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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

11 Consolidated Actions:)
12 JAMES CORNN, ERIC DUVOE, KIM)
13 MARCHANT, individually and on)
14 behalf of all other similarly situated)
15 current and former employees of UPS,)
16 Plaintiffs,)
17 vs.)
18 UNITED PARCEL SERVICE, INC.,)
19 dba UPS, and Ohio Corporation; JOHN)
20 NADDY, an individual, and Does 1)
21 through 150, inclusive,)
22 Defendants.)

23 _____)
24 JOHN DESPRES, individually,)
25 Plaintiff,)
26 vs.)
27 UNITED PARCEL SERVICE, INC.)
28 Defendants.)

Consolidated Case No.: C03 2001 TEH
FIRST AMENDED COMPLAINT OF
PLAINTIFF JOHN DESPRES FOR
DAMAGES, INJUNCTIVE RELIEF AND
RESTITUTION
DEMAND FOR JURY TRIAL

27 Plaintiff JOHN DESPRES alleges as follows:

1 advantage over its competition and a resultant disadvantage to Plaintiffs by electing not to pay
2 Plaintiff the full amount of wages due as required by California law.

3 8. Plaintiff is informed and believes and, based thereon, alleges that officers of UPS knew
4 of these facts and legal mandates, yet, nonetheless, repeatedly directed, authorized and/or ratified the
5 violation of the laws cited herein.

6 9. Despite UPS's knowledge of Plaintiff's entitlement to full pay and rest and/or meal
7 breaks for all applicable work periods, UPS failed to provide same to Plaintiff, in violation of
8 California State statutes, Industrial Welfare Commission Wage Orders and Title 8 of the California
9 Code of Regulations.

10 10. As a direct and proximate result of Defendant's unlawful conduct, as set forth
11 herein, Plaintiff has sustained damages, as described above, including a loss of compensation, in
12 amounts to be established at trial. As a further direct and proximate result of Defendant's unlawful
13 conduct, as set forth herein, Plaintiff is also entitled to recover costs and attorneys' fees, pursuant
14 to California Labor Code §§ 218.5 and/or California Code of Civil Procedure § 1021.5.

15
16 **JURISDICTION AND VENUE**

17 11. This court has jurisdiction of this action by virtue of its consolidation with the case
18 of *Cornn, et. al. v. United Parcel Service, Inc., et. al.*, which was removed from state court to this
19 Court. Such removal was based, *inter alia*, on federal question jurisdiction under 28 U.S.C. §§ 1331,
20 1367 and 1441(b), and diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441(a) and (b). This
21 Court also has supplemental jurisdiction to consider claims arising under California state law,
22 pursuant to 28 U.S.C. §1367.

23 12. Venue as to Defendant(s) is proper in this judicial district, pursuant to 28 U.S.C. §
24 1391. Defendant UPS maintains facilities and offices in the Northern District of California, and
25 transacts business, has agents, and is otherwise within this Court's jurisdiction for purposes of
26 service of process. The unlawful acts alleged herein have had a direct effect on Plaintiff within this
27 judicial district. Defendant UPS operates said facilities and has employed numerous persons in this
28 judicial district, as well as throughout the State of California.

PARTIES

13. At all times relevant hereto plaintiff John Despres (the “Plaintiff”) was and is a natural person, and was, during the relevant time period identified herein, employed by defendant UPS as a parcel/package delivery driver (“Driver”). As a Driver, Plaintiff was entitled, and continues to enjoy an entitlement, to various conditions of employment, including, but not limited to, full pay for all hours worked and rest and/or meal periods.

14. In said position, Plaintiff was repeatedly paid a substandard wage insofar as he was denied full pay for all hours worked, and was frequently permitted to work, and did work at all relevant times, shifts exceeding four hours or a major fraction thereof (of at least three and one-half hours), without being afforded ten minute rest periods and without being afforded mandatory meal periods.

15. At all times herein relevant, defendant UNITED PARCEL SERVICE, INC. (hereinafter referred to as “UPS” and/or “Defendant”) was a business entity, duly licensed, located and doing business in the State of California including, but not limited to, the Counties of Alameda and Contra Costa.

