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14 themselves and all others similarly-situated and on behalf of the general public.

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **IN AND FOR THE COUNTY OF SAN DIEGO**

17 MARIANA LABASTIDA, ABRAHAM
18 CECENA, AND GEORGE VAN HEMERT
19 on behalf of themselves and all others similarly
20 situated, and on behalf of the general public

21 Plaintiff(s).

22 v.

23 MCNEIL TECHNOLOGIES INC, a Virginia
24 Corporation, and DOES 1 through 500, inclusive.

25 Defendant(s).

CASE NO. 37-2007-00074518-CU-OE-CTL

CLASS ACTION FOURTH AMENDED
COMPLAINT FOR:

- 1) Failure to Pay Overtime
- 2) Failure to Provide Meal Periods or Compensation in Lieu Thereof
- 3) Failure to Provide Rest Periods or Compensation in Lieu Thereof
- 4) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions
- 5) Failure to Pay Wages of Terminated or Resigned Employees
- 6) Violation of Unfair Competition Law
- 7) Private Attorney Generals Act of 2004
- 8) Declaratory Relief/ Labor Code Violations

1 Plaintiffs Mariana Labastida, Abraham Cecena, and George Van Hemert (herein referred to as
2 "Plaintiffs"), on behalf of themselves and all others similarly-situated, hereby file this Complaint against
3 defendant MCNEIL TECHNOLOGIES, INC., and DOES 1-100 (hereinafter collectively referred to as
4 "Defendants" or "MCNEIL"). Plaintiffs are informed and believe, and on the basis of that information
5 and belief, allege as follows:

6 **INTRODUCTION**

7 1. This is a Class Action, pursuant to Code of Civil Procedure section 382, seeking unpaid wages,
8 overtime wages, meal and rest period compensation, failure to comply with wage statement provisions,
9 waiting time penalties, injunctive, declaratory and other equitable relief, interest, attorneys' fees and
10 costs under various sections of the California Labor Code, I.W.C. Wage Orders, Title 8 of the California
11 Code of Regulations, Business and Professions Code sections 17200 et. seq., and California Code of
12 Civil Procedure §§382 and 1021.5.

13 2. Plaintiffs bring this action on behalf of Plaintiffs and all persons similarly-situated (hereafter
14 referred to as "Class Members" and/or the "Plaintiff Class"), who are or have been employed by
15 MCNEIL in any position within the State of California, at any time during the operative Class Period
16 whom MCNEIL denied compensation for overtime when owed, denied meal and rest periods, subjected
17 to unlawful withholdings from wages, or failed to comply with wage statement provisions. Plaintiffs, on
18 behalf of themselves and all other members of the class alleged herein, also brings an action for
19 monetary recovery for Defendants' violation of California Business and Professions Code sections
20 17200, et. seq., including injunctive relief and restitution of all benefits MCNEIL has enjoyed from its
21 unfair, unlawful and/or fraudulent business practices.

22 3. For at least four years prior to the filing of this action and through to the trial date ("Class Period"),
23 Defendants' violations of California's wage and hour laws, as described more fully below, have been
24 ongoing. During the Class Period, MCNEIL has had a consistent policy of (1) unlawfully failing to pay
25 overtime compensation due; (2) unlawfully denying the Plaintiffs and the Class Members statutorily-
26 mandated meal and rest periods; (3) willfully failing to pay to the Plaintiffs and/or those Class Members
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1 whose employment with MCNEIL terminated in a prompt and timely manner: (4) willfully failing to
2 provide Plaintiff and the Class Members with accurate itemized statements.

3 4. Plaintiffs are informed and believe, and based thereon allege, that within the Class Period,
4 defendant MCNEIL despite actual knowledge and California's legal mandates, enjoyed an advantage
5 over its competition and a resultant disadvantage to its workers by electing not to provide proper
6 overtime compensation, statutorily-mandated meal and rest periods, pay all wages due and/or provide
7 accurate wage statements.

8 5. Plaintiffs are informed and believe and, based thereon allege, that officers of MCNEIL knew of
9 these facts and legal mandates, yet, nonetheless, repeatedly authorized and/or ratified the violation of the
10 laws cited herein.

11 6. Despite MCNEIL's knowledge of the Plaintiff Class's entitlement to the above listed items,
12 MCNEIL failed to provide same to members of the Plaintiff Class, in violation of various sections of the
13 California Labor Code, Industrial Welfare Commission Wage Orders and Title 8 of the California Code
14 of Regulations. This action is brought to redress and end this long-time pattern of unlawful conduct.

15 7. With respect to putative class members on whose behalf this case were brought, Defendant McNeil
16 attempted to undermine the rights that these potential class members may have in this case. Specifically,
17 during the period of on or about September of 2008 through to July of 2009, Defendant contacted
18 putative class members and informed them that Defendant owed them additional money stemming from
19 their employment with defendant. Based on information and belief, the receipt of the monies owed to
20 the putative class members was contingent on them signing a "General Release Agreement."

21 8. Based on information and belief, the class members that signed "General Release Agreements" did
22 not have a bona fide dispute with defendant with respect to any past wages owed at the time they signed
23 the "General Release Agreement."

