IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Case No.

LATOYA MANIGAULT and MELISSA PENNINGTON,
individually and on behalf of all others similarly situated,

Plaintiffs,

versus

PAYLESS SHOESOURCE, INC.;
COLLECTIVE BRANDS, INC.; and
COLLECTIVE BRAND SERVICES, INC.,

Defendants.

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, Latoya Manigault and Melissa Pennington, allege, individually and on behalf of a class of persons similarly situated that in deciding this case, the court faces four issues – all else being peripheral:

- **Issue One: The Single Store Manger Can't Supervise Two Plus Employees.** The Fair Labor Standards Act, and New York Labor Laws requires employers to pay overtime unless the law provides an "exemption."[1] One of these exemptions is the "Executive Exemption." To qualify, an executive or manager must supervise two or more full time employees.[2] Here, Defendants decided that a group of Store Managers who do not supervise two or more full time employees should not be paid overtime. Is Payless correct to have denied them overtime under the executive exemption?

- **Issue Two: Non-Discretionary Bonuses Prohibit Half-Time Pay.** An employer may not pay overtime at the rate of half-time (.5) when it pays bonuses, unless the bonus is for

[1] *See*, 29 U.S.C. § 213(a)(1); NYLL Article 19 § 651(5)(c).
[2] *See*, 29 CFR 541.100. With the exception of the required minimum salary, New York's Codes, Rules and Regulations mirror the United States Department of Labor's definition of an "executive" employee**.** *See* 12 N.Y.C.R.R. § 142-2.14(c)(4)(i)(a)-(e).

individual performance. This is because employees receiving such bonuses cannot be said to receive "a fixed salary" – a requirement to qualify for the lower rate of overtime. Here, Payless paid a group of Store Managers overtime at the rate of .5, while providing them with non-discretionary group bonuses that were not for their individual performance. Does the non-discretionary group bonus prohibit overtime from being paid as half time instead of the statutory default time and one half (1.5)?

- **Issue Three: Failure to Factor in Bonuses When Determining Overtime Rate.** The law says an employee's regular rate of pay includes "all remuneration for employment."[3] Here, Payless paid bonuses to employees but failed to factor the remuneration into their regular rate of pay when calculating overtime it owed them. Is the Company's failure to take into considerations all remuneration when calculating their overtime pay a violation?

- **Issue Four: Store Manages and Store Leaders Fail the Executive Exemption Because they Do Not Manage or Have Discretion**. The law provides that employees who are a bona fide manager do not have to be paid overtime if they meet every part of the executive exemption test. To be an executive and pass the test means they primarily manage, including regularly managing people, part of the enterprise, and make meaningful decisions, at their discretion. The Managers here do not perform this type of work. Are they entitled to overtime pay?

Manigault and Pennington further allege:

Summary of the Allegations

Here, Defendants made voluntary determinations that managers who do not supervise two or more full time employees or their equivalent as required by the Fair Labor Standards Act ("FLSA") Executive Exemption (and 12 NYCRR § 142-2.2), should be hourly, non-exempt employees. However, for much of the time within the past decade, Defendants willfully chose to both misclassify and underpay this group of employees (titled "Store Managers" and "Store Leaders") as exempt from the overtime wage sections of the Fair Labor Standards Act and New York Labor Law ("NYLL") for all many of its stores in New York and around the United States. Defendants further willfully refused to compensate these employees for all the hours worked over 40 hours in any work week even when they admit and self-determined that they were non-exempt employees. Further, Defendants have a *de facto*, common practice and unwritten policy

[3] 29 U.S.C. § 207(e); 29 C.F.R. § 778.108.

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, as well as not having to pay anyone to work necessary hours required to keep the stores fully operating at shoestring labor budgets. The decision was made at the highest corporate level, was wrong, and the actors had reasons to know it, *e.g.*, they have faced claims in the past and are aware of the misclassification and the inapplicability of any FLSA and NYLL exemptions (the NYLL applies the FLSA's exemptions).

Payless admittedly appreciates the lack of exemptions applicable to the single store manager who does not regularly and customarily supervise 2 or more full time employees; however, they still want to pay less wages to this class than required under New York law. Simply said, Payless made a business decision to purposefully evade the provisions of the FLSA and New York Labor Law and their respective applicable regulations.