16. Those defendants identified as Does 1 through 25, inclusive, are and were, at all relevant times herein-mentioned, officers, directors and/or managing agents of some/each of the remaining defendants.

17. Plaintiff is informed and believes and, based thereon alleges, that defendant UPS directly or indirectly employs and, since June 27, 1999, has employed and/or exercised control over the wages, hours and/or working conditions of the Plaintiff, while working for UPS as a Driver.

FIRST CAUSE OF ACTION
UNLAWFUL DEDUCTION OF EARNED WAGES
AND FAILURE TO PAY OVERTIME
(VIOLATION OF CALIFORNIA LABOR CODE, IWC WAGE ORDERS)

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

1 19. California wage and hour law mandates that an employer pay its employees for all
2 time worked. Labor Code § 218 and 218.5 provide a private right of action for nonpayment of
3 wages. Labor Code § 222 prohibits the withholding of part of an agreed upon wage. Labor Code §
4 223 prohibits an employer from paying a wage scale which is less than that required by statute or
5 contract. Labor Code § 224 permits deductions from wages only when the employer is required or
6 empowered to do so by state or federal law, or when the deduction is expressly authorized in writing
7 by the employee, for specified purposes that do not result in reducing the employee's wages.

8 20. During the time period beginning June 27, 1999 and continuing through the present,
9 Plaintiff was employed by, and performed work for, defendant UPS. Defendant was required to
10 compensate Plaintiff for all hours worked, and was prohibited from making any deductions that had
11 the effect of reducing the wage agreed upon.

12 21. At all relevant times, Defendant was aware of and was under a duty to comply with,
13 various additional provisions of the California Labor Code and/or Wage Orders issued by the
14 Industrial Welfare Commission, as cited and discussed elsewhere in this Complaint.

15 22. By refusing to compensate Plaintiff for all wages earned, Defendant violated those
16 California Labor Code and IWC Wage Order provisions, cited herein.

17 23. Plaintiff is informed and believes, and thereon alleges, that Defendant breached its
18 legal duty to fully pay wages due to Plaintiff, by automatically deducting a portion of Plaintiff's
19 earned wages when Plaintiff's time records indicated that a meal period was not taken. Defendant
20 devised a computer program to edit the actual hours reported by Plaintiff, deducting a portion of the
21 hours shown as worked whenever a meal period was not taken during any given work day.
22 Defendant did not make a reasonable effort to determine whether the time deducted was actually
23 worked as reported by Plaintiff. Defendant presumed that the actual reported hours had not been
24 accurately reported, without a reasonable basis therefor. The conduct complained of is a form of
25 what is sometimes called "dinging" and is prohibited by law. Defendant also failed to pay overtime
26 that was due pursuant to IWC Wage Order No. 9-2001, Section 3(A).

27 24. Plaintiff is informed and believes, and thereon alleges, that, as a direct result of
28 Defendant's systematic and improper deductions in Plaintiffs' pay, which resulted from UPS's

1 application of an automatic computer program, Plaintiff has suffered, and continues to suffer,
2 substantial unpaid wages and overtime, lost interest on such wages, and expenses and attorneys' fees
3 incurred in seeking to compel Defendant to fully perform its obligations under state law. As a result,
4 Plaintiff has sustained damage in an amount according to proof at trial, and is entitled to recover all
5 penalties allowed by law.

6
7 **SECOND CAUSE OF ACTION**
8 **FAILURE TO PROVIDE REST AND/OR MEAL PERIODS TO PLAINTIFF**

9
10 25. Plaintiff incorporates in this cause of action each and every allegation of the preceding
11 paragraphs, with the same force and effect as though fully set forth herein.