24 9. During the period of on or about October of 2008 through to July of 2009, Defendant obtained
25 signed "General Release Agreements" from Plaintiff Van Hemert and other similarly-situated putative
26 class members (Subclass). Under the agreement, class members were required to waive all rights they
27 might have against Defendant (including but not limited to, statutorily provided overtime compensation
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1 rights, minimum wage, compensation rights, compensation for denied meal and rest breaks) in exchange
2 for a nominal sum of money which is less than what they would be entitled to under the statutory laws.
3 In exchange for a nominal sum of less than all the wages earned and owed, the class members would
4 forego any rights they have directed at the enforcement of California's minimum wage and overtime
5 laws for the benefit of workers as well as any other claim they may have against Defendants.

6 **JURISDICTION AND VENUE**

7 10. This Court has jurisdiction in this matter due to Defendants' violations of the California Labor
8 Code, California Business and Professions Code, California Code of Civil Procedure, the Industrial
9 Welfare Commission (hereinafter "IWC") Wage Order(s) and related common law principles.

10 11. The Court has further jurisdiction over Plaintiffs and the Class Members' claims for injunctive
11 relief, and restitution of ill-gotten benefits arising from MCNEIL's unfair, unlawful and/or fraudulent
12 business practices under Business & Professions Code §§17203 and 17204.

13 12. The Court also has jurisdiction in this matter because both the individual and aggregate monetary
14 damages and restitution sought herein exceed the minimal jurisdictional limits of the Superior Court and
15 will be established at trial, according to proof.

16 13. Venue as to each Defendant is proper in this judicial district, pursuant to California Code of Civil
17 Procedure sections 395 (a) and 395.5 as at least some of the acts complained of herein occurred in the
18 County of San Diego. During the relevant time period, each Defendant either owned, maintained offices,
19 transacted business, had an agent or agents within the County of San Diego, had its principal place of
20 business in the County of San Diego, or otherwise was found within the County of San Diego and each
21 Defendant is within the jurisdiction of this Court for purposes of service of process.

22 14. The unlawful acts alleged herein have a direct effect on Plaintiffs and those similarly situated
23 within the State of California and within San Diego County. During the relevant time period,
24 Defendants employed numerous Class Members in San Diego County and throughout the State of
25 California.

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PARTIES

A. Plaintiffs:

15. During the herein-relevant time period, plaintiff MARIANA LABASTIDA was and is a natural person over the age of eighteen (18), residing in San Diego, California and was, during the relevant time period identified herein, employed by MCNEIL as a non-exempt hourly paid linguist, an employment position which was entitled to enjoy an entitlement to various conditions of employment.

16. During the herein-relevant time period, plaintiff ABRAHAM CECENA was and is a natural person over the age of eighteen (18), residing in San Diego, California and was, during the relevant time period identified herein, employed by MCNEIL as a non-exempt hourly paid linguist, an employment position which was entitled to enjoy an entitlement to various conditions of employment.

17. During the herein-relevant time period, plaintiff GEORGE VAN HEMERT was and is a natural person over the age of eighteen (18), residing in San Diego, California and was, during the relevant time period identified herein, employed by MCNEIL as a non-exempt hourly paid linguist, an employment position which was entitled to enjoy an entitlement to various conditions of employment. Plaintiff Van Hemert further signed an agreement referred to as a "General Release Agreement" wherein in exchange for a nominal payment of less than all the wages earned and owed to him, Van Hemert was required to sign an agreement waiving any and all rights and claims he might have against Defendants.

18. Plaintiffs Labastida, Cecena and Van Hemert:

- a. Worked in excess of eight (8) hours per day and 40 hours per week without being paid premium overtime wages;
- b. Worked in excess of five (5) and/or ten (10) hours per day without being provided a first and/or second meal period and not being compensated one (1) hour of pay at their regular rate of compensation for each meal period that was not provided, all in violation of California labor laws, regulations, and Industrial Welfare Commission Wage Orders;
- c. Worked without being provided a minimum of ten (10) minute rest period for every four (4) hours or major fraction thereof worked and not being compensated one (1) hour of

1 pay or other compensation at their regular rate of compensation for each rest period that
2 was not provided:

3 d. Were not provided with accurate itemized pay statements; and

4 e. Upon termination of employment, were not paid all wages due in a prompt and timely
5 manner.

6 19. As used throughout this Complaint, the terms "Class Members" and/or the "Plaintiff Class" refer to
7 the named plaintiffs herein as well as each and every person eligible for membership in the Plaintiff
8 Class, as further described and defined below.

9 20. At all times herein relevant, the Plaintiffs were and now are persons within the class of persons
10 further described and defined herein.

11 21. The Plaintiffs bring this action on behalf of themselves and as a class action, pursuant to California
12 Code of Civil Procedure §382, on behalf of all persons similarly-situated and proximately damaged by
13 the unlawful conduct described herein.