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 how the NYLL applies its exemptions, and have faced challenges before. Defendants have self-policed some or all of their stores at certain intervals within the relevant class period of 6 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 admittedly agree that title of store managers and store leaders (hereinafter collectively referred to as "Managers") are interchangeable and are the same

position. Defendants admittedly agree and recognize that Managers who do not regularly and customarily supervise 80 or more hours of subordinate labor do not meet any exemption under the FLSA or NYLL.

Defendants know that many of its Managers then fail and have failed 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 "Managers" (also known as "store managers" or "store leaders") don't act like managers. 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 and shelving inventory, answering telephones, greeting customers, pricing, handling displays and primarily performing non-management duties as recognized under the FLSA and NYLL. Defendants have taken this class and transitioned them in and out of exempt status yet willfully refuse to compensate these employees during the periods of time that Payless recognizes them as an exempt employee.

Managers in this class were mandated to work overtime without being paid a premium, such as a half time using the Fluctuating Workweek ("FWW") method or being paid time and a half, and further are forced to work numerous hours beyond their schedules under coercive tactics and warnings that claiming all hours will negatively affect their 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 underpaid, or *paid less,* while being overworked.

Defendants have been unjustly enriched by virtue of their systematic failure to compensate Plaintiffs and the Class in accordance with the NYLL. They seek a declaratory judgment that that the Defendants have willfully violated the NYLL, 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.

On behalf of the Class, Plaintiffs seek injunctive relief requiring Defendants to comply with the law, compensatory damages in the amounts Plaintiffs, and the Class members, should have received had Defendants paid them overtime compensation in accordance with the law, along with liquidated damages, pre- and post-judgment interest, and attorneys' fees and costs.

INTRODUCTION

Plaintiffs, Latoya Manigault and Melissa Pennington, individually, and on behalf of all others similarly situated, sue Defendants, Payless Shoesource, Inc., Collective Brands, Inc., and Collective Brands Servicing, Inc., pursuant to the provisions of the New York Labor law and applicable regulations, and states as follows:

1. Plaintiffs bring this action on behalf of themselves and a class of similarly situated current and former employees, to seek redress for systematic and class-wide failure to pay overtime and for unjust enrichment.

2. Pursuant to plan and policy, Manigault, Pennington, and similarly situated current and former employees have been given the title of "Store Manager" and "Store Leader" and unlawfully misclassified by Defendants as exempt employees to avoid compensating them for time worked in excess of forty (40) hours per week.

3. Defendants failed to pay Manigault, Pennington, and similarly situated employees in accordance with the provisions of New York Labor Law ("NYLL"), applicable regulations and common law principles of unjust enrichment, including, but not limited to, their failure to pay Manigault, Pennington, and the Class for all wages due for overtime work at not less than one and one-half times their regular rate of pay for all hours worked in excess of forty (40) hours in a workweek.

4. In this pleading, the term "Store Manager" or "Store Leader" means any employee with the title of Store Manager or Store 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).

5. In this pleading, "Defendants" mean the named Defendants, Payless Shoesource, Inc., Collective Brands, Inc., and Collective Brands Servicing, 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).

6. 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 AND VENUE

7. This Court has federal jurisdiction over the Plaintiffs' New York state law class action claims pursuant to the jurisdictional provisions of the Class Action Fairness Act, 28 U.S.C. §1332(d)(2) as at least one class member is diverse from at least one Defendant and there is more than $5 million total in controversy, exclusive of interest and costs.

8. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

9. This Court has personal jurisdiction over this action because the Defendants operate substantial business in Monroe County, New York, and some of the damages at issue occurred in Monroe County, New York.

10. Venue is proper in this Division pursuant to 28 U.S.C. § 1391(b) because the Defendants reside in this district and because a substantial part of the events giving rise to the claims occurred in this District.

11. Plaintiffs bring causes of action based solely on and arising under New York law. The claims of Manigault, Pennington, and the Class are claims for violations of the NYLL's (and its implementing regulations') overtime wage provisions that occurred exclusively in New York and all, or substantially all, Class members are residents of New York. These claims arise from Defendants' systematic wage abuse against their "Store Managers" and "Store Leaders" in New York.

THE PARTIES

The Representative Plaintiff, Latoya Manigault

12. Ms. Manigault is a citizen and resident of Monroe County, New York. She worked for Payless from December of 2008 to June of 2011 as a Store Manager in Henrietta, New York.

