Collective Classes, are willing and able, and consent to doing so.

37. Shallin, Winslow, Terry, and Pennington are proper Class representatives as they were employed by Defendants as Store Managers and Store Leaders, and because they:

a) did not regularly and customarily supervise the work of two full time employees or their equivalent throughout their time with Payless;

b) were not paid for all overtime hours worked including off the clock hours because they routinely worked off the clock and through lunches upon a de facto company policy which encouraged them to do so;

c) even when paid overtime, were underpaid by Payless using incorrect regular rates of pay and incorrect overtime rates; and

d) were at one time paid by the hour, or as a flux, non-exempt, salaried employee receiving half time under the FWW.

38. Mr. Shallin, Mr. Winslow, Mr. Terry, and Ms. Pennington contributed to the company 401k plan, which was an automatic enrollment unless the manager/leader opted out.

39. Plaintiffs allege for themselves, and on behalf of the class who elect to

opt-in to this action that they are entitled to unpaid wages from Defendants for overtime work for which they did not receive any overtime premium pay, as required by the FLSA and for periods in which they were underpaid in violation of the FLSA.

40. PAYLESS operates more than 3,499 retail shoe stores nationwide, including 3496 in the 50 U.S. States and 19 in Connecticut. Upon information and belief, approximately one half of these stores are run by a single Store Manager or Store Leader such that the estimated class size is approximately 3000 employees.

41. Upon information and belief, all U.S. stores are uniform in management, and the stores are mirror images of each other according to national, uniform policies set by the Defendants.

42. Upon information and belief, all or substantially all stores operate with the same training models for employees, career paths, job titles, hierarchy, pay practices, and employee policies and procedures.

43. Upon information and belief, all stores are supervised by territory or District Managers, who represent and report to the corporate office under a structured, corporate controlled manner to obtain national uniformity and control of each store and all employees.

44. The overtime wage provisions set forth in FLSA §207 apply to PAYLESS, and all Defendants, who collectively engage in interstate commerce under the definition of the FLSA. Indeed, at all relevant times, Defendants engaged in interstate commerce and/or in the production of goods for commerce within the meaning of FLSA Sec. 203 as a common business enterprise.

45. Each of the Defendants has, at all relevant times herein, grossed more than

$500,000 in operating revenues during each of the last 10 fiscal years.

46. The actual job duties performed by the proposed class of Store Leaders and Store Managers does not satisfy the elements of any exemption within FLSA §213; and Defendants agree, as they convert Managers to hourly non-exempt employees, or salaried nonexempt under the FWW, when they did not regularly and customarily direct the work of 80 hours of subordinate labor using some unknown look-back period and some unknown percentage of time for this determination and reclassification. Furthermore, Defendants agree that they convert other Managers to hourly non-exempt FLUX employees who receive half time for their overtime hours pursuant to the FWW despite working a mandatory 45 hour workweek and receiving a non-discretionary bonus that is tied directly to their income.

47. Defendants abandoned the use of the FWW on December 9, 2012, transitioning all Flux Managers to hourly nonexempt employees who receive time and one-half for all overtime hours.

48. Upon information and belief, the title of "Store Manager" is either being renamed or replaced most recently by the title of Store Leader; with all job duties and responsibilities, compensation plans, exempt status, and job descriptions for these positions remaining the same and uniform in all 50 states and its territories (with perhaps the exception for California, which the Defendants may have reclassified as an hourly non-exempt position as a result of a prior class action against the Defendants).

49. No four year college degree is required for the Store Manager or Store Leader Position.

50. The Store Leaders and Store Managers were eligible for non-discretionary

bonuses paid quarterly tied directly to the Managers compensation, but Defendants failed to use the bonuses in the regular rate of pay calculation, overtime rate, or Defendants' decision to pay some Managers half time under the FWW.

51. For example, the Store Leader Position job postings from PAYLESS'S website shows that the STORE LEADER position, number 3752, is the same for all U.S. states, and that the company now references the store manager position as a "store leader" position. Payless does not dispute that the Store Manager and Store Leader are one and the same position, and uniform across the stores in job description, job duties and responsibilities. See attached Exhibit "B."

52. Store Leaders' paystubs also reflect the title of Store Manager, and such employees of this class are not explained by the Defendants why some are called managers and others leaders, although they are performing the same job duties and function.

53. All job postings are handled by the corporation and listed on the company's website. The job descriptions for the Store Leader are admittedly identical for all states as per the company postings, and the Defendants no longer post the job title of store manager.

54. Shallin, Winslow, Terry, Pennington and other similarly situated employees are currently now or have previously been covered under FLSA §207.

55. Pursuant to FLSA §207, PAYLESS, as the employer of Shallin, Winslow, Terry, Pennington and other similarly situated employees, was and is required to pay one and one-half times each employee's hourly rate for hours worked in excess of forty (40) hours per week.

56. Apparently, Defendants agree and admit so much, as some Store Leaders and Store Managers performing the same exact job duties but with lesser labor hours to supervise are re-classified as hourly, non-exempt employees. All such hourly paid managers are paid time and one half of some hourly rate of pay.

57. Additionally, Defendants agree and admit so much, as some Store Leaders and Store Managers performing the same exact job duties but with lesser labor hours to supervise are re-classified as hourly, non-exempt employees and given the sub-title of "Flux Manager" or "Flux Store Leader". All such FLUX, hourly paid managers, are paid half time using the FWW.

58. Plaintiffs Shallin, Winslow, Terry and Pennington were labeled or classified periodically during their employment as an exempt and non-exempt when Payless looked back and saw they did not meet the required supervising and directing the work of 80 hours of subordinate labor.

59. Plaintiffs Terry and Pennington were labeled or classified periodically during their employment as a Flux Managers when Payless looked back and saw they did not meet the required supervising and directing the work of 80 hours of subordinate labor.

60. During one or more weeks, Terry and Pennington were paid half time, using the FWW, CFR 78.114 for overtime hours.

61. Store Managers and Leaders were eligible and entitled to a non-discretionary, quarterly bonus that was calculated based upon store profitability and a percentage of the wages earned by the employee, including overtime, during the quarter.

62. Payless did not explain the specifics of the change in classification to

Store Managers or Store Leaders, and did not fully explain the impact and affect, and the fact that Managers would be non-exempt and entitled to overtime wages for all hours over 40 at a rate of one and one half times their regular rates of pay.

63. Payless purposefully did not explain the specifics of the Flux designation to store managers or store leaders, and fully explain the impact and affect, and the fact that they would be non-exempt and entitled to overtime wages for all hours over 40 at a rate of half time under the FWW.

64. Moreover, Payless purposefully never explained how they determined who would be classified as flux, or "fluxed", and weekly paychecks for 45 hours even as a flux were nearly the same as the pay received while salaried such that many had no idea if or when they were on flux or fluxed (converted to hourly, non-exempt).

65. Thus Shallin, Winslow, Terry, and Pennington were paid for overtime wages at some times, albeit incorrectly and not using the correct regular rate of pay, nor with the correct time and one half rate.

66. Upon information and belief, Payless failed to include the non-discretion bonuses paid to the class in the calculations of the regular rates of pay and as well overtime rates even when they did pay overtime wages to these Managers and Leaders placed on the FLUX hourly non-exempt status.

67. Even when agreeing to pay Managers for overtime wages, Defendants set the regular rates of pay at an improper and reduced hourly rate so as to minimize the premium paid to Managers. Thus if a manager was fluxed and converted to hourly, he received half time using the FWW despite having a mandatory 45 hour work week that only fluctuated upwards.

68. Moreover, Defendants had a corporately controlled, common practice of warning all Manager/Leaders, whether salaried or hourly, from clocking in hours above 45, and have engaged in a pattern and practice of willfully violating the FLSA by refusing to compensate such employees despite clear knowledge that these employees must work greater than 45 hours in order to fulfill their job duties.