14 **B. Defendants:**

15 *1. Named Defendants*

16 22. Defendants MCNEIL TECHNOLOGIES, INC. was and is a corporation organized and existing
17 under the laws of the State of Virginia and licensed to do business in California, and, in concert with
18 other defendants, was doing business in California, including the County of San Diego, and based on
19 information and belief is doing business in California. During the Class Period, Defendant employed
20 Plaintiffs and similarly-situated persons as employees within California and San Diego County. On
21 information and belief, Defendant has exercised control over the wages, hours and/or working conditions
22 of Plaintiffs and the Class Members within various California counties, included but not necessarily
23 limited to San Diego, County.

24 *2. Doe Defendants*

25 23. Those defendants identified as Does 1 through 100, inclusive, are and were, at all relevant times
26 herein-mentioned, officers, directors, partners and/or managing agents of some/each of the remaining
27 defendants. Plaintiffs are informed and believe and, on that basis allege that, at all relevant times herein
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1 mentioned, each of the defendants identified as Does 1 through 100, inclusive, employed and/or
2 exercised control over the wages, hours and/or working conditions of Plaintiffs and the Class Members
3 at various California locations, as identified in the preceding paragraph.

4 24. Plaintiffs are unaware of the true names and capacities of those defendants sued herein as Does 1
5 through 100, inclusive and, therefore, sue these defendants by such fictitious names. Plaintiffs will seek
6 leave of Court to amend their Complaint when same are ascertained. Plaintiffs are informed and believe
7 and, on that basis, allege that each of the fictitiously-named defendants is responsible in some manner
8 for, gave consent to, ratified and/or authorized the conduct herein alleged and that Plaintiffs and Class
9 Members' damages, as herein alleged were proximately caused thereby.

10 25. Plaintiffs are informed and believe and, on that basis, allege that, at all relevant times herein
11 mentioned, each of the defendants was the agent and/or employee of each of the remaining defendants
12 and, in doing the acts herein alleged, was acting within the course and scope of such agency and/or
13 employment.

14 26. There is no preemption of the claims brought in this Complaint because these claims are based
15 upon State law. There is no dispute over the terms of any collective bargaining agreement ("CBA") and
16 there is no need to interpret the terms of any CBA.

17 **CLASS ACTION ALLEGATIONS**

18 27. Plaintiffs bring this action on behalf of themselves and on behalf of all persons similarly situated
19 and proximately damaged by Defendants' conduct, including, but not necessarily limited to, the
20 following Plaintiff Class:

21 All current and former California-based employees having a title of
22 Linguist and/or other similarly designated titles, who have worked for
23 Defendant MCNEIL within the last four years from the filing of this
complaint up to and including the time of trial for this matter.

24 28. Plaintiff Van Hemert bring this action on behalf of himself and on behalf of all persons similarly-
25 situated and proximately damaged by Defendants' conduct, including, but not necessarily limited to, the
26 following Plaintiff Subclass:

1 All persons employed by McNeil in California as Linguists at any time
2 within four years from the filing of the complaint up to and including the
3 time of trial in this matter, who signed a Release/Waiver purporting to
4 have class members waive claims alleged in this lawsuit.

5 29. Defendants, its officers and directors are excluded from the Plaintiff Class.

6 30. Throughout discovery in this litigation, Plaintiff may find it appropriate and/or necessary to amend
7 the definition of the Class or create Subclasses. In any event, Plaintiff will formally define and designate
8 a class definition at such time when Plaintiff seeks to certify the Class and/or Subclasses alleged.

9 31. This action has been brought and may properly be maintained as a class action under Code of Civil
10 Procedure §382 because there is a well-defined community of interest in the litigation and the proposed
11 Class is easily ascertainable.

12 **A. Ascertainable Class:**

13 32. The proposed class is ascertainable in that the members can be identified and located using
14 information contained in Defendants' payroll and personnel records.

15 **B. Numerosity:**

16 33. A Class action is the only available method for the fair and efficient adjudication of this
17 controversy. The members of the Plaintiff Class are so numerous that joinder of all members is
18 impractical, if not impossible, insofar as the Plaintiffs are informed and believe and, on that basis, allege
19 that the total number of Class Members is, at least, in the hundreds of individuals. Membership in the
20 Class will be determined upon analysis of employee and payroll, among other, records maintained by
21 MCNEIL.