The Representative Plaintiff, Melissa Pennington

13. Ms. Pennington is a citizen and resident of Oneida County, New York. She worked for Payless from May of 2006 to January of 2013 as a Store Manager in New Hartford, New York.

The Defendants

14. 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. Upon information and belief, this Defendant controls all of the Payless shoe stores in the New York.

15. 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. 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".

16. 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".

17. At all times relevant to this action, Plaintiffs and the Class were "employees" covered by the New York Labor Law, and Defendants were "employers" of Plaintiff and the Class of "Store Managers" and "Store Leaders" they seek to represent, as those terms are defined by New York Labor Law §§ 2, 651(5) and (6), 190(2) and (3) and applicable regulations, 12 NYCRR § 142-2.14.

CLASS ACTION ALLEGATIONS

18. Plaintiffs bring this action individually and as a class action for relief under the New York Labor Law as a New York statewide class under Fed. R. Civ. P. 23(a) and (b)(1), (b)(2), and/or (b)(3) as representative of a proposed New York Class (the "Class") consisting of themselves and:

> All Store Managers and Store Leaders who are currently employed or were previously employed with PAYLESS SHOESOURCE within the state of New York, within the past six years preceding this lawsuit who did not customarily and regularly each week while employed, direct the work of 2 or more full time employees or their equivalent of eighty (80) hours of subordinate employees.

19. Additionally, Plaintiffs bring this action individually and as a class action for relief under the New York Labor Law as three New York statewide sub classes under Fed. R. Civ. P. 23(a) and (b)(1), (b)(2), and/or (b)(3) as representative of three proposed New York sub classes 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 state of New York, within the past six years preceding this lawsuit who were treated as non-exempt employees at any time and who worked off the clock.

B. All Store Managers and Store Leaders who are currently employed or were previously employed with PAYLESS

SHOESOURCE in the State of New York, within the past six 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.

C. All Store Managers and Store Leaders who are currently employed or were previously employed with PAYLESS SHOESOURCE in the State of New York, within the past six 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.

20. The Class and sub classes are so numerous that joinder of all Class members is impracticable. Although the precise number of such persons is unknown, and the facts are presently within the sole knowledge of Defendants, there are hundreds of Store Managers and Store Leaders employed by Defendants in New York as of the date this Complaint was filed. The Class also includes former employees who were employed by Defendants since 2008. Because there are approximately two-hundred and thirty-five (235) Payless stores in New York, Plaintiff reasonably estimates the class size is upwards of five hundred or more (500) current and former Store Managers and Store Leaders who have worked at Payless during the past six (6) years given the turnover history in this position. Therefore, the Class and sub classes are sufficiently numerous to warrant certification.

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

a) Whether Defendants violated the New York Labor Law by failing to pay Plaintiffs and the Class overtime wages;

b) Whether Defendants were unjustly enriched by their wage policies;

c) Whether Defendants should be enjoined from continuing the alleged wrongful practices in violation of New York Labor Law and applicable regulations; and

d) What is the proper measure of damages for the type of injury and losses suffered by Plaintiff and the Class.

22. Manigault's and Pennington's claims are typical of those of the Class, because they are, or were, employed by Defendants as Store Managers (or Store Leaders) who sustained damages, including non-payment of overtime wages, as a result of Defendants' common compensation policies and practices. The defenses that likely will be asserted by Defendants against Plaintiffs are typical of the defenses that Defendants will assert against the Class members.

23. All Managers have a mandatory corporate schedule of forty-five (45) hours per week, and Payless admits and does not dispute that all Mangers in this Class, as well as in all New York stores, have the same job duties, same job descriptions and are paid according to the same pay scheme.

24. Manigault and Pennington will fairly and adequately protect the interests of the Classes and have retained counsel experienced in pursuing complex and class action litigation who will adequately and vigorously represent the interests of the Classes.

25. 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 of the class and/or pursuant to Fed. R. Civ. P. 23(b)(2), because Defendants acted or refused to act on grounds generally applicable to the whole Class, making appropriate declaratory and injunctive relief with respect to the named Plaintiffs and the Class.