69. Defendants evaluated the performance of each Store Manager/Leader by evaluating whether their store labor hours kept to the company prepared and budgeted schedules. If the store incurred more hours than on the schedule, Managers were warned this would negatively affect a score given to this process, and therefore would be against their interest and future to clock in all hours.

70. This unwritten rule and de facto policy therefore had a chilling effect on all managers on clocking in all work hours. Store managers/leaders that did clock in some or all hours above 45 were encouraged to not do so, but were not disciplined by Payless.

71. Shallin, Winslow, Terry, Pennington and other Managers and Leaders they know of had to work off the clock in order to complete their job duties and cover the store, as the District Managers and Payless commanded Shallin, Winslow, Terry and/or Pennington and others similarly situated not to clock in all hours. This unwritten rule of not clocking in all hours was enforced by Payless so that if the Manager/Leader during the look-back period did not meet the requisite supervision of 80 hours and was reclassified, Payless would not owe as many overtime hour wages when they get hit with a claim such as is occurring here.

72. Regardless, Defendants recognize and admit that Managers and Store

Leaders who do not regularly and customarily supervise 80 or more hours fail to satisfy any exemption under the FLSA, and are placed on non-exempt status. Defendants however, have made no effort to pay all these employees for the overtime hours owed.

73. Defendants cannot therefore have any reasonable contention that the misclassification of the class of Store Managers and Store Leaders in this case were in good faith classified as exempt employees under the FLSA; likewise, nor can Defendants claim any good faith basis for willfully refusing to pay these employees the overtime hours incurred when they admit some were not meeting the 80 hours of labor supervision and executive exemption.

74. In order for a Store Manager or Store Leader to be exempt as a manager as is traditionally known, the Executive exemption in the FLSA requires that the Store Managers or Store Leaders, regularly and customarily direct the work and supervise 2 or more full time employees or their equivalent.

75. Simply put, all of the class members in this case are non-exempt because the Defendants' single unit Store Managers and Store Leaders generally did not and do not have 80 hours of subordinate employee labor during the calendar weeks in the years in which they were Managers. Accordingly, for every member of the Class that this is the case, no executive exemption under the FLSA can survive. Further, as a matter of law, Defendants should have known this was unlawful, and their actions are and were willful.

76. Defendants choose to make this 80 hour determination on either a quarterly and semi-annual basis, whereas the law does not proscribe this to be the proper manner of determining if the managers met the 80 hour requirement.

77. Defendants, having knowledge of the executive exemption, having faced claims by store managers on several occasions challenging the exemptions within the last 10 years, were more than well aware that many of its managers were deserving of overtime wages as a result of not sufficiently supervising 2 or more full time employees or their equivalent regularly and customarily.

78. Defendants faced similar collective action claims for FLSA violations in 2006, in the case of *Quick, Hicks and Stokes Pheal et. al. v. Payless Shoesource, Inc*., in the United States District Court for the Southern District of Mississippi, case no: 3:06-CV-23-HTW-JCS; likewise, in 2010, all Defendants were sued in another collective action in *Schultz et. al. v. Payless*, and Collective Brands, United States District Court, Eastern District Of Missouri, Case no: 10-CV-1643, 2010.

The FLSA Class Allegations

79. Mr. Winslow worked for PAYLESS from November of 2011 until January of 2014 as a Store Leader in store number 5147 in Connecticut. Mr. Shallin worked for PAYLESS from June of 2012 until September of 2013 as a Store Manager in store number 5230 in Connecticut. Mr. Terry worked for PAYLESS from September of 2011 until June of 2013 as a Store Manager in Connecticut. Ms. Pennington worked for PAYLESS from May of 2006 until January of 2013 as a Store Leader in store number 5132 in New York.

FLSA Violation I:
Defendants' Willful Misclassification Of Plaintiffs

80. For the majority of Shallin's, Winslow's, Terry's, and Pennington's work

hours as a Store Manager or Store Leader, their job duties included sales and customer service type work, and other typically hourly, non-exempt duties such as: stocking, shelving, unloading shipments, pricing, inventory, customer service, cash register, cleaning, handling phone calls, processing payroll and time records, and handling displays and promotions. While Shallin, Winslow, Terry, and Pennington also assisted the District Manager or other Store Managers in the hiring process, they did not have the authority to make the decision on hiring any employee without the approval of the District Manager or another Store Manager.

81. Shallin, Winslow, Terry, and Pennington spent the majority of their time working alone in the store due to the budget constraints required of them and their store by Payless. During the typical daily shift, they were alone in the store upwards of 7 to 9 hours per day; often from 8:00 am until late in the afternoon, and/or for the entire shift.

82. Generally therefore, they did not have the ability to supervise or delegate to other hourly, allegedly subordinate, store sales associates, and were therefore routinely forced to work without any breaks or lunch breaks.

83. During the remaining other hours of their shifts, Shallin, Winslow, Terry, and Pennington were at most working with one other sales associate.

84. Generally, Shallin, Winslow, Terry, and Pennington did not have time to act as an executive or administrator, as their primary duty and the duties which took the majority of their time involved acting as a sales associate and store clerk, for upwards of 90% of their work hours. Management stressed that their primary duty was to sell and their stores were expected to meet certain daily, monthly and yearly sales goals or they would be subject to discipline. Payless closely monitored daily and monthly store

receipts.

85. Payless prepared the weekly proposed schedules for store managers and store leaders, although Managers and Leaders could adjust them.

86. Shallin, Winslow, Terry and Pennington, like all other store managers and leaders, could not formally discipline any employee without approval from the District Manager and could not terminate any employee without approval of Human Resources and the District Manager.

87. Shallin, Winslow, Terry, and Pennington could interview candidates for an open position by checking with Payless's database which had prescreened candidates who were assigned a green sign or dot as eligible for interview.

88. Shallin, Winslow, Terry, and Pennington then would interview candidates using a Payless interview script which managers and leaders were not permitted to deviate from. The interview form provided a score for each candidate, and someone who met the requisite score was then eligible for further interview with another store manager or the district manager. The interview and hiring process did not require the store manager to present any recommendations of whether to hire the candidate.

89. The District Manager, who then typically handled the 2nd interview, would then make decisions on who or whether to hire the candidate without the necessity to obtain the store manager's recommendations.

90. Shallin's, Winslow's, Terry's, and Pennington's primary job duties did not involve the exercise of discretion and judgment in matters of significance affecting the store or Payless. They generally did not have any authority to make independent decisions on matters that affected the business as a whole or any significant part of the

business. The inventory, the store presentation and layout, the policies and procedures, prices, and products sold, budget, were all created and directed by PAYLESS corporate office in a uniform and nationalized scale and scope.

91. Shallin, Winslow, Terry, and Pennington generally could not throughout most of the day, delegate work to sales associates or leave the store, and thus were not even afforded a full lunch break. Shallin, Winslow, Terry, and Pennington even had to shovel snow and clear and clean sidewalks.

92. Shallin, Winslow, Terry, and Pennington did not have the authority to promote employees, and any decision on whether to have an assistant manager was the decision of the District Manager or higher.

93. Generally, sales associates were paid minimum wage, and assistant managers were hourly employees, and store managers and leaders did not determine wage rates for the hourly employees.

94. Shallin's, Winslow's, Terry's, and Pennington's stores did not customarily and regularly have employees working 80 or more hours during the week.

95. Shallin, Winslow, Terry, and Pennington did not have the independent authority to decide whether or not an employee should be disciplined for an infraction or what the discipline would be. Disciplinary decisions were made by Shallin's, Winslow's, Terry's, and Pennington's superiors and/or dictated by Defendants' company policies.