12 26. California Labor Code § 512(a) provides:

13 An employer may not employ an employee for a work period of
14 more than five hours per day without providing the employee with
15 a meal period of not less than 30 minutes, except that if the total
16 work period per day of the employee is no more than six hours, the
17 meal period may be waived by mutual consent of both the employer
18 and employee. An employer may not employ an employee for a
19 work period of more than 10 hours per day without providing the
20 employee with a second meal period of not less than 30 minutes,
21 except that if the total hours worked is no more than 12 hours, the
22 second meal period may be waived by mutual consent of the
23 employer and the employee only if the first meal period was not
24 waived.

25 27. Further, California Labor Code § 226.7 provides:

26 (a) No employer shall require any employee to work during any meal
27 or rest period mandated by an applicable order of the Industrial
28 Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest
period in accordance with an applicable order of the Industrial
Welfare Commission, the employer shall pay the employee one
additional hour of pay at the employee's regular rate of compensation
for each work day that the meal or rest period is not provided.

25 28. At all relevant times, Defendant was aware of and was under a duty to comply with
26 California Labor Code §§ 512 and 226.7, as well as each and every then-current California Industrial
27 Welfare Commission Wage Order and section of Title 8 of the California Code of Regulations.

28 29. Specifically, Wage Order No. 3-2000(12) provides:

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Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

(See, 8 CCR § 11030)

30. By failing to consistently provide rest and/or meal periods to Plaintiff, Defendant violated this and every other applicable IWC Wage Order and/or section of Title 8 of the California Code of Regulations, as well as Labor Code § 512, as they pertain(ed) to rest and/or meal periods.

31. As a direct and proximate result of Defendant's unlawful conduct, as set forth herein, Plaintiff has sustained damages, including loss of earnings, in an amount to be established at trial. As a further direct and proximate result of Defendant's unlawful conduct, as set forth herein, Plaintiff is entitled to recover penalties, in an amount to be established at trial, as well as costs and attorneys' fees, pursuant to statute.

THIRD CAUSE OF ACTION
FAILURE TO MAINTAIN AND PROVIDE ITEMIZED AND ACCURATE WAGE STATEMENTS TO PLAINTIFF

32. Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

33. California Labor Code § 226(a) provides:

Each employer shall semimonthly, or at the time of each payment of wages, furnish each of his or her employees either as a detachable part of the check, draft or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an itemized wage statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on salary and who is exempt from payment of overtime under subdivision (a) of section 515 or any applicable order of the Industrial Wage Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions; provided, that all deductions made on written orders of the employee may be

1 aggregated and shown as one item; (5) net wages earned; (6) the
2 inclusive dates of the period for which the employee is paid; (7) the
3 name of the employee and his or her social security number; and (8)
4 the name and address of the legal entity which is the employer, and
5 (9) all applicable hourly rates in effect during the pay period and the
6 corresponding number of hours worked at each hourly rate by the
7 employee. The deductions made from payments of wages shall be
8 recorded in ink or other indelible form, properly dated, showing the
9 month, day, and year, and a copy of the statement or a record of the
10 deductions shall be kept on file by the employer for at least three
11 years at the place of employment or at a central location within the
12 State of California.

13 34. The IWC Wage Orders also establish this requirement, in § 7(B) (8 Cal. Code Regs.
14 § 11010 et. seq.)

15 35. Moreover, California Labor Code § 226(e) provides:

16 An employee suffering injury as a result of a knowing an intentional
17 failure by an employer to comply with subdivision (a) is entitled to
18 recover the greater of all actual damages or fifty dollars (\$50) for the
19 initial pay period in which a violation occurs and one hundred dollars
20 (\$100) per employee for each violation in a subsequent pay period,
21 not exceeding an aggregate amount of four thousand dollars (\$4,000),
22 plus costs and reasonable attorney fees.

23 36. Finally, California Labor Code § 1174 provides:

24 Every person employing labor in this state shall: ...(d) Keep, at a
25 central location in the state or at the plants or establishments at which
26 employees are employed, payroll records showing the hours worked
27 daily by and the wages paid to, and the number of piece-rate units
28 earned by and any applicable piece rate paid to, employees employed
at the respective plants or establishments. These records shall be kept
in accordance with rules established for this purpose by the
commission, but in any case shall be kept on file for not less than two
years.