26. Class certification is also appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because, as alleged above, questions of law and fact common to the Class predominate over any questions that might arguably affect only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

27. A class action is superior to other available methods for the fair and efficient adjudication of this controversy alleged herein for at least the following reasons:

A. This action will cause an orderly and expeditious administration of the Class' claims; economies of time, effort and expense will be fostered; and uniformity of decision will be ensured;

B. This action presents no difficulties impeding its management by the Court as a class action; and no superior alternative exists for the fair and efficient adjudication of this controversy;

C. Class members currently employed by Defendants would be reluctant to file individual claims for fear of retaliation or blacklisting even after the end of their employment;

D. The Class is readily identifiable from records that Defendants are legally required to maintain; and

E. Prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendants.

28. Without a class action, Defendants will likely retain the benefit of their wrongdoing and will continue a course of action which will result in further damages to Plaintiffs and the members of the putative Class.

29. Currently pending before the United States District Court, for the District of Connecticut is a collective action case, brought pursuant to the Fair Labor Standards Act ("FLSA") and styled as *Mark Shallin, Bryan Winslow, and Juan Terry, individually and on behalf of all others similarly situated who consent to their inclusion in a collective action v. 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*, Case No. 3:14-CV-00335-RNC, which, like this class action, has also been brought on behalf of all Store Managers and Store Leaders.

30. Likewise, the Defendants are expected to admit in this case, and in *Shallin, Winslow, and Terry*, that the job descriptions and job duties for all Store Managers and Store Leaders are the same for all Payless stores in the United States of America.

FACTUAL BACKGROUND

31. PAYLESS operates more than 3,499 retail shoe stores nationwide, including 3,496 stores in the 50 U.S. States, 235 of which are located in New York. Upon information and belief, many of these stores are run by a single Store Manager or Store Leader such that accounting for turnover in the past six years, the estimated class size is approximately 500 or more employees.

32. Upon information and belief, all stores are uniform in management, and the stores are mirror images of each other.

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

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

35. Under the regulations implementing the New York Labor Law, non-exempt employees must be paid at a rate of "not less than one and one-half times the regular rate at which he is employed" for any hours worked in excess of forty hours in a given week. 12 NYCRR § 142-2.2 (adopting provisions of the Fair Labor Standards Act and implementing New York Labor Law).

36. The Store Manager and Store Leader job description is the same for all Payless stores in New York; as well as for the U.S.A.

37. The job duties of the Store Manager/Leader are the same as well for all store managers of single stores.

38. No college education is required for the Manager Position.

39. All job postings are handled by the corporation and listed on the company's website. The job descriptions for the Store Manager and Store Leader position are identical for all states, including New York State.

40. The Store Leaders and Store Managers were eligible for non-discretionary bonuses paid quarterly depending upon the profitability of the store, but were not used in the calculation of the regular rates of pay or the overtime rates.

41. Upon information and belief all store managers and store leader worked more than forty-five (45) hours per week every week.

42. Most if not all single store managers do not regularly and customarily supervise 2 or more full time employees, thus the position fails to meet the executive exemption within the

Fair Labor Standards Act ("FSLA"), § 213, and does not fall within any exemptions recognized under the New York Labor Law, which has adopted the FLSA's exemptions.

43. The job duties of the single store Manager as well do not satisfy the administrative exemption, and Payless has not contended such store managers are administratively exempt in their pay practices and business practices.

44. Pursuant to 12 NYCRR § 142-2.2, Payless, as the employer of Plaintiffs and other similarly situated employees, was and is required to pay one and one-half times each employee's hourly rate of pay for all hours worked in excess of forty (40) hours per week. New York does not accept payment of overtime wages at a Fluctuating Workweek ("FWW"), or half-time amount, under the circumstances that occurred here for Plaintiffs and the Class.

45. The Defendants, as a matter of policy and practice, willfully and intentionally failed to pay Plaintiffs and the Class members one and one-half times their regular rate of pay for any hours worked over forty (40) in a week in violation of 12 NYCRR § 142-2.2 which resulted in its employees being paid less than they should have been.

46. Defendants during some periods of the relevant 6 years at issue converted some members to non-exempt, salaried positions and paid half-time (.5) in lieu of time and a half the employees' regular rate of pay. Defendants called these managers "FLUX" or "Fluxed", likely synonymous with the term Fluctuate from the FWW terminology.