96. Although labeled as a "manager" or "store leader", the store manager's/leader's primary duties were to be a sales associate and to keep the store stocked and open for business. Defendants know, or should have known, that Shallin, Winslow, Terry, and Pennington's position does not and did not satisfy the definition of

an EXECUTIVE Exempt employee or an Administrative Exempt employee within the FLSA laws.

97. Store managers and leaders were given daily sales goals as well as a yearly sales goal. Payless stressed to the managers and leaders that sales were their primary responsibility and failing to reach goals would negatively affect their future.

98. Sales employees were paid at or near minimum wage, and even assistant manager were not paid substantially more than this such that Payless had large turnover in the store employees causing Managers to have to pick up the slack periodically.

99. Shallin, Winslow, Terry, and Pennington could not just decide their own work schedule and was advised by Payless that the company had a mandatory store manager/store leader schedule of: working 3 day shifts (9:00 am to 6:00 pm) and two night shifts (12:00 pm until 9:00 pm, unless on the weekend), and of the night shifts, one had to on a weekend. Such information was set in the Store Leader Handbook.

100. The primary job duty and function of the Store Manager and Store Leader of this class is not management of the store or enterprise as contemplated by the FLSA and the Code of Federal Regulations. The primary job duty is to be a sales associate and sell shoes and related products, as well as to handle customer service.

101. Only the District Managers exercise the discretion and judgment on matters of significance that affect the business as a whole as called for the in the Administrative and Executive Exemptions of the FLSA.

FLSA Violation II:
Defendants' De Facto Off The Clock Company Policy

102. The Company had a policy against any hourly employee incurring

overtime wages and working overtime hours, as well as any employee working more than the hours on the schedule. When an employee did not show up or called off, the Store Manager or Store Leader was required and expected to pick up the shift causing the Store Manager's hours to substantially increase.

103. Because of the limited budget for labor, Mr. Shallin and Ms. Pennington would at times use their sick time or vacation time on the payroll, even though actually working in the store, in order then to be able to have relief by having an employee work in the store, so as not to go over the store labor budget which includes the managers hours regardless of exempt status. The District Manager was aware that store managers and leaders were doing this.

104. Other Store Leaders and Managers across the U.S. also would do such things as clock longer lunch hours and use PTO time to avoid incurring more work hours on the clock.

105. Mr. Shallin, Mr. Winslow, Mr. Terry, and Ms. Pennington were warned by the District Manager not to report any hours above 45 to the company, and on one occasion when one of them did, he was told "I don't care how you do it, don't put in for more than 45 hours."

106. Mr. Shallin worked many weeks in a range of 60 to 70 hours, but was unable to record the hours or had to remove or delete the hours above 45.

107. Store managers and leaders likewise would work additional days or even double shifts without clocking in all the hours worked; Plaintiffs at times were told they were salaried exempt so the number of hours clocked in was of no concern to them so they did not clock in all the hours; and regardless, they were warned at times not to clock

in all the hours.

108. Mr. Winslow was required to work three morning shifts per week and two nights shifts per week, one of which on a weekday night and one of which on a weekend night.

109. Mr. Shallin, Mr. Winslow, Mr. Terry and Ms. Pennington were required to work a minimum of 45 hours per week, (as were all Store Managers and Store Leaders) however, because of insufficient staff and a limited payroll budget, Mr. Winslow found it necessary to work upwards of 55 hours per week.

110. Mr. Winslow averaged fifty-five (55) hours of work per week, including hours off the clock. Mr. Winslow was warned by Payless against working on the clock after 45 hours, despite being treated as a salaried, exempt manager.

111. Mr. Winslow could not decide his own schedule and was advised by Payless that the company had a mandatory store manager/store leader schedule of: working 3 day shifts (9:00 am to 6:00 pm) and two night shifts (12:00 pm until 9:00 pm, unless on the weekend), and of the night shift, one had to on a weekend. Such information was set in the Store Leader Handbook.

112. However, Mr. Winslow found it necessary to often work four nights per week including two weekday nights and two weekend nights.

113. Mr. Terry often found it necessary to work 6 days a week sometimes covering double shifts from open until close.

114. Mr. Terry averaged 55 hours of work per week.

115. Ms. Pennington often found it necessary to work upwards of fifty (50) hours per week including working off the clock.

116. Mr. Shallin averaged between 60 and 70 hours of work per week at times, and always greater than 45 unless out for illness or other time off.

117. Store Managers and Leaders had a mandatory 45 hours per week corporate schedule, which included required usual weekend work. Store Managers and Store Leaders were expected to not take off 2 days in a row, and most if not all were scheduled to work 5 days at 9 hours thus equating to 45 hours.

118. Shallin, Winslow, Terry, and Pennington worked these hours throughout their employment with PAYLESS, and as to which Defendants were aware of the overtime hours necessary by each, through communications between them and the District Manager(s). When employees quit or were terminated, Shallin, Winslow, Terry, and Pennington had to cover even more hours.

119. Because of insufficient staff and a limited payroll budget, Mr. Shallin, Mr. Winslow, Mr. Terry, and Ms. Pennington found it necessary to work substantial more hours weekly, and the District Manager(s) were aware of this. Similarly, store managers and store leaders in other stores in the district also were working routinely beyond 45 hours in each week and not clocking in all their hours.

FLSA Violation III:
Defendants' Improper Use Of The FWW And Underpayment Of Overtime Wages

120. Shallin, Winslow, Terry, and Pennington were paid annual salaries at times, but their paychecks reflected hourly rates. Payless never fully explained to the store managers and leaders the reasons for conversion to FLUX or even when it was occurring.

121. Payless, even when paying these managers hourly, intentionally failed to

pay these employees the required one and one half times their regular rates of pay, instead paying either on a FWW basis (1/2 time) or some other lesser or alternative formula that is contrary to the FLSA causing each class member to be underpaid.

122. Additionally, Defendants agree and admit so much, as some Store Leaders and Store Managers performing the same exact job duties but with lesser labor hours to supervise are re-classified as hourly, non-exempt employees and given the sub-title of "Flux Manager" or "Flux Store Leader". All such FLUX, hourly paid managers, are paid half time using the FWW.

123. Plaintiffs Shallin, Winslow, Terry and Pennington were labeled or classified periodically during their employment as an exempt and non-exempt when Payless looked back and saw they did not meet the required supervising and directing the work of 80 hours of subordinate labor.

124. Plaintiffs Terry and Pennington were labeled or classified periodically during their employment as a Flux Managers when Payless looked back and saw they did not meet the required supervising and directing the work of 80 hours of subordinate labor.

125. During one or more weeks, Terry and Pennington were paid half time, using the FWW, CFR 78.114 for overtime hours.

126. Store Managers and Leaders were eligible and entitled to a non-discretionary, quarterly bonus that was calculated based upon store profitability and a percentage of the wages earned by the employee, including overtime, during the quarter.

127. Payless did not explain the specifics of the change in classification to Store Managers or Store Leaders, and did not fully explain the impact and affect, and the

fact that Managers would be non-exempt and entitled to overtime wages for all hours over 40 at a rate of one and one half times their regular rates of pay.

128. Payless purposefully did not explain the specifics of the Flux designation to store managers or store leaders, and fully explain the impact and affect, and the fact that they would be non-exempt and entitled to overtime wages for all hours over 40 at a rate of half time under the FWW.

129. Moreover, Payless purposefully never explained how they determined who would be classified as flux, or "fluxed", and weekly paychecks for 45 hours even as a flux were nearly the same as the pay received while salaried such that many had no idea if or when they were on flux or fluxed (converted to hourly, non-exempt).

130. Thus Shallin, Winslow, Terry, and Pennington were paid for overtime wages at some times, albeit incorrectly and not using the correct regular rate of pay, nor with the correct time and one half rate.