22 **C. Commonality:**

23 34. There is a well-defined community of interest in the questions of law and fact involved affecting
24 the plaintiff class. The common questions of fact and law exist to all Class Members and predominate
25 over any questions affecting only individual members of the class. The common legal and factual
26 questions which do not vary from class member, to class member and which may be determined without
27 reference to individual circumstance of any class member include, but are not limited to, the following:
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- 1 a. Whether Defendant violated Labor Code sections 226.7, and/or 512 by failing to
2 consistently provide meal and rest periods to its employees:
- 3 b. Whether defendant MCNEIL violated Labor Code §§201-203 by failing to pay all wages
4 due and owing at the time that Class Members' employment with Defendant terminated;
- 5 c. Whether defendant MCNEIL violated Labor Code §§510, 1194 by failing to properly pay
6 overtime wages owed;
- 7 d. Whether Plaintiffs and the Class Members are entitled to "waiting time" penalties/wages
8 pursuant to Labor Code section §203;
- 9 e. Whether Plaintiffs are entitled to underpayment penalties pursuant to Labor Code §558;
- 10 f. Whether Plaintiff and the Class Members are entitled to seek recovery of penalties for the
11 California Labor Code and Wage Order violations alleged herein, pursuant to Labor Code
12 §§2698 and 2699 and, if so, for what time period;
- 13 g. Whether Defendant violated Labor Code section 226 by failing to provide correct
14 itemized statements to members of the Class;
- 15 h. Whether Defendant violated Business and Professions Code §§17200 et seq. by engaging
16 in unfair, unlawful and/or fraudulent business practices;
- 17 i. Whether members of the Class are entitled to compensatory damages, and if so, the
18 means of measuring such damages;
- 19 j. Whether the members of the Class are entitled to injunctive relief;
- 20 k. Whether the members of the Class are entitled to restitution;
- 21 l. Whether Defendants are liable for pre-judgment interest; and
- 22 m. Whether Defendants are liable for attorneys' fees and costs.
- 23 n. With respect to the subclass, whether McNeil had a bona fide dispute with them.
- 24 o. With respect to the subclass, whether McNeil unconditionally paid all wages concededly
25 due prior to the execution of any release.
- 26 p. With respect to the subclass, the issue of enforceability of the release/waiver agreements.

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1 **D. Typicality:**

2 35. The claims of the named Plaintiffs are typical of the claims of the Class and Subclass. Plaintiffs and
3 all members of the Class and Subclass sustained injuries and damages arising out of and caused by the
4 Defendants' common course of conduct in violation of laws, regulations that have the force and effect of
5 law, and statutes as alleged herein.

6 **E. Adequacy of Representation:**

7 36. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class.
8 The Plaintiffs' interests are typical of those of the Plaintiff Class and the Plaintiffs have the same
9 interests in the litigation of this case as the Class Members. The Plaintiffs are committed to vigorous
10 prosecution of this case and have retained competent counsel. The Plaintiffs are not subject to any
11 individual defenses unique from those conceivably applicable to the Plaintiff Class as a whole. Plaintiffs
12 anticipate no management difficulties in this litigation.

13 **F. Superiority of Class Action:**

14 37. Since the damages suffered by individual Class Members, while not inconsequential, may be
15 relatively small, the expense and burden of individual litigation by each member makes or may make it
16 impractical for members of the Plaintiff Class to seek redress individually for the wrongful conduct
17 alleged herein. Should separate actions be brought or be required to be brought by each individual
18 member of the Plaintiff Class, the resulting multiplicity of lawsuits would cause undue hardship and
19 expense for the Court and the litigants. The prosecution of separate actions would also create a risk of
20 inconsistent rulings, which might be dispositive of the interests of other Class Members who are not
21 parties to the adjudications and/or may substantially impede their ability to adequately protect their
22 interests.

23 38. There is no plain, speedy or adequate remedy other than by maintenance of this class action since
24 plaintiffs are informed and believe that the damage to each plaintiff is relatively small, making it
25 economically unfeasible to pursue remedies other than class action.

26 39. Even if every class member could afford individual litigation, the court system could not. It would
27 be unduly burdensome on the courts in which individual litigation of numerous cases would proceed.

1 Individualized litigation would also present the potential for varying, inconsistent or contradictory
2 judgments and would magnify the delay and expense to all parties and to the court system resulting from
3 multiple trials of the same complex factual issues. Class action treatment will allow those similarly-
4 situated persons to litigate their claims in the manner that is most efficient and economical for the parties
5 and the judicial system. Plaintiff is unaware of any difficulties that are likely to be encountered in the
6 management of this action that would preclude its maintenance as a class action.

7 40. California has a “clear public policy that is specifically directed at the enforcement of California’s
8 minimum wage and overtime laws for the benefit of workers.” The right to recover unpaid wages is
9 extremely important to workers, their families, and society as a whole. The full and prompt payment of
10 wages due an employee is a “fundamental public policy of this state.” (*Gould v. Maryland Sound*
11 *Industries, Inc.* (1995) 31 Cal.App.4th 1137,1147.) It serves “society’s interests,” as well as those of
12 individual employees. (*Ibid.*)

13 41. In *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, the Court stated: “Public policy has long
14 favored the ‘full and prompt payment of wages due an employee.’” (*Id.*, at p. 837, quoting *Kerr’s*
15 *Catering Service v. Dept. of Industrial Relations* (1962) 57 Cal.2d 319, 326.) Wages are not ordinary
16 debts, the Court continued. Because of the “economic position of the average worker,” and “his
17 dependence on wages for the necessities of life for himself and his family, it is essential to the public
18 welfare that he receive his pay promptly.” (*Ibid.*, quoting *In re Trombley* (1948) 31 Cal.2d 801, 809-
19 819, internal quotation marks omitted.) “Delay of payment or loss of wages results in deprivation of the
20 necessities of life” (*Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal.App. 370, 379-
21 380.)