47. On December 9, 2012, Defendants repealed their own use of the FWW (1/2 time pay for overtime hours), and notified managers who did not in Defendants' own determination meet the 80 hours of subordinate labor, that they were being converted to hourly, non-exempt employees and would be paid overtime at a rate of one and one half times their regular rates of pay.

48. Regardless, Payless failed under all methods to pay this class of employees the correct overtime rates as they did not include the value of non-discretionary bonuses in the overtime wage rates.

49. Defendants have intentionally and repeatedly engaged in the practice of misclassifying non-exempt Store Managers and Store Leaders as salaried exempt employees for the purpose of minimizing payroll, increasing profitability, and paying their employees less than required under the law.

50. Apparently, Defendants agree and admit so much, as some 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".

51. Prior to December 9, 2012, upon information and belief, FLUX managers received a salary plus half time for hours worked in excess of forty (40) and therefore were paid less than they were entitled.

52. However again, when Payless calculated the overtime wage rates for Flux employees it willfully miscalculated the regular rates of pay both by failing to include the bonuses in the calculations, and also by willfully lowering the employee's true hourly rates during the conversion from salaried exempt.

53. New York law does not permit overtime compensation based upon the fluctuating workweek, or use of the half time, under the circumstances the Plaintiff and Class endured, and thus Payless willfully underpaid employees in this class in violation of New York Labor Law.

54. After December of 2012 some or all such FLUX managers, those deemed by Payless to be non-exempt as not meeting the 80 hour requirement of the executive exemption,

and not being subject to the administrative exemption, were then converted to hourly paid employees and paid at time and one half for all overtime hours.

55. Store Managers/Leaders were forced to work off the clock without compensation in order to complete their job duties and keep the stores within the small labor budgets, the result of which was that the class of Store Managers were being paid less than they should have under New York law.

56. Payless intentionally did not adequately and fairly explain the specifics of the Flux designation to store managers or store leaders; Plaintiffs and the class of similarly situated employees were not clearly explained that they were being converted to non-exempt employees, and that they were entitled to be paid overtime wages for all hours over 40 at a rate of one and one half times their regular rates of pay.

57. Moreover, Payless never explained how they determined who would be classified to 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).

58. Thus there was never a clear and mutual understanding between the Defendants and the Plaintiffs and Class concerning how or why they would be paid.

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

60. 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.

61. As a result of Payless making a FLUX determination on a quarterly basis, its managers were paid less by not receiving compensation for all the previous hours worked in excess of forty (40) for the quarter during a so-called "look back" period of time.

62. Although Payless then attempts to comply with the overtime laws going forward from the look back period, it willfully and purposefully refuses to compensate these managers for the preceding overtime hours during this "look back" period.

63. Moreover, when Payless converted salaried exempt employees to hourly non-exempt employees, it purposefully lowered and reduced the regular rate of pay so as to fit the 40 hours of straight pay and the 5 hours of overtime pay into the exact or near exact same wages as these managers received while previously on salaried, exempt status.

64. So for example a manager/class member employee earning $450 per week in salary should have a regular rate of pay of arguably $10.00 per hour. If converted to hourly, non-exempt, the employee should receive $400 for the 40 hours, plus $75 for the 5 hours of overtime. However, Payless would then intentionally and willfully reduce the regular hourly rate of pay such that the total wages for the employee would receive would still equate to $450.00, even after being converted to non-exempt status.

65. Plaintiffs, and the class of similarly situated employees, were willfully and intentionally paid less than the correct overtime rates by the Defendants under this scheme, and also were not paid overtime at a rate of time and one half their regular rates of pay.

66. Additionally, upon information and belief, Payless failed to include the non-discretionary bonuses paid to the class in the calculations of either their regular rates of pay or

overtime rates – whether they paid overtime wages to these Managers and Leaders placed on the FLUX, salaried non-exempt status, or hourly, non-exempt status. This resulted in its employees being paid less than required under the New York Labor Law.

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 fit the compensation to be paid to each employee for the 45 hours per week into the exact same pay as the employees received while on salary.

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 New York Labor Law 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" Defendants gave to this process, and therefore would be against the employees' interest and to clock in all hours in the future.

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.

71. Managers were encouraged to work off the clock because they were given limited staff and a limited budget and therefore were not capable of completing the necessary job duties in their limited 45 hour workweek.