FLSA Violation IV:
Defendants' Underpayment Of Overtime By Failing To Include Bonus Money In Calculations Of Regular Rate And Overtime Rates Of Pay

131. The Store Leaders and Store Managers were eligible for non-discretionary bonuses paid quarterly tied directly to the Managers compensation, but Defendants failed to use the bonuses in the regular rate of pay calculation, overtime rate, or Defendants' decision to pay some Managers half time under the FWW.

132. Upon information and belief, Payless failed to include the non-discretion bonuses paid to the class in the calculations of the regular rates of pay and as well overtime rates even when they did pay overtime wages to these Managers and Leaders placed on the FLUX hourly non-exempt status.

133. Even when agreeing to pay Managers for overtime wages, Defendants set the regular rates of pay at an improper and reduced hourly rate so as to minimize the premium paid to Managers.

FLSA Violation V:
Defendants' Underpayment Of Overtime By Reducing The Regular Rate of Pay

134. Defendants engaged in a nationwide pay practice to avoid paying overtime by their practice of reducing the Managers regular rate of pay without telling them.

135. Plaintiffs, and the Class of similarly situated employees, were at one time paid on a salary basis which was intended to compensate them for a 45 hour workweek.

136. Therefore, Defendants should have calculated the Managers regular rate of pay by dividing the given salary by the 45 hour intended work week.

137. However, Defendants purposefully underpaid, and thereby paid less, in overtime compensation by reducing the Managers regular rate of pay when Defendants converted those Managers from salaried exempt to an hourly nonexempt position.

138. Payless purposefully never explained how they determined who would be classified as nonexempt, or converted to flux, and weekly paychecks for 45 hours even as a nonexempt hourly employee were nearly the same as the pay received while salaried such that many had no idea if or when they were converted to hourly, non-exempt.

139. If the employee's salary was $450.00 per week as an exempt employee based upon a 45 hour mandatory work week, the employee's regular rate of pay would be $10.00 per hour and the overtime rate should be $15.00 per hour. So the week following conversion to an hourly nonexempt, for the same 45 hour mandatory work week, the employee should receive $400.00 plus $75.00 in overtime compensation for a total of

$475.00. However, first the Defendants do not tell the employee that they are being converted to hourly nonexempt employee and secondly, the employees total compensation remains at $450.00 by reducing their regular rate of pay as a scheme to offset the increased wages they owe the employee.

140. Defendants are purposefully evading the FLSA's overtime requirements by reducing the regular rate of pay and paying the employees less.

141. As such, Plaintiffs contend that this is an intentional act of Defendants to avoid paying overtime at a correct rate of time and one-half the regular rate of pay.

142. Therefore, Defendants underpaid, and thereby paid less, to all nonexempt hourly employees.

FLSA Summary Allegations

143. The Defendants willfully violated FLSA §207 by failing to pay Shallin, Winslow, Terry, Pennington and all others similarly situated the proper overtime compensation for all hours worked in excess of forty (40) per week.

144. Upon information and belief, for the three-year period before this filing, (the "Class Period"), the continued violations of FLSA §207 that are complained of herein have been practiced and imposed upon all Store Managers and Store Leaders of PAYLESS nationwide, who have regularly worked in excess of forty hours per week. There are more than 3,496 stores nationwide, each modeled with uniformity and each with Store Managers or Store Leaders.

145. Mr. Shallin, Mr. Winslow, Mr. Terry, and Ms. Pennington bring this FLSA claim on behalf of all Store Managers and Store Leaders who work or who have worked for PAYLESS at any time during the Class Period, and those who did not

customarily and regularly supervise two or more full time employees or their equivalent of 80 hours of subordinate employee labor.

146. PAYLESS has willfully misclassified this select class of Store Manager and Store Leader positions as salaried, exempt employees, and willfully and without good faith, underpaid and incorrectly paid these employees for the purpose of avoiding the overtime pay provisions of the FLSA and saving labor costs. PAYLESS has done so uniformly throughout its stores nationwide for the proposed putative class described in this complaint, regardless of even when Payless itself recognized that the class members failed to satisfy the element of supervising 80 or more hours of subordinate labor. The job duties of the Store Manager and Store Leader positions are uniform throughout all PAYLESS stores nationwide.

147. PAYLESS has intentionally and repeatedly engaged in the common practice of misclassifying and underpaying Store Managers and Store Leaders as required under the FLSA for the purpose of minimizing payroll and increasing profitability.

148. Shallin, Winslow, Terry, and Pennington were subject to discipline if they were found to be late for shifts or if they closed the store early or left early, just like any other hourly, non-exempt employee. Payless monitored at all times, which employees were in the store and the times each came in and left, including that of the store managers/leaders.

149. Store Managers and Store Leaders had required sales goals for the stores. If the Store Managers and Store Leaders do not meet these sales goals, they are subject to discipline, including being placed on PIPS, or possible termination of their employment.

150. Store Managers and Store Leaders, since they are working in the stores

alone for the majority of their work days or even alone on some days, are the primary sales persons and customer services employees of the store. Each had daily, monthly and yearly sales goals that had to be met, as well as daily customer surveys which had to be completed used by Payless to market customers for future sales.

151. The primary job duty therefore of the Store Leader or Store Manager is to be a sales associate and sell products.

152. PAYLESS is liable under the FLSA for failing to properly compensate Store Managers and Store Leaders who worked over forty (40) hours per week, and as such, notice should be sent to past and current employees of PAYLESS. It is estimated that there are at least 5,000 current or past similarly situated Store Managers and Store Leaders who have worked over 40 hours per week without overtime pay or without being paid the correct overtime wage rate or for all hours worked in violation of the FLSA. These similarly situated employees would benefit from the issuance of a court supervised notice regarding the present lawsuit and the opportunity to join in the present lawsuit pursuant to FLSA §216(b). These similarly situated employees are known to PAYLESS, are readily identifiable, and can be located only through PAYLESS'S records.

153. Upon information and belief PAYLESS has settled claims for overtime wages of Store Managers in the past, and has been on notice that the job duties actually being performed were primarily non-exempt and as such PAYLESS should have conducted studies and analysis of the job duties being performed to see if they fell within any of the exemptions. Defendants resolved these individual claims questioning the exemption rather than to reclassify the position and compensating all Store Managers and Store Leaders.

COUNT 1 - 207

VIOLATIONS OF FLSA §207 AND DECLARATORY ACTION PURSUANT TO 28 U.S.C. SECTIONS 2201 and 2202

154. Plaintiffs allege and incorporate by reference paragraphs sixteen (16) through (153) of this Complaint and fully restates and re-alleges all facts and claims herein.

155. PAYLESS has willfully and intentionally engaged in a nationwide pattern and practice of violating the provisions of the FLSA, by misclassifying all Store Managers and Store Leaders who do not supervise 2 full time employees or their equivalent (80 or more hours) as exempt under the FLSA overtime wage provision during one or more weeks, thereby improperly failing and/or refusing to pay Plaintiffs and the Putative Class, comprised of all current and former similarly situated employees who work or have worked over forty (40) hours per week, overtime compensation pursuant to FLSA §207.

156. PAYLESS has been operating its business since 1956, and is well aware of the FLSA, its provisions and exemptions, and knew or should have known that job title alone (i.e. Store Manager (and now) Store Leader) is not controlling of the overtime exemption status of employment under the FLSA.

157. PAYLESS has reason to know that the Store Managers and Store Leaders of this specific class are not exempt under the FLSA and yet continued to misclassify those employees as Payless has settled similar claims in the past. *Schultz v. Payless Shoesource, Inc.*, 2010 WL 4088953 (E.D. Mo.).

158. PAYLESS knowingly and willfully misclassified Shallin, Winslow, Terry,

Pennington and other employees similarly situated, comprised of the Plaintiff Class, as exempt for the purposes of decreasing costs and maximizing profitability. Defendants cannot have a good faith basis for treating this class of store managers and store leaders as exempt because they know the elements and the requirements of the exemptions, which this class falls short of satisfying and have willfully refused to compensate the class for their overtime hours.