22 42. Consistent with the societal purpose served by wage and hour laws, the Legislature has explicitly
23 and repeatedly provided that such statutory remedies cannot be waived by individual workers. Labor
24 Code section 1194 – a statute involved in this case – provides that an employee receiving less than the
25 legal minimum wage or legal overtime compensation may bring a civil action for the full amount of his
26 unpaid wages “notwithstanding any agreement to work for a lesser wage.” (Lab. Code, §1194, subd.(a).)
27 Labor Code section 219 provides–_that no provision of the article on timely payment of wages “can in
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1 any way be contravened or set aside by a private agreement, whether written, oral or implied.” (Lab.
2 Code, §219, subd.(a).) Labor Code section 206.5 prohibits any employer from requiring the execution of
3 a release of any wage claim unless the wages have been paid. The release is null and void, and violation
4 of the statute is a misdemeanor. (Lab. Code, §206.5.). The pertinent portion of section California Civil
5 Code § 1668 provides that contracts “which have for their object, directly or indirectly, to exempt
6 anyone from responsibility for his own ... violation of law, whether willful or negligent, are against the
7 policy of the law.” [Emphasis added.]. Agreements involving small monetary payment of some wages
8 conditioned on the waiver of one’s statutory rights to minimum wages and overtime requirements in
9 wage and hour cases violate section 1668 because they effectively exempt employers from responsibility
10 for their statutory wage violations. For more than 85 years, California courts have construed section
11 1668 to invalidate contract clauses that relieve a party from liability for statutory violations. (*Health Net*
12 *of California, Inc. v. Department of Health Services* (2004) 113 Cal.App.4th 224, 235; *Halliday v.*
13 *Green* (1966) 244 Cal.App.2d 482, 488 [safety order].) Under section 1668, a party cannot contract
14 away liability for statutory violations, whether intentional or negligent. (*Health Net, ibid.*) This principle
15 applies even where the contracting parties are of equal bargaining power, as in *Health Net*, which
16 involved a contract between Health Net and a state agency. (*Cf. Baker Pacific Corp. v. Suttles* (1990)
17 220 Cal.App.3d 1148, 1155 [applying §1668 to invalidate exculpatory clause in “pistol to the head”
18 employment contract].)

19 43. Defendants through the use of the release/waiver agreement sought to contravene and/or set aside
20 by a private agreement provision of the article on timely payment of wages in violation of California
21 law. Specifically, Defendants contracted with its employees to exempt themselves from responsibility
22 for their own violations of law.

23 44. Defendants, possessing superior bargaining power carried out a scheme to deliberately cheat large
24 numbers of class members out of individually small sums of money.” Defendant’s conduct was designed
25 to exempt itself “from responsibility for its own fraud, or willful injury to the person or property of
26 another.”
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1 45. The contract at issue is a contract of adhesion operating to insulate Defendants from liability that
2 would otherwise be imposed under California law, and is thus unconscionable. Defendants did not offer
3 employees the opportunity to opt out and/or negotiate the terms of the agreement. Thus, the "General
4 Release Agreement" is a contract of adhesion and is procedurally unconscionable. (*Little, supra*, 29
5 Cal.4th at p.1071.)

6 **CAUSES OF ACTION**

7 **FIRST CAUSE OF ACTION**

8 **(As to All Defendants)**

9 **UNLAWFUL FAILURE TO PAY OVERTIME WAGES**

10 46. Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs,
11 with the same force and effect as though fully set forth herein.

12 47. Upon information and belief, MCNEIL employs hourly non-exempt employees in California. The
13 hourly employees included but were not limited to linguists or other similar positions.

14 48. Plaintiffs and members of the Plaintiff Class were regularly required to work overtime hours and
15 are entitled to overtime compensation for overtime work performed for the Defendants, in an amount
16 according to proof. Pursuant to Labor Code sections 510 and 1194, the Plaintiff Class members seek the
17 payment of all overtime compensation which they earned and accrued for four (4) years prior to filing of
18 this complaint, according to proof.

19 49. As a direct and proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiff and
20 members of the Plaintiff Class have sustained damages, including loss of earnings for hours of overtime
21 worked on behalf of Defendants, in an amount to be established at trial. As a further direct and
22 proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiff and members of the Class
23 are entitled to recover "waiting time" penalties/wages, in an amount to be established at trial, costs and
24 attorneys' fees, pursuant to statute.

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1 **SECOND CAUSE OF ACTION**

2 **(As To All Defendants)**

3 **FAILURE TO PROVIDE MEAL PERIODS OR COMPENSATION IN LIEU THEREOF**

4 50. Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs.
5 with the same force and effect as though fully set forth herein.

6 51. Plaintiffs and Plaintiff Class members are entitled to an hour of pay for each instance when
7 Defendants MCNEIL failed to properly provide a meal period as set forth in the Labor Code sections
8 226.7, 512 and the applicable IWC Wage Orders, in an amount according to proof. Pursuant to Labor
9 Code sections 226.7 and 512, the Plaintiff Class members seek the payment of all meal period
10 compensation which they are owed, according to proof.