72. Managers were told to do what it takes to get the job done but to stay within their limited labor scheduling standards as well as maintain their specific allotted budgets.

73. In order to maintain those labor scheduling standards and stay below budget a manager would have to close the store during business hours and therefore managers were forced to determine that it was in their best interest to work off the clock; managers had no choice.

74. Managers were aware that working any overtime hours would put them beyond their allotted budget and doing so would result in reprimand.

75. Therefore, Managers were left between a rock and a hard place in deciding whether to maintain the budget or work hours off the clock.

76. Managers often worked through their lunches because they were alone in the store for the majority of the work day.

77. 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.

LATOYA MANIGAULT

78. Manigault worked for Payless from December of 2008 until June of 2011 as a Store Manager.

79. Manigault's duties as a Store Manager included sales and customer service type work, and other typically hourly, non-exempt duties such as: stocking, shelving, unloading shipments, pricing, inventory, customer service, working at the cash register, cleaning, handling

phone calls, processing payroll and time records, and handling displays and promotions. While Manigault also assisted the District Manager or other Store Managers in the hiring process, she did not have the authority to make the decision on hiring any employee without the approval of the District Manager or another Store Manager.

80. Manigault spent the majority of her time working alone in the store due to the Defendants' budget constraints imposed upon her and the store. During the typical daily shift, she was 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.

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

82. During the remaining other hours of her shifts, Manigault was at most working with one other sales associate.

83. Manigault did not have the ability to supervise, hire, or fire other employees.

84. Generally, Manigault did not have time to act as an executive or administrator, as her primary duty and the duties which took the majority of her time involved acting as a sales associate and store clerk, for upwards of 90% of her work hours. Management stressed that her (and other similarly situated Mangers) primary duty was to sell and the stores were expected to meet certain daily, monthly and yearly sales goals or Manigault and the Class would be subject to discipline. Payless closely monitored daily and monthly store receipts.

85. Manigault's primary job duties did not involve the exercise of discretion and judgment in matters of significance affecting the store or Payless. She 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.

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

87. Manigault, 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.

88. Manigault 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.

89. Manigault's store did not customarily and regularly have 2 full time employee or other employees working 80 or more hours during the week.

90. Manigault was not in reality a manager as that term is known within the meaning of the New York Labor Law (and the FLSA, as adopted by the NYLL). The primary job duty of Manigault was to work as a sales associate and store clerk, generating sales, maintaining the cash register, stocking inventory, and following instructions of corporate procedures.

91. Manigault was paid an annual salary, but her 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.

92. Manigault received a salary throughout her time as an employee/manager. She was told that she was a FLUX manager at some time during her employment.

93. She regularly worked over 40 hours each week and was required to work a corporate mandated, Store Manager 45 hours per week schedule, typically 5 days at 9 hour shifts.

94. Manigault was paid at one time on a salary basis, and did not receive time and one half for her overtime hours over 40 in a work week.

95. Manigault was paid at one time on an hourly basis, and did not receive the correct overtime compensation for her overtime hours over 40 in a work week.

96. Upon information and belief, Manigault was switched from salaried exempt to salaried non-exempt, with a payment of a half time pay in keeping with the Defendants' Flux category and use of the fluctuating work-week method. Manigault was labeled a "Flux" Manager during some part of her employment with the Defendants, but was never told exactly what this meant and that she was entitled to be paid overtime wages. Manigault and Defendant never reached an agreement on being paid a salary and half time basis, nor did her schedule fluctuate below 40 hours in any work week.

97. Manigault was warned by the District Manager not to report any hours above 45 to the company, and on one occasion when she did, was told "I don't care how you do it, don't put in for more than 45 hours."

98. Manigault averaged between fifty (50) to fifty-five (55) hours of work per week.

99. Manigault worked these hours throughout her employment with Payless, and many of her overtime hours were off the clock.

100. While employed by Defendants, Manigault regularly worked more than forty (40) hours in a week but was not paid overtime compensation; therefore she was paid less than what she was owed.

MELISSA PENNINGTON

101. Pennington worked for Payless from May of 2006 until January of 2013 as a Store Manager.

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

103. Pennington spent the majority of her time working alone in the store due to the Defendants' budget constraints imposed upon her and the store. During the typical daily shift, she was alone in the store upwards of 7 to 9 hours per day; often from 9:00 am until late in the afternoon, and/or for the entire shift.