159. PAYLESS has not acted in good faith by willfully and knowingly misclassifying its Store Managers and Store Leaders and as such Payless is liable for unpaid overtime compensation and an additional equal amount as liquidated damages. *Johnson v. Big Lots Stores, Inc.*, 604 F.Supp.2d 903 at 925 (E.D. La. 2009).

160. PAYLESS knowingly and willfully failed to track the hours worked by most, if not all of the Store Managers and Store Leaders, including Shallin, Winslow, Terry, Pennington and other employees similarly situated, comprised of the Plaintiff Class.

161. PAYLESS suggested, encouraged and requested that all managers and leaders not clock in all hours worked above 45 and at times required managers and leaders to edit their times to reduce the overtime hours incurred.

162. Again, Payless explained to these managers that claiming all these hours would negatively affect their scores as managers, and throw off the scheduling component of each store such that it was in their best interest not to claim all such hours.

163. Managers were not specifically told each time they were fluxed or converted to hourly, and many still believing they were salaried, were more than willing to follow the company policy of not clocking in all hours since they were lead to believe

they would not be paid for it anyway.

164. By failing to record, report, and/or preserve records of hours worked by the Named Plaintiff, Opt-Ins and purported Classes, the Defendants have failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions of employment in violation of the FLSA 29 USC 201 *et. seq*., including 29 USC Sec. 211(c) and 215 (a).

165. PAYLESS knew or should have known that the act of paying Shallin, Winslow, Terry, Pennington and other employees similarly situated, comprised of the Plaintiff Class, on a salary basis on any week in which they did not supervise 80 hours, without overtime pay, is insufficient and evades the wage and hour requirements of the FLSA.

166. Payless knew or should have known that when it did pay overtime wages to the class, it failed to include the value of non-discretionary bonuses in the regular rates of pay, and further using some other improper means, incorrectly calculated the overtime rates paid for all members of this class.

167. Payless knew or should have known that up and until December 9, 2012, when it used the FWW pursuant to CFR 778.114 that Managers were not subject to the FWW because they received non-discretionary bonuses tied directly to their income, including salaries and overtime wages, and as well were required to work a mandatory, non-fluctuating 45 hour workweek.

168. Analyzing some pay records of the class members reveals that the regular rate of pay was set at a number less than the true hourly rate, resulting in a windfall for Defendants and an underpayment for each class member for overtime hours. Each

employee paid a salary was told that the weekly salary was intended to compensate them for the mandatory, corporate schedule of 45 hours per week.

169. Moreover, Payless commanded, instructed, warned, and /or coerced Plaintiffs, and the class of similarly situated employees, not to clock in all hours over 45 or otherwise, to cut time from the time records so as to reduce the number of hours on the clock. Defendants had this willful, company De Facto off the clock policy which applied to all Managers, whether exempt or non-exempt to avoid recording all hours worked.

170. Further, in examining pay stubs, the class was not paid time and one half their regular rates of pay, and Payless willfully used a lesser pay rate such as the FWW or some other formula which resulted in the class as a whole, even when paid some overtime, not receiving the required time and a half their regular rates of pay.

171. Payless engaged in a nationwide pay practice of reducing a Managers regular rate of pay when transitioning them from salaried exempt to hourly nonexempt in order to avoid compensating them for all overtime owed.

172. The widespread nature of PAYLESS' failure to pay overtime wages, and even when paid, incorrectly and not for all hours worked under the FLSA is demonstrative of PAYLESS' willful plan and scheme to evade and avoid paying overtime wages to all of their Store Managers and Store Leaders in this class.

173. To summarize, Payless has willfully and lacking in good faith, violated the FLSA by the following unlawful pay practices applicable to Class A, and to the subclasses as follows:

a) Willfully misclassifying Store Managers and Leaders as salaried exempt during some or all of the periods of time in which they did not regularly and customarily

direct the work of 2 or more full time employees or the equivalent;

b) improperly paying non-exempt Managers/Leaders half time pursuant to the FWW, CFR 778.114;

c) maintaining a De Facto, unwritten policy of requiring Managers to work off the clock thereby affecting the entire class of similarly situated employees from being paid all hours worked while treated as non-exempt, and when misclassified as exempt, likewise not having a record of their hours; and

d) willfully failing to properly document and record all hours worked in violation of the FLSA.

e) willfully engaged in a nationwide pay practice to avoid paying overtime by reducing a Managers regular rate of pay when transitioning them from salaried exempt to hourly nonexempt.

174. As a result of PAYLESS' willful violations of the FLSA, Shallin, Winslow, Terry, Pennington and the Plaintiff Class, comprised of all other employees similarly situated, have suffered damages by PAYLESS' failure to pay overtime compensation in accordance with FLSA §207.

175. PAYLESS has not made a good faith effort to comply with the FLSA, and the overtime compensation requirements with respect to Shallin, Winslow, Terry, Pennington and the Plaintiff Class, comprised of all other employees similarly situated.

176. Due to PAYLESS' willful violations of the FLSA, a three-year statute of limitations applies to the FLSA violations pursuant to *29 U.S.C. §255(a).*

177. As a result of PAYLESS' unlawful acts, Shallin, Winslow, Terry, Pennington and the Plaintiff Class, comprised of all other similarly situated employees,

have been deprived of overtime compensation in amounts to be determined at trial; and are entitled to recovery of such amounts, liquidated damages in amount equal to the overtime wages due, prejudgment interest, attorneys' fees, costs and other compensation pursuant to *29 U.S.C. §216(b),* as well as injunctive relief pursuant to *29 U.S.C. §217*.

178. Additionally, Shallin, Winslow, Terry, and Pennington seek a declaratory judgment as to the above allegations (*e.g.*, that the Defendants purposely and uniformly misclassified this select class of Store Managers and Store Leaders under the FLSA, which has resulted in less than all of the compensation due to them, which creates additional harms and violations of ERISA and the Plan for failing to contribute all of the retirement benefits due to them).

WHEREFORE, Mark Shallin, Bryan Winslow, Juan Terry Jr., and Melissa Pennington, individually, and on behalf of all other similarly situated past and present Store Managers and Store Leaders of PAYLESS, request the following relief:

a. Designation of this action as a collective action and Certification on behalf of the proposed Class and sub classes pursuant to 29 U.S.C. §216(b).

b. That Shallin, Winslow, Terry, and Pennington be allowed to give notice of this collective action, or that this Court issue such notice at the earliest possible time; to all past and present Store Managers and Store Leaders employed by Payless at any time during the three (3) year period immediately preceding the filing of this suit, through and including the date of this Court's issuance of the Court Supervised Notice for each respective class;

c. Designate the Named Plaintiffs as Representatives of the Collective Class for purposes of engaging in mediation, with the authority to execute any Collective Class settlement agreement the parties might reach, which is subject to Court’s approval before making any such agreement binding.

d. That all past and present Store Managers and Store Leaders be informed of the nature of this collective action, and similarly situated employee's right to join this lawsuit if they believe that they were or are misclassified as an

exempt employee;

e. That the Court find and declare PAYLESS in violation of the overtime compensation provisions of the FLSA;

f. That the Court find and declare PAYLESS' violations of the FLSA were and are willful;

g. That the Court find and declare PAYLESS' practice of reducing the regular rate of pay to offset the time and one-half of wages that will be owed in overtime compensation is in violation of the FLSA and award the difference between the rate as used by PAYLESS and the correct rate based upon the employees previous earnings.

h. That the Court enjoin PAYLESS', under to *29 U.S.C. § 217*, from withholding future payment of overtime compensation owed to members of the Plaintiff Class.