11 52. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein, Plaintiffs and
12 Plaintiff Class have sustained damages, including loss of compensation/wages, in an amount to be
13 established at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth
14 herein, Plaintiffs and Plaintiff Class are entitled to recover various penalties, in an amount to be
15 established at trial, as well as costs, interest and attorneys' fees, pursuant to statute.

16 **THIRD CAUSE OF ACTION**

17 **(As To All Defendants)**

18 **FAILURE TO PROVIDE REST PERIODS OR COMPENSATION IN LIEU THEREOF**

19 53. Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs
20 with the same force and effect as though fully set forth herein.

21 54. Plaintiffs and Plaintiff Class members are entitled to an hour of pay for each instance when
22 Defendant MCNEIL failed to properly provide a rest period as set forth in the Labor Code section 226.7
23 and the applicable IWC wage orders, in an amount according to proof. Pursuant to Labor Code section
24 226.7, the Plaintiff Class members seek the payment of all rest period compensations which they are
25 owed according to proof.

26 55. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein, Plaintiffs and
27 Plaintiff Class have sustained damages, including loss of compensation/wages, in an amount to be
28 established at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth

1 herein, Plaintiffs and Plaintiff Class are entitled to recover various penalties, in an amount to be
2 established at trial, as well as costs, interest and attorneys' fees, pursuant to statute.

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4 **FOURTH CAUSE OF ACTION**
5 **(As To All Defendants)**
6 **KNOWING AND INTENTIONAL FAILURE TO COMPLY WITH ITEMIZED EMPLOYEE**
7 **WAGE STATEMENTS PROVISIONS**

8 56. Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs.
9 with the same force and effect as though fully set forth herein.

10 57. California Labor Code § 226(a) provides:

11 Each employer shall semimonthly, or at the time of each payment of
12 wages, furnish each of his or her employees either as a detachable part of
13 the check, draft or voucher paying the employee's wages, or separately
14 when wages are paid by personal check or cash, an itemized wage
15 statement in writing showing: (1) gross wages earned; (2) total number of
16 hours worked by each employee whose compensation is based on an
17 hourly wage; (3) all deductions; provided, that all deductions made on
18 written orders of the employee may be aggregated and shown as one item;
19 (4) net wages earned; (5) the inclusive date of the period for which the
20 employee is paid; (6) the name of the employee and his or her social
21 security number; and (7) the name and address of the legal entity which is
22 the employer.

23 58. The IWC Wage Orders also establish this requirement in §7 (B) thereof (8 Cal. Code Regs. §11010
24 et. seq.).

25 59. Moreover, California Labor Code §226(e) provides:

26 An employee suffering injury as a result of a knowing and intentional
27 failure by an employer to comply with subdivision (a) is entitled to recover
28 the greater of all actual damages or fifty dollars (\$50) for the initial pay
period in which a violation occurs and one hundred dollars (\$100) per
employee for each violation in a subsequent pay period, not exceeding an
aggregate penalty of four thousand dollars (\$4,000), and is entitled to an
award of costs and reasonable attorney's fees.

60. Finally, California Labor Code §1174 provides:

Every Person employing labor in this state shall: (d) Keep, at a central
location in the state or at the plants or establishments at which employees

1 are employed. payroll records showing the hours worked daily by and the
2 wages paid toemployees..... These records shall be kept in accordance
3 with rules established for this purpose by the commission, but in any case
4 shall be kept on file for not less than two years.

5 61. Plaintiffs and Plaintiff Class members seek to recover actual damages, costs and attorneys' fees
6 under this section on behalf of themselves and the Class.

7 62. Defendant MCNEIL failed to provide timely, accurate itemized wage statements to Plaintiffs and
8 Plaintiff Class members in accordance with Labor Code §226(a) and the applicable IWC Wage Orders.
9 The wage statements provided by Defendants have not accurately reflected actual number of hours
10 worked, gross wages earned, net wages earned, and/or the appropriate deductions of such Class
11 members.

12 63. As a direct and proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiffs and
13 Plaintiff Class members are entitled to recover actual damages and/or penalties, in an amount to be
14 established at trial, as well as costs and attorneys' fees, pursuant to statute.

15 **FIFTH CAUSE OF ACTION**
16 **(As To All Defendants)**
17 **FAILURE TO TIMELY PAY WAGES DUE AT TERMINATION**

18 64. Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs,
19 with the same force and effect as though fully set forth herein.

20 65. Section 201 and 202 of the California Labor Code require Defendants to pay employees all wages
21 due within 72 hours of termination of employment. Section 203 of the Labor Code provides that if an
22 employer willfully fails to timely pay such wages the employer must, as a penalty, continue to pay the
23 subject employees' wages until the back wages are paid in full or an action is commenced. The penalty
24 cannot exceed 30 days of wages.

25 66. As alleged above, Plaintiffs and the Class they seek to represent are entitled to compensation for
26 unpaid overtime compensation, and for unprovided or improperly provided rest periods and unprovided
27 or improperly provided meal periods but to date have not received such compensation.

28 67. More than 30 days have passed since certain Class Members have left Defendant MCNEIL's
employ.