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

105. During the remaining other hours of her shifts, Pennington was at most working with one other sales associate.

106. Pennington did not have the ability to supervise, hire, or fire other employees.

107. Generally, Pennington did not have time to act as an executive or administrator, as her primary duty and the duties which took the majority of her time involved acting as a sales associate and store clerk, for upwards of 90% of her work hours. Management stressed that her (and other similarly situated Mangers) primary duty was to sell and the stores were expected to meet certain daily, monthly and yearly sales goals or Pennington and the Class would be subject to discipline. Payless closely monitored daily and monthly store receipts.

108. Pennington's primary job duties did not involve the exercise of discretion and judgment in matters of significance affecting the store or Payless. She 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.

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

110. 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.

111. 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.

112. Pennington's store did not customarily and regularly have 2 full time employee or other employees working 80 or more hours during the week.

113. Pennington was not in reality a manager as that term is known within the meaning of the New York Labor Law (and the FLSA, as adopted by the NYLL). The primary job duty of Pennington was to work as a sales associate and store clerk, generating sales, maintaining the cash register, stocking inventory, and following instructions of corporate procedures.

114. Pennington was paid an annual salary, but her 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.

115. Pennington received a salary throughout her time as an employee/manager. She was told that she was a FLUX manager at some time during her employment.

116. She regularly worked over 40 hours each week and was required to work a corporate mandated, Store Manager 45 hours per week schedule, typically 5 days at 9 hour shifts.

117. Pennington was paid at one time on a salary basis, and did not receive time and one half for her overtime hours over 40 in a work week.

118. Pennington was paid at one time on an hourly basis, and did not receive the correct overtime compensation for her overtime hours over 40 in a work week.

119. Upon information and belief, Pennington was switched from salaried exempt to salaried non-exempt, with a payment of a half time pay in keeping with the Defendants' Flux category and use of the fluctuating work-week method. Pennington was labeled a "Flux" Manager during some part of her employment with the Defendants, but was never told exactly what this meant and that she was entitled to be paid overtime wages. Pennington and Defendants never reached an agreement on being paid a salary and half time basis, nor did her schedule fluctuate below 40 hours in any work week.

120. Pennington was warned by the District Manager not to report any hours above 45 to the company.

121. Pennington averaged between forty-five (45) to fifty (50) hours of work per week.

122. Pennington worked these hours throughout her employment with Payless, and many of her overtime hours were off the clock.

123. While employed by Defendants, Pennington regularly worked more than forty (40) hours in a week but was not paid overtime compensation; therefore she was paid less than what she was owed.

First Cause of Action

New York Labor Law: Unpaid Overtime Wages in Violation of 12 NYCRR § 142-2.2

124. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

125. Throughout the Class Period, Plaintiffs and members of the Class were Defendants' "employees" within the meaning of the New York Labor Law §§ 2, 190(2) and (3), and 651(5) and (6).

126. Throughout the Class Period, Defendants failed to pay Plaintiffs and the Class overtime wages of not less than one and one-half times their regular rate of pay for each hour worked in excess of forty (40) hours in a workweek in violation of 12 NYCRR § 142-2.2.

127. Plaintiffs and the Class seek the amount of their underpayments based on Defendants' failure to pay one and one half time the regular rate of pay for work performed in excess of forty hours, as provided by New York Labor Law § 663(1), and such other legal and equitable relief from Defendants' unlawful and willful conduct as the Court deems just and proper.

128. Defendants have willfully and intentionally engaged in a statewide pattern and practice of violating the provisions of the New York Labor Law, by misclassifying Store Managers and Store Leaders as exempt and improperly failing and/or refusing to pay Plaintiffs and the 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 12 NYCRR § 142-2.2.

129. Payless has been operating its business since 1956 and knew, or should have known, that job title alone (i.e. Store Manager and Store Leader) is not controlling of the

overtime exemption status of employment under 12 NYCRR § 142-2.2, the NYLL and the FLSA as adopted by the NYLL.

130. Payless knowingly and willfully misclassified Plaintiffs and other employees similarly situated, comprised of the Class, as exempt for the purposes of decreasing costs and maximizing profitability.

131. The widespread nature of Payless' failure to pay overtime, in violation of 12 NYCRR § 142-2.2, demonstrates Payless' willful plan and scheme to evade and avoid paying overtime to all of their Store Managers and Store Leaders.