i. That the Court award to Mr. Shallin, Mr. Winslow, Mr. Terry, Ms. Pennington and the Plaintiff Class, comprised of all similarly situated employees, overtime compensation for previous hours worked in excess of forty (40) for any given week during the past three years AND liquidated damages of an equal amount of the overtime compensation, in addition to penalties and interest on said award pursuant to FLSA §216 and all other related economic losses;

j. That the Court award to Mr. Shallin, Mr. Winslow, Mr. Terry, Ms. Pennington and the Plaintiff Class, comprised of all similarly situated hourly employees, overtime compensation at a rate of time and one-half the regular rate of pay which should be calculated using the earnings prior to being converted to an hourly employee.

k. That the Court award Shallin, Winslow, Terry, Pennington and the Plaintiff Class reasonable attorneys' fees and costs pursuant to FLSA § 216, including expert fees;

l. That the Court award Shallin, Winslow, Terry, and Pennington a Class Representative fee for the justice they sought out for so many and their services in this case.

m. That the Court issue a declaratory judgment under 29 U.S.C 216-17, 28 U.S.C. 2201 and 2202 for the unlawful misclassification and pay practices complained of herein and that the Defendants violated the FLSA, and that such pay practice violation was willful and uniformly applied to all Store Managers and Store Leaders of this proposed, which has resulted in a loss

of compensation due to them in both wages and retirement benefits;

n. Pre-judgment and post-judgment interest, as provided by law: and

o. That the Court award any other legal and equitable relief as this Court may deem appropriate.

ERISA ALLEGATIONS

179. Shallin, Winslow, Terry, and Pennington, the ERISA Named Plaintiffs, brings these ERISA claims for relief under the Act as a nationwide class under Fed. R. Civ. P. 23(a) and (b)(1) and/or (b)(2) and/or (b)(3) as representative of a proposed ERISA Class.

180. The principal claim is for clarification of future benefits, followed by a determination of benefits due and enforcement of the Plan under ERISA § 502(a)(1)(B).

181. Defendants maintain a 401(k) Plan, to which Shallin, Winslow, Terry, Pennington and the Opt-In Plaintiffs[4], and numerous members of the purported ERISA Class participate(d) in every pay period they worked.

182. The official name of the Plan is called the Payless Shoesource, Inc., 401(k) Profit Sharing Plan, sometimes referred to as the Collective Brands 401(k) Plan. For simplicity, we call it the “401k Plan" or "Plan.”

183. The Plan Sponsor is PAYLESS SHOESOURCE, INC.

184. The Plan Administrator is the PAYLESS SHOESOURCE, Inc., and employer Defendants control the plan, along with its administration.

185. The Plan Trustee is Wells Fargo Retirement Services.

[4] Those Opt-In Plaintiffs would be part of the ERISA Class if certified, but ask here to be named as full Plaintiffs.

186. The Plan year is the 12-month period beginning the first day of the calendar year and ending on the last day of the calendar year.

187. Contributions to the Plan, along with administrative costs, and trustee fees, are paid by the Defendants, whereas fund management fees are paid by the employees.

188. The Plan explains that **all employee will be enrolled automatically in the Plan** (unless they affirmatively elect not to enroll). Unless expressly changed, employees have three percent of their earnings automatically deducted and Payless matches this contribution by depositing the same, subject to the Code, ERISA and Plan terms, e.g., max contributions per year.

189. The Plan explains that once eligible, PAYLESS immediately matches 3% each pay period (up to 100%) that an employee contributes, then 50% of the next 2% an employee contributes, and finally 25% of the next 1% an employee contributes.

190. Further, as the Plan's Summary Plan Descriptions says: once eligible, having worked for 180 days, the Company *will* match your contributions.

191. Accordingly, the Plaintiffs bring this suit on behalf of an "**ERISA Class**" composed of:

> All Store Managers and Store Leaders who worked for Payless Shoesource Inc., Collective Brands, Inc. or Collective Brand Services Inc., who participated in the Payless 401(k) Plan, within six years from the date this action was filed, and until to the day of case disposition, who worked more than 40 hours, in a at least one workweek, and whose overtime hours and earnings considered, contributed, and matched.

192. Whether it is one percent, or some higher percent, all contributions are based upon an employee's earned compensation. Thus, if the Plan Administrator and

employer, through its fiduciaries and actors, as was the case here, does not deduct the proper amount from an employee's paycheck, or contributes less than the correct amount, the employee has suffered harm.

193. In this case, Defendants failed to consider, match, and deducted the correct amount of money to be included in the Plaintiffs and Classes 401k accounts. This failure has caused Plaintiffs to be unsure about their retirement account balances, how the plan works, and the benefits that are due to them under both the law and Plan.

194. Indeed, overtime earned by a Plan participant, including Shallin, Winslow, Terry, and Pennington is to be considered eligible compensation under the Plan, ERISA, and the Code. This is true regardless of whether the employee is *paid* overtime. Said differently, if an employee works overtime, under the Plan terms and in conjunction with the law, the employee is entitled to eligible compensation for those overtime hours. This is because the determination of "eligible compensation" is for overtime *earned* – not overtime *paid*.

195. The total eligible compensation by a Plan Participant, including Mr. Shallin, Mr. Winslow, Mr. Terry, and Ms. Pennington is then supposed to be matched by the Company, subject to the maximum amount of employee contributions, but it is not supposed to be less than one percent.

196. For example, if an employee's total eligible compensation equals $20,000 and the employee elected three percent of their bi-weekly pay check to contribute (which should include all overtime), the employee's contribution would be $23.08 for the pay period. The Company matches this in its entirety thereby contributing $23.08 for the pay period.

197. The Company is to then record these contributions in its records.

198. However, if an employee worked overtime in a workweek, like Mr. Shallin, Mr. Winslow, Mr. Terry, and Ms. Pennington did, where the Company did not pay them for the overtime, despite its legal duty to pay it, then they have earned less than legally is required in the applicable workweek, and the Company has contributed less than it legally is required in breach of ERISA and the Plan terms.

199. Further, the Company has failed to keep accurate records because both ERISA and the FLSA require strict compliance in record keeping for hours worked and benefits earned. This is what happened to Shallin, Winslow, Terry, Pennington and the ERISA Class and why they are reasonably in a position to serve as class representatives.

200. In other words, the Class harms Shallin, Winslow, Terry, and Pennington complain of are not based on what someone told them, or what they heard, it is about the legal duties under the law and the Plan, whether the Defendants' actions towards all Store Managers and Store Leaders violate the law, and what their rights are under the same.

201. The matching contributions Shallin, Winslow, Terry, Pennington and the Class experienced are required to be transferred to the Plan's trustee on the same day the employee's pay check is received.

202. The contributions made by the Defendants on behalf Shallin, Winslow, Terry, Pennington and Plan participants are invested in the Plan, by the Defendants, in themselves.

203. The Defendants here have failed to credit the Named Plaintiffs, Shallin, Winslow, Terry, Pennington, the Opt-Ins, and the ERISA Class, with the compensation due to them under the law.

204. Indeed, the Defendants have failed to credit the Named Plaintiffs, Opt-In Plaintiffs, and the ERISA Class, with the compensation due to them under the terms of the Plan.

205. The Defendants have left the Class, Shallin, Winslow, Terry, and Pennington confused about their rights under the Plan, both now and in the future.

206. This failure to denote the work as pensionable pay or eligible compensation (as the Plan describes it) is a violation of ERISA.

207. The harm has occurred already, continues to occur today, and if legal action does not stop it, the applicable statute of limitations to Shallin's, Winslow's, Terry's, and Pennington's claims and the ERISA class will continue to erode and be lost forever.