1 68. As a consequence of Defendants' willful conduct in not paying wages owed, certain Class
2 Members are entitled to 30 days of wages as a penalty under Labor Code section 203 for failure to pay
3 legal wages, together with interest thereon and attorneys' fees and costs.

4 **SIXTH CAUSE OF ACTION**
5 **(As To All Defendants)**
6 **VIOLATION OF UNFAIR COMPETITION LAW**

7 69. Plaintiffs incorporate in this cause of action each and every allegation of the preceding paragraphs,
8 with the same force and effect as though fully set forth herein.

9 70. The failure to pay lawful overtime compensation and rest and meal period pay to each Plaintiff
10 Class member, and timely pay all pay due upon termination of employment to each Class Member, is an
11 unlawful and unfair business practice within the meaning of Business and Professions Code sections
12 17200, et. seq., including but not limited to violations of the applicable State of California Industrial
13 Welfare Commission Wage Orders, regulations and statutes, or is otherwise a practice which is unfair
14 and unlawful, including that the Defendants did not pay tax contributions in the form of FICA, Social
15 Security, Medicare and Unemployment Insurance.

16 71. This cause of action is brought under Business and Professions Code sections 17203 and 17204,
17 commonly called the Unfair Competition Law. Under this cause of action and pursuant to Business and
18 Professions Code section 17208, Plaintiff and all Plaintiff Class Members seek restitution of overtime
19 wages, meals and rest period wages, and other pay owed, where such wages were due each of the class
20 members during the Class Period, commencing (4) years prior to filing of this complaint, according to
21 proof.

22 72. This cause of action is brought as a cumulative remedy as provided in Business and Professions
23 Code section 17205, and is intended as an alternative remedy for restitution for Plaintiffs and each
24 Plaintiff Class.

25 73. As a result of the Defendants' unlawful and unfair business practice of failing to pay overtime
26 wages, meal and rest period wages, and other wages in a prompt manner, each Plaintiff Class member
27 has suffered damages and is entitled to restitution in an amount according to proof.

1 74. Plaintiffs are informed and believe, and thereon allege, that Plaintiffs and members of the Plaintiff
2 Class are prejudiced by Defendants' unfair trade practices.

3 75. As a direct and proximate result of the unfair business practices of Defendants, and each of them,
4 Plaintiffs, individually and on behalf of all employees similarly situated, are entitled to equitable and
5 injunctive relief, including full restitution, disgorgement and specific performance of all payments which
6 have been unlawfully withheld from Plaintiffs and members of the Plaintiff Class as a result of the
7 business acts and practices described herein and enjoining Defendants to cease and desist from engaging
8 in the practices described herein.

9 76. The illegal conduct alleged herein is continuing, and there is no indication that Defendants will not
10 continue such activity in the future. Plaintiffs allege that if Defendants are not enjoined from the conduct
11 set forth in this Complaint, they will continue their unfair and unlawful conduct.

12 77. Plaintiff further request that the court issue a preliminary and permanent injunction prohibiting
13 Defendants from requiring the Plaintiff Class to work overtime without proper compensation, to work
14 through meals periods, and from continuing to fail to provide rest periods and meal periods or provide
15 appropriate compensation in lieu thereof.

16 **SEVENTH CAUSE OF ACTION**
17 **(As To All Defendants)**
18 **PRIVATE ATTORNEY GENERALS ACT OF 2004**

19 78. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding
20 paragraphs. This cause of action is pled by all Plaintiffs, against all Defendants

21 79. The California Labor Code "Private Attorney Generals Act of 2004" ("the Act") is codified at
22 Labor Code sections 2699-2699.5. Labor Code section 2699.3(a)(2)(C) provides that notwithstanding
23 any other provisions of law, a Plaintiffs may as a matter of right amend an existing complaint to add a
24 cause of action arising under the Act, within sixty (60) days of the time periods provided therein.
25 Plaintiffs hereby allege that they have, to the extent necessary to support any or all of the causes of
26 action and/or requests for relief as alleged herein, complied with the applicable notice provisions of the
27 Act, and obtained permission as described in the Act to commence and continue with this private action.
28

1 Plaintiffs are informed and believe and based on such information and belief alleges that they and the
2 class are entitled to recover penalties for violations of the California Labor Code sections 201-203, 204,
3 210, 226, 226(a), 226.3, 226.7, 510, 512, 558, 1174, 1194, and further prayed herein.

4 **EIGHTH CAUSE OF ACTION**
5 **(As To All Defendants)**
6 **DECLARATORY RELIEF/ LABOR CODE VIOLATIONS**

7 80. Plaintiffs herein repeat and re-allege as though fully set forth at length each and every paragraph of
8 this Complaint, excepting those paragraphs which are inconsistent with this cause of action for
9 declaratory relief.