132. As a result of Payless' violations the NYLL and 12 NYCRR § 142-2.2, Plaintiffs and the Class, comprised of all other employees similarly situated, have suffered damages by Payless' failure to pay overtime compensation in accordance with 12 NYCRR § 142-2.2.

133. In light of Defendants' longstanding and ongoing violations of the NYLL and applicable regulations, Defendants' failure to pay current employees their wages due has caused and is causing irreparable injury to those Class members who are currently employed by Defendants, and unless enjoined, will cause further irreparable injury, leaving those Class members with no adequate remedy at law.

134. Due to Defendants' violations of the NYLL, Plaintiffs and members of the Class are entitled to recover from Defendants all of the unpaid overtime wages of not less than one and one-half times their correct regular rates of pay for each hour worked in excess of forty (40) hours in a workweek, reasonable attorney's fees, costs, pre-judgment and post-judgment interest, liquidated damages and other compensatory and equitable relief pursuant to New York Labor Law Article 6 § 190, *et seq.*, Article 19 § 650, *et seq*, and 12 NYCRR § 142-2.2.

Second Cause of Action

Unjust Enrichment: Defendants' Failure to Pay Overtime Wages

135. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

136. Defendants have failed to pay Plaintiffs and the Class members' overtime wages for the hours they each worked for Defendants. 12 NYCRR § 142-2.2 requires that Payless, subject to the exemptions of section 7 and 13 of the FLSA, pay their employees one and one-half times each employee's hourly rate of pay for all hours worked in excess of forty (40) hours per week.

137. Defendants were enriched by Plaintiffs and the Class working over forty (40) hours per week, because Plaintiffs and the class were not paid according to the requirement of the NYLL and Defendants were able to receive more work while paying less wages.

138. Defendants' enrichment came at the Plaintiffs and the Class' expense because Defendants paid Plaintiffs and the Class less than required under the law to receive more work from Plaintiffs and the Class. Instead of being properly paid for all hours worked according to the overtime provisions of the NYLL, Plaintiffs and the Class were instead forced to continue working many hours over 40, enriching the Defendnats, without receiving compensation at the legally required overtime rate.

139. It is against equity and good conscious to permit Defendants to obtain this benefit without adequately compensating Plaintiffs and the Class because Defendants knew or should have known that failing to pay the Plaintiffs and the Class their lawfully required overtime wages was wrong, but Defendants implemented a uniform, nation-wide policy to prevent Plaintiffs and the Class from receiving their owed and earned overtime wages anyway.

140. Due to Defendants' violations of the New York Labor Law, Plaintiffs and members of the Class are entitled to recover from Defendants their unpaid wages, reasonable attorney's fees, costs and pre-judgment and post-judgment interest.

141. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Plaintiffs and the Class also seek injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

Third Cause of Action

Declaratory Judgment Pursuant to 28 U.S.C. §§ 2201 and 2202

142. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein

143. Plaintiffs and the class seek a declaratory judgment as to the above allegations. Specifically, that Defendants purposely and uniformly misclassified Plaintiffs and the Class under the New York Labor Law, which has resulted in Plaintiff and the Class receiving less than all compensation due to them.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all members of the Class, requests the following relief:

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

B. Designation of the Named Plaintiffs as Representative of the Class;

C. Entering judgment against Defendants, jointly and severally, in the amount of the Plaintiffs' and the Class members' unpaid wages for the preceding six (6) years minus

any of the Plaintiffs', and Class members', recovery of unpaid wages in *Shallin, Winslow, Terry*, statutory damages and actual and compensatory damages, and pre- and post-judgment interest as allowed by law;

D. Awarding Plaintiffs and the Class members attorney's fees and costs incurred in this litigation;

E. Awarding Plaintiffs and the Class members liquidated damages offset or less any recovery awarded or obtained in the *Shallin, Winslow, Terry* FLSA overtime case;

F. Issuing a declaratory judgment that the practices complained of herein are unlawful under New York Labor Law;

G. Enjoining Defendants to cease the practices found illegal or in violation of the rights of the Class of Store Managers and Store Leaders; and

H. Granting Plaintiffs and the Class such further relief as this Court deems 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.

Dated: This ____ day of August, 2014.

/s/ Dale James Morgado
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