37. Defendant UPS has made unlawful deductions and/or setoffs from Plaintiff's wages
and has failed to maintain, at all times, and to provide, semimonthly or at the time of each payment
of wages, timely, accurate itemized wage statements to Plaintiff in accordance with Labor Code §
226(a) and the IWC Wage Orders. None of the statements provided by Defendant to Plaintiff has
accurately reflected actual gross wages earned, net wages earned and/or the appropriate deductions.

38. Plaintiff seeks to recover actual damages, costs and attorneys' fees under these
sections.

FOURTH CAUSE OF ACTION
UNFAIR BUSINESS PRACTICES UNDER THE UNFAIR COMPETITION ACT

39. Plaintiff incorporates in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

40. Pursuant to Rule 23(b) of the FRCP, Plaintiff brings this claim for relief, alleging that Defendant has violated California Business & Professions Code §§ 17200-17208 by unlawfully failing to pay overtime wages, failing to provide rest and/or meal periods and failing to maintain and provide itemized and accurate wage statements.

41. Plaintiff further brings this cause of action on behalf of the general public, seeking equitable and statutory relief to stop the misconduct of Defendant, as complained of herein, and to compel disgorgement of all profits obtained by Defendant through the unfair, unlawful and fraudulent business practices described herein.

42. The knowing conduct of Defendant, as alleged herein, constitutes an unlawful and/or fraudulent business practice, as set forth in California Business & Professions Code §§ 17200-17208. Specifically, Defendant conducted business activities while failing to comply with the legal mandates cited herein.

43. Defendant's knowing failure to adopt policies in accordance with and/or adhere to these laws, all of which are binding upon and burdensome to Defendant's competitors, engenders an unfair competitive advantage for Defendant, thereby constituting an unfair business practice, as set forth in California Business & Professions Code §§ 17200-17208.

44. Defendant UPS has clearly established a policy of accepting a certain amount of collateral damage, as represented by the damages to the Plaintiff herein alleged, as incidental to its business operations, rather than accept the alternative costs of full compliance with fair, lawful and honest business practices ordinarily borne by responsible competitors of Defendant and as set forth in legislation and the judicial record.

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RELIEF SOUGHT

WHEREFORE, Plaintiff prays for judgment and the following specific relief against **Defendants, and each of them**, jointly and separately, as follows:

1. An award to the Plaintiff of damages for the amount of unpaid compensation in an amount to be proven at trial;

2. That Defendants are found to have violated Labor Code § 512, Industrial Welfare Commission Wage Order(s) and/or Sections of Title 8 of the California Code of Regulations for willful failure to provide rest and/or meal periods to Plaintiff;

3. That Defendant is found to have violated the record keeping provisions of California Labor Code §§ 226 and 1174 and the applicable IWC Wage Order(s) as to Plaintiff;

4. That Defendant is found to have violated Business & Professions Code §§ 17200-08, et seq. by failing to pay Plaintiff all compensation for rest and/or meal periods denied, and that defendant further be enjoined to cease and desist from such unlawful activities and pay restitution for such violations;

5. That Defendant be ordered and enjoined to pay restitution to Plaintiff, due to Defendant's unlawful activities, pursuant to Business & Professions Code §§ 17200-08, et seq.;

6. That Defendant further be enjoined to cease and desist from unlawful activities in violation of Business & Professions Code § 17200;

7. For all other Orders, findings and determinations identified and sought in this Complaint;

8. For Interest on the amount of any and all economic losses, at the prevailing legal rate;

9. For reasonable Attorneys' Fees, pursuant to 29 U.S.C. §216(b), California Labor Code §§ 218.5 and/or California Civil Code § 1021.5; and

10. For Costs of suit and any and all such other relief as the Court deems just and proper.

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JURY DEMAND

Plaintiff hereby demands trial by jury on all issues triable of right by jury.

Dated: December 2, 2003

SCOTT COLE & ASSOCIATES, APC

By: _____
Scott Edward Cole, Esq.
Clyde H. Charlton, Esq.
Attorneys for Plaintiff