208. There is no administrative procedure set up for Shallin, Winslow, Terry, Pennington or the ERISA Class to participate in prior to brining this suit. This is because they seek to clarify and enforce Plan terms and rights, and seek to enforce provisions under ERISA. Further, they seek an adjustment in records and accounting of hours and contributions, and otherwise seeking appropriate equitable relief under 502(a)(3); all relief that the Plan documents does not anticipate or provide an administrative procedure for. Indeed, it would be futile to even attempt to go through a process when no such process exists, or was ever even contemplated by the Plan documents.

209. More specifically, in this case, the only administrative scheme set up for plan participants is when a "claim for benefits" is denied (*e.g.* a retired employee seeks to have his or her 401(k) benefit paid out having reached 72 years of age but was denied because he didn't participate long enough for certain contributions to vest). Here, the

ERISA Class isn't seeking a "claim for benefits" as the plan documents would suggest, but rather their request at its heart is for equitable relief, accounting, clarification, and Plan revisions.

210. Exhaustion is impossible here because the plan provides for no administrative scheme to afford Shallin, Winslow, Terry, Pennington and the Class the relief they seek. For example, they are seeking to determine what their future benefits will be. Thus, they have no procedural requirements to exhaust before seeking to clarify their rights under the law, and subsequently enforce a Plan Term.

211. At all relevant times, the ERISA Class, Shallin, Winslow, Terry, and Pennington have been employees of the Defendants, within the meaning of ERISA Sec. 3(6), 29 USC Sec. 1002(6), and participants in the Plan.

212. The ERISA Class is so numerous that joinder of all members is impracticable. Based on information and belief, it exceeds over two thousand.

213. Shallin, Winslow, Terry, and Pennington are informed and believe that during the Class period, Defendants employed several thousand persons who satisfy the definition of the ERISA Class.

214. Questions of law and fact common to the ERISA Class as a whole include, but are not limited to, the following:

p. Whether Defendants failed, and continue to fail to maintain accurate records of actual time worked and wages earned by the ERISA Named Plaintiffs and the ERISA Class;

q. Whether Defendants failed and continue to fail to provide accurate wage statements itemizing all actual time worked and wages earned by the ERISA Named Plaintiffs and the ERISA Class;

r. Whether Defendants have violated and continue to violate ERISA §

209(a)(1), 29 U.S.C. § 1059(a)(1), as alleged herein;

s. Whether Shallin, Winslow, Terry, Pennington and the ERISA Class were credited and/or paid all eligible compensation due to them for purposes of the Payless 401(k) Plan, as required by ERISA;

t. Whether Shallin, Winslow, Terry, Pennington and the ERISA class should be credited and/or paid eligible compensation due to them via their respective 401(k) accounts, even if they are not entitled to overtime wages, because the Plan terms require them to receive 401(k) credit for ***earned*** overtime compensation even if it is not ***paid*** overtime compensation;

u. Whether Defendants violated ERISA's fiduciary standards by their failure to credit the ERISA Named Plaintiffs and the ERISA Class with all Compensation which they were paid ***or entitled to be paid*** for purposes of the Plan, as required by ERISA;

v. What exactly are the rights and future rights of ERISA Class members under the Plan, based upon whether the positions of Store Manager and Store Leader were misclassified under the FLSA and/or ERISA;

w. Whether Class members are entitled to damages in the form of money to be paid into their respective 401(k) accounts based on Defendants' violation of ERISA;

x. If Class members are entitled to damages, what method can be used to calculate those damages;

y. Whether equitable relief under ERISA Sec. 502(a)(3) such as a surcharge is appropriate equitable relief to make the ERISA class whole, and should the relief include an official plan amendment to clarify the rights of those misclassified under the law; and

z. Whether Defendants violated ERISA's fiduciary standards by its failure to credit the ERISA Named Plaintiffs and the ERISA Class with all Compensation for which they were paid or entitled to be paid for purposes of the Plan, as required by ERISA.

215. The ERISA Named Plaintiffs' claims are typical of those of the ERISA Class. The ERISA Named Plaintiffs, like all other ERISA Class members, was subject to Defendants' policies and practices of failing to record overtime worked and Defendants'

policy and practice of failing to credit all eligible compensation earned or owing as Compensation under the Plan.

216. Indeed, Shallin, Winslow, Terry, and Pennington were one of the "*all*"[5] who were mandated by the Defendants and the Plan to contribute three percent of bi-weekly earnings, to which they, like the ERISA Class were short changed on when it comes to matching contributions, as required by the Plan.

217. The ERISA Named Plaintiffs, Shallin, Winslow, Terry, and Pennington will fairly and adequately represent and protect the interests of the ERISA Class. The ERISA Named Plaintiffs have retained counsel competent and experienced in complex class actions and ERISA. Indeed, their counsel has participated in ERISA actions that have led to approximately 100 million dollars of recovery and have litigated multiple ERISA class actions.

218. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(1) because adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of the other members and/or pursuant to Fed. R. Civ. P. 23(b)(2), because Defendants acted or refused to act on grounds generally applicable to the ERISA Class, making appropriate declaratory and injunctive relief with respect to the ERISA Named Plaintiffs and the ERISA Class as a whole, and/or pursuant to Fed. R. Civ. P. 23(b)(3) because the Named Plaintiffs and the ERISA Class may be entitled to an award of owed benefits, to be credited to their 401(k) accounts, based on Defendants' ERISA violations.

[5] The Plan explains that all employee will be enrolled automatically in the Plan (unless they affirmatively elect not to enroll) and can contribute to the Plan and receive a 100% vested company match after 180 days of service.

219. The ERISA Named Plaintiffs intend to send notice to all members of the ERISA Class to the extent allowed or required by Rule 23.

COUNT 2 – 502(a)(1)(B)

(Brought by the ERISA Named Plaintiffs on Behalf of themselves and the ERISA Class)
(Pursuant to ERISA § 502(a)(1)(B) to enforce plan terms, clarify rights to future benefits under the plan terms, and recover benefits due)

220. The ERISA Named Plaintiffs, on behalf of themselves and the ERISA Class, re-allege and incorporate by reference paragraphs 1 through 219 as if they were set forth again herein.

221. ERISA Sec. 502(a)(1)(B) authorizes a participant or beneficiary to bring a civil action to recover benefits due under the terms of the plan, to enforce rights under the terms of the plan, and to clarify rights to future benefits under the terms of the plan.

222. This is exactly what the ERISA Named Plaintiffs and ERISA class seek to do.

223. As explained in the preceding sections, the ERISA Named Plaintiffs and ERISA Class seek to clarify what amount of future rights and benefits are due to them for their current overtime work - their future overtime work, if any - and their past performed overtime work, which is currently unpaid, but due according to the law, and therefore not being contributed by the Defendants into the 401(k) they are earning. They are also seeking clarification related to their rights as to accounting and record maintenance the Plan and Defendants are supposed to keep.

224. Plaintiffs and the ERISA Class also seek to enforce their rights under the Plan by seeking a judgment to order the Defendants to comply with ERISA and the Plan

terms to update the records with the proper accounting and maintenance and to have the Defendants contribute any amounts due to them under the law, which were earned but have not yet been contributed by the Defendants, and by seeking a recover any of those benefits lost due the misclassification of the Store Manager/Leader positions.