10 81. An actual controversy has arisen, and a dispute now exists, between plaintiffs and the members of
11 the class represented by them, and Defendants, and each of them, concerning the respective rights,
12 duties, obligations and liabilities of the respective parties, both as to the past and as to the future, in that
13 plaintiffs and the members of the class represented by them contend that the above-mentioned pattern,
14 practice and uniform administration of corporate policy of Defendant obtaining releases and waivers of
15 statutory claims and minimum working conditions in exchange for a nominal sum less than all the wages
16 earned by them and less than what they would be owed under the law is in violation of the laws of the
17 State of California; and thus by their very nature these release/waiver agreements are unenforceable;
18 whereas Defendants, and each of them, deny said contentions and in turn contend that agreements which
19 circumvent statutory wage requirements are enforceable and thus the class members who have signed
20 said agreements are not entitled to any further compensation whatsoever for said work.

21 82. Plaintiffs and the members of the class represented by them, desire a declaration of their rights, and
22 the duties and obligations of the Defendants, and each of them, in regard to this ongoing controversy and
23 dispute, which continues to this day. Such a declaration is necessary and appropriate in order that
24 plaintiffs and the members of the class represented by them, may ascertain their rights in reference to
25 said work to be performed in the future, so that they may not be deprived of their just compensation for
26 work to be performed in the future.

27 ////

PRAYER

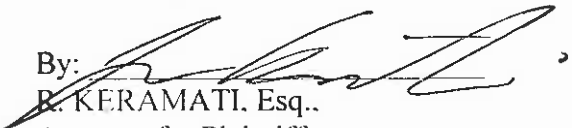
WHEREFORE, Plaintiffs, on behalf of themselves and the proposed Plaintiff Class, prays for judgment and the following specific relief against Defendants, and each of them, jointly and separately, as follows:

- a) That the Court determine that this action may be maintained as a class action and certify the proposed Plaintiff Class and notice thereto to be paid by Defendants;
- b) That the court determine that the failure of the Defendants to pay overtime compensation to Plaintiffs and the Plaintiff Class be adjudged and decreed to violate the applicable IWC Wage Orders, regulations and statutes;
- c) That the Defendants be ordered to pay and judgment be entered for overtime wages for Plaintiffs and Plaintiff Class members on the First Cause of Action;
- d) That the Defendants be ordered to pay and judgment be entered for meal period pay on the Second Cause of Action;
- e) That the Defendants be ordered to pay and judgment be entered for rest period pay on the Third Cause of Action;
- f) That the Defendants be ordered to pay and judgment be entered for penalties as authorized by Labor Code section 226(e) to Plaintiffs and each Class member on the Fourth Cause of Action;
- g) That the Defendants be ordered to pay and judgment be entered for Labor Code section 203 penalties on the Fifth Cause of Action;
- h) That the Defendants be found to have engaged in unfair competition in violation of Business and Professions Code sections 17200, et seq. on the Sixth Cause of Action;
- i) That the Defendants be ordered and enjoined to pay restitution to Plaintiffs and each Plaintiff Class member due to the Defendants' unlawful and unfair competition, including disgorgement of their wrongfully withheld wages and pay owed and interest thereon pursuant to Business and Professions Code sections 17203 and 17204;
- j) That Plaintiffs and each Plaintiffs Class member, be awarded attorneys fees and costs pursuant to statute, including but not limited to Labor Code sections 218.5, 1194 and Code of Civil Procedure 1021.5.

- 1 k) Otherwise determine the appropriate remedy to compensate Plaintiffs and each Plaintiff Class
2 member as required to promote fairness and justice, including but not limited to establishing
3 procedures for compensation, compensation amounts and fluid recovery if appropriate:
4 l) For compensatory and general damages according to proof on certain causes of action:
5 m) For economic and/or special damages according to proof with interest on certain causes of action;
6 n) For an injunction ordering Defendants, and each of them, to cease and desist from engaging in
7 the unfair, unlawful, and/or fraudulent practices alleged in the Complaint;
8 o) A declaratory judgment that the Release/Waivers are unenforceable and the class and subclass
9 members are entitled to recover the balance of all statutory wages and other related claims
10 stemming from the failure to pay all wages owed to them.
11 p) Prejudgment interest at the maximum rate:
12 q) Costs of the proceedings herein; and
13 r) All such other and further relief as the Court deems just and proper.

14
15 Dated: 9-24-09

EMLS, P.C.

16 By: 
17 B. KERAMATI, Esq.,
18 Attorney for Plaintiffs
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PROOF OF SERVICE

FILED
CIVIL DIVISION
SEP 24 2009
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LABASTIDA ET AL. V. MCNEIL TECHNOLOGIES, INC.

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 110 West "C" Street, Suite 1300, San Diego, California 92101.

On September 24, 2009, I served the foregoing document(s) described as **CLASS ACTION FOURTH AMENDED COMPLAINT** on the interested parties in this action as follows:

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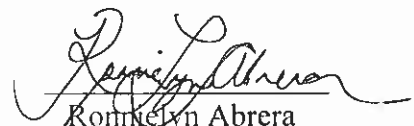
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/X/ **(BY U.S. Mail)** I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit. I deposited such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Diego, California.

// **(BY Facsimile)** I served a true copy by facsimile pursuant to C.C.P. 1013(e), calling for agreement and written confirmation of that agreement or court order, to the number(s) listed above or on attached sheet. Said transmission was reported complete and without error.

/X/ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Executed on September 24, 2009 at San Diego, California.


Rommelyn Abrera