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Los Angeles Superior Court

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7 all others similarly situated and the general public

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF LOS ANGELES – CENTRAL**

BC501700

10 CHRIS B. SIRKO, on behalf of himself,
11 all others similarly situated and the general
12 public

Case No. _____

12 Plaintiffs,

11 **CLASS ACTION COMPLAINT FOR
12 DAMAGES, RESTITUTION, PENALTIES
13 AND INJUNCTIVE RELIEF**

13 v.

- 1. Failure to Pay Overtime Wages (Lab. Code §§204, 515, 1194, 1198);
- 2. Failure to Provide Accurate Itemized Wage Statements (Lab. Code §226);
- 3. Unfair Business Practices (Bus. & Prof. Code §§17200-17208)

14 INTERNATIONAL BUSINESS
15 MACHINES CORPORATION, a New
16 York Corporation, and DOES 1 through
17 100, Inclusive,

17 Defendants.

18 **DEMAND FOR JURY TRIAL**

19 Plaintiff CHRIS B. SIRKO (hereinafter "Plaintiff" or "SIRKO"), on behalf of himself,
20 the general public, and all others similarly-situated, complains and alleges as follows:

21 **I.**

22 **INTRODUCTION**

23 1. This case arises out of Defendant's systematic and uniform mis-classification of
24 proposed class members as exempt from overtime pay, resulting in the non-payment of overtime
25 compensation to certain California-based Information-Technology (IT) employees of Defendant
26 INTERNATIONAL BUSINESS MACHINES CORPORATION (hereinafter referred to as "IBM"
27 or "Defendant") for hours worked in excess of 8 hours per day and/or in excess of 40 hours per
28 week. The job titles for these proposed IBM class members may have changed through the years

1 encompassed by the action; however the job tasks and functions are substantially identical and have
2 changed very little, if at all. The proposed Plaintiff Class I covers all Defendant's current or former
3 employees performing work in the State of California having job titles, job codes or descriptions as
4 it relates to approximately 313 persons who were hired as "transitional exempt employees" from
5 Kaiser Permanente (KP), Kaiser Foundation Hospitals (KPH) or from Southern California
6 Permanente Medical Group, Inc. (SCPMG) on approximately May 1, 2009, and who were assigned
7 by IBM to service and maintain the Kaiser Permanente Information Technology ("KP-IT") account.
8 Plaintiff Class II covers all Defendant's current or former employees performing work in the State
9 of California having job titles, job codes or job descriptions of "Technical Professional" and/or
10 similar job titles, job codes, salary grades or position descriptions, who were assigned to service and
11 maintain the KP-IT account, and who IBM classified as "exempt" employees based on company
12 records. The positions are devoted to maintaining KP-IT's health and data systems, applications
13 and networks. Although the precise system and software application tools differ, the core and
14 essential functional aspects of the job titles and job codes are virtually identical and all were
15 uniformly and systematically classified by Defendant as exempt from overtime without justification.
16 Like SIRKO, all persons in these positions that were based in the State of California spent a
17 majority of their work time engaged in non-exempt functions for the Defendant and were mis-
18 classified as exempt employees during the proposed "Class Period," which is defined as four years
19 prior to the filing of the Complaint through the date of commencement of trial.

20 2. In fact, during the relevant time period covered by this suit, Plaintiff is informed
21 and believes that he, and members of the proposed Plaintiff Classes, regularly worked side-by-
22 side with contract employees, borrowed servants and hourly employees performing substantially
23 identical tasks and duties. While those contract employees, borrowed servants and hourly
24 employees were paid overtime, Plaintiff and the proposed classes were not. Further, Plaintiff is
25 informed and believes, and based thereon alleges, that Defendant has engaged in conduct to re-
26 classify some, but not all, individuals within the proposed Plaintiff Classes as hourly or non-
27 exempt from applicable statutes, regulations and Wage Orders relating to employee benefits and
28 protections otherwise presumed to exist.

1 3. By this action, SIRKO, on behalf of himself, on behalf of the general public, and
2 on behalf of all other similarly situated current and former employees based in California, seeks
3 damages and restitution in the recovery of unpaid overtime wages for hours worked in excess of
4 eight (8) hours per day and/or forty (40) hours per week for himself and each of the putative
5 class members. SIRKO also seeks payment of "premium wages" for non-compliant meal periods
6 and rest periods, "waiting time" penalty wages for formerly employed putative class members
7 who were not paid all wages due at the time of separation from IBM, penalties for Defendant's
8 failure to provide accurate itemized wage statements, penalties, in a representative capacity, as
9 provided by the Private Attorney General Act ("PAGA") and declaratory/injunctive relief, to the
10 extent permitted by law, that the positions identified and the tasks/duties performed fail to
11 plainly and unmistakably meet the requirements of any recognized exemption under California
12 law.

13 4. By sending the appropriate notice to the California Labor and Workforce
14 Development Agency (LWDA), Plaintiff intends to bring this case as a representative action
15 seeking penalties for the State of California in a representative capacity, as provided by the
16 Private Attorneys General Act ("PAGA") to the extent permitted by law, as an aggrieved
17 employee who held the positions identified and was mis-classified despite the fact that the
18 tasks/duties performed fail to plainly and unmistakably meet the requirements of any recognized
19 exemption under California law. A true and correct copy of the Notice correspondence showing
20 compliance with Labor Code §2699.3 is attached hereto as Exhibit "A." Plaintiff gives notice of
21 intent to file a First Amended Complaint as a "Representative Action" as provided by California
22 Code of Civil Procedure as specifically permitted and authorized by Labor Code
23 §2699.3(a)(2)(C) if within 33-days from the date of the Notice to the LWDA, the agency does
24 not intervene, declines to investigate, or fails to take actions proscribed by the applicable statute.

25 5. Plaintiff brings this as a class action pursuant to California Code of Civil
26 Procedure Section 382, and under the Unfair Competition Law, California Labor Code sections
27 201-204, 226, 226.7, 515, 518, and 1194, applicable Wage Orders of the Industrial Welfare
28 Commission (IWC), Title 8 of the California Code of Regulations, section 11050, et seq., and

1 pursuant to Business & Professions Code, section 17200, et seq. The Plaintiff Classes sought to
2 be certified consists of the following:

3 PLAINTIFF CLASS I:

4 All Defendant's California-based employees who were assigned to
5 work for IBM's "Kaiser Permanente Information Technology"
6 ("KP-IT") account in non-managerial positions as "transitional
7 exempt employees" (including employees who perform
8 substantially identical functions under similar circumstances under
9 different job descriptions or titles) and who, from the period of 4
10 years prior to the commencement of this action until the date of
11 trial, were classified by Defendant as "exempt" as demonstrated by
12 Defendant's records.

9 PLAINTIFF CLASS II:

10 All Defendant's California-based employees having job titles,
11 codes and salary bands of "Technical Professional - Job Family
12 24A" (including employees who perform substantially identical
13 functions under similar circumstances under different job
14 descriptions or titles) who were assigned to work for IBM's
15 "Kaiser Permanente Information Technology" ("KP-IT") account
16 in non-managerial positions and who, from the period of 4 years
17 prior to the commencement of this action until the date of trial,
18 were classified by Defendant as "exempt" as demonstrated by
19 Defendant's records.

20 6. The "Overtime Subclass" includes members of Plaintiff Class I and Plaintiff Class
21 II who worked in excess of 8 hours per day and/or 40 hours per week, and who were not paid
22 overtime compensation as required by applicable orders of the Industrial Welfare Commission
23 ("IWC.") The "Wage Statement Subclass" includes members of Plaintiff Class I and Plaintiff
24 Class II who, by virtue of their "exempt" classification, were not provided with accurate itemized
25 wages statements showing all hours actually cause or suffered to work and the corresponding
26 pay, including pay at the requisite overtime rate for overtime hours worked. The "UCL
27 Subclass" includes members of Plaintiff Class I and Plaintiff Class II who are owed restitution as
28 a result of IBM's misclassification and unpaid overtime wages.

7. As used herein, the term "Plaintiff" means CHRIS B. SIRKO, who is the named
Plaintiff Class representative; the term "Plaintiff Classes" includes the Plaintiff and all members
of the proposed Classes and Subclasses. Plaintiff held positions for which recovery is sought and
worked hours of overtime in excess of 8 per day and/or 40 per week without commensurate pay
as required by the California Labor Code and/or applicable Wage Orders of the IWC, alleged

1 here to be IWC Wage Order 2001-4. During Plaintiff's employment, Defendant has knowingly
2 and intentionally failed to properly and accurately itemize his wage statements to reflect all hours
3 worked and has failed to provide statements that show all overtime hours worked and the
4 requisite overtime rate required to be paid. In short, Plaintiff has suffered injury and loss as a
5 result of Defendant's conduct and mis-classification, and Defendant has unjustly retained wages
6 such that recovery for said sums, plus interest at the legal rate, is due. Plaintiff's injury in fact
7 provides his standing to sue both on his own behalf, and as a proposed class representative on
8 behalf of others similarly situated in the proposed Plaintiff Classes and Subclasses.

9 8. The obligations and responsibilities of Defendant's exempt positions assigned to
10 the KP-IT account are virtually identical from region to region, district to district, facility to
11 facility, and employee to employee in the State of California. Any differences in job activities
12 between the different individuals in these positions were and are legally insignificant to the
13 issues presented by this action. Defendant's records and acts relating to mis-classification are a
14 matter of systematic and uniform practice for which individual issues do not predominate, and in
15 fact, all issues are systematically linked, related and common, both in terms of facts and law, for
16 Plaintiff and each of the proposed members of the Plaintiff Classes during the proposed Class
17 Period. To wit, each of the following is alleged:

- 18 a. As a matter of course during all or a substantial portion of the proposed
19 Class Period, Plaintiff and each member of the proposed Plaintiff Class I and
20 II, were regularly, uniformly, and systematically required by Defendant to
21 work in excess of eight (8) hours per day and/or required to work in excess of
22 forty (40) hours per week during the proposed Class Period without being paid
23 the requisite overtime wage required by California Labor Code Section 510,
24 515, 515.5, 1194 and applicable IWC Wage Order. Plaintiff, and each
25 member of the proposed Plaintiff Classes, who were classified as "exempt"
26 during the proposed Class