WHEREFORE, Mark Shallin, Bryan Winslow, Juan Terry Jr., and Melissa Pennington individually, and on behalf of the ERISA Class, request the following relief:

a. Certification of this action as a class action on behalf of the proposed ERISA Class;

b. Designation of the Named Plaintiffs as Representatives of the ERISA Class and the undersigned as Class Counsel;

c. Clarification and determination of benefits due through a declaration that the practices complained of herein violate ERISA, and clarifying what the Plaintiffs and ERISA Class members rights are under Plan, whether the Defendants are interpreting the Plan correctly, including when misclassification of an employee is found under the FLSA, and even when it is not; plus clarification on what further duties are due to ERISA Class members due to a misclassification under the FLSA;

d. Appropriate relief to remedy Defendants' violations of ERISA;

e. Enforcement of plan terms through by ordering and declaring that Defendants have unlawfully failed to credit the Named Plaintiffs and the ERISA Class with eligible compensation for all work performed, as required by ERISA and the terms of the Plan, and ordering Defendant to take the necessary steps to provide the benefits and credit due to them so they will be made whole;

f. An order requiring that Defendants remedy their breaches of ERISA duties by crediting the Named Plaintiffs and the ERISA Class with Eligible Compensation and Pay for all of their past, present, and future uncompensated work, along with interest;

g. Attorneys' fees and costs of suit under ERISA 502(g); and

h. Such other relief as the Court may deem necessary, just, and proper.

COUNT 3 – 502(a)(3)

(Brought by the ERISA Named Plaintiffs on Behalf of themselves and the ERISA Class)
(Violation of ERISA § 502(a)(3) for Appropriate Equitable Relief)

225. The ERISA Named Plaintiffs, on behalf of themselves and the ERISA Class, re-alleges and incorporate by reference paragraphs 1 through 219 as if they were set forth again herein.

226. ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1), requires that an employer which sponsors an employee benefit plan maintain records with respect to each of its employees sufficient to determine the benefits due or which may become due to such employees.

227. On information and belief, the 401(k) Plan is an employee benefit plans within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), and ERISA § 3(3), 29 U.S.C. § 1002(3).

228. Pursuant to the terms of the Plan, employees' rights to ***receive*** the contributions to the Plan are dependent, in part, on their compensation, which is defined by the Plan's governing instruments and the law to include, among other things, employees' earned overtime wages.

229. Pursuant to the terms of the Plan, employees' rights to ***share*** in the contributions to the Plan are dependent, in part, on their Compensation, which is defined by the Plan's governing instruments to include, among other things, employees' overtime earned wages.

230. By the Defendants' failure to contribute all the benefits and monies due the ERISA Named Plaintiffs, and members of the prospective ERISA Class, Defendants

have damaged Plaintiffs and Class by causing them to lose the benefits and opportunity to earn interest on their retirement investments.

231. By the Defendants' failure to record and/or report all of the hours worked by the ERISA Named Plaintiffs, and members of the prospective ERISA Class, Defendants have failed to maintain records with respect to each of its employees sufficient to determine the benefit accrual rights under the Plan, and for its Plan Participants in violation of ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1).

232. In order to remedy this violation of ERISA by Defendants, the ERISA Named Plaintiff on behalf of himself and members of the ERISA Class seek injunctive relief, and such other equitable relief as the Court deems just and proper, as provided by **Section 502(a)(3) of ERISA**, 29 U.S.C. § 1132(a)(3).

233. The ERISA Named Plaintiffs on behalf of themselves and members of the ERISA Class seek recovery of their attorneys' fees and costs of action to be paid by Defendants, as provided by Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

WHEREFORE, Mark Shallin, Bryan Winslow, Juan Terry Jr., and Melissa Pennington, individually, and on behalf of ERISA Class, request the following relief:

a. Certification of this action as a class action on behalf of the proposed ERISA Class;

b. Designation of the Named Plaintiffs as Representatives of the ERISA Class and the undersigned as Class Counsel;

c. A declaration that the practices complained of herein violate ERISA § 209(a), 29 U.S.C. § 1129(a);

d. Appropriate equitable and injunctive relief to remedy Defendants' violations of ERISA including but not limited to § 209(a);

e. A declaration that Defendants have breached its fiduciary duties by failing

to credit the Named Plaintiffs and the ERISA Class with Eligible Compensation for all work performed, as required by ERISA and the terms of the Plan and depriving them of lost investment opportunities;

f. A declaration that Defendants have breached their fiduciary duties by failing to credit the Named Plaintiffs and the ERISA Class with Pensionable Pay for all work performed, as required by ERISA and the terms of the Plan;

g. An order requiring that Defendants remedy their breaches of fiduciary duties and ERISA in general by crediting Named Plaintiffs and the ERISA Class with Eligible Compensation and Pensionable Pay for all of their past, present, and future uncompensated work, plus damages for their lost investments opportunity;

h. Attorneys' fees and costs of suit under Sec. 502(g); and

i. Such other injunctive and appropriate equitable relief as the Court may deem necessary, just, and proper.

COUNT 4 – 502(a)(3)

(Brought by the ERISA Named Plaintiffs on Behalf of themselves and the ERISA Class)
(Pursuant to ERISA § 502(a)(3) to Remedy Failures to Credit Service As Required by ERISA)

234. The ERISA Named Plaintiffs, on behalf of themselves and the ERISA Class, re-allege and incorporate by reference paragraphs 1 through 219 as if they were set forth again herein.

235. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that employee benefit plan fiduciaries discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries and, inter alia, (1) for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administration; (2) with the care, skill, prudence, and diligence under the circumstances that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims; and

(3) in accordance with the documents and instruments governing the plan.

236. On information and belief, the governing instruments of the Plan confers on Defendants the responsibility and/or control with respect to the crediting of compensation, thereby rendering Defendants a fiduciary in this regard.

237. On further information and belief, Defendants have exercised actual discretionary authority, responsibility, and/or control in determining what compensation would and would not be credited under the Plan. By reason of the exercise of such discretion, Defendants have been a fiduciary of the Plan with respect to the crediting of compensation.

238. Defendants breached ERISA, including their fiduciary duties by failing to credit compensation due for overtime performed by the ERISA Named Plaintiffs and the members of the ERISA Class as eligible compensation under the Plan.

239. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the ERISA Named Plaintiffs on behalf of themselves and all members of the ERISA Class seek an injunction requiring Defendants to credit all members of the ERISA Class with Compensation under the Plan for all of the past and future overtime work performed by those Class members and any such other equitable relief as this Court deems appropriate.

240. The ERISA Named Plaintiffs on behalf of themselves and members of the ERISA Class, seeks recovery of their attorneys' fees and costs of action to be paid by Defendants, as provided by Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1).

WHEREFORE, Mark Shallin, Bryan Winslow, Juan Terry Jr., and Melissa Pennington, individually, and on behalf of ERISA Class, request the following relief:

a. Certification of this action as a class action on behalf of the proposed ERISA

Class;

b. Designation of the Named Plaintiffs as Representatives of the ERISA Class and the undersigned as Class Counsel;

c. A declaration that the practices complained of herein violate ERISA § 209(a), 29 U.S.C. § 1129(a);

d. Appropriate equitable and injunctive relief to remedy Defendants' violations of ERISA § 209(a);

e. A declaration that Defendants have breached their fiduciary duties by failing to credit the Named Plaintiffs and the ERISA Class with eligible compensation for all work performed, as required by ERISA and the terms of the Plan;

f. A declaration that Defendants have breached their fiduciary duties by failing to credit the Named Plaintiffs and the ERISA Class with pensionable pay for all work performed, as required by ERISA and the terms of the Plan;

g. An order requiring that Defendants remedy its breaches of fiduciary duty by crediting Named Plaintiffs and the ERISA Class with eligible compensation pensionable pay for all of their past, present, and future uncompensated work;

h. Attorneys' fees and costs of suit under ERISA Sec. 502(g); and

i. Such other injunctive and equitable relief as the Court may deem necessary, just, and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury on all questions of fact raised by this Complaint.

Respectfully submitted by:

Dated: 7th day of August, 2014

/s/ Mitchell L. Feldman, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2014, a copy of the foregoing SECOND AMENDED COMPLAINT was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

FELDMAN MORGADO, P.A.

/s/ Mitchell L. Feldman
Mitchell L. Feldman, Esq. (PHV 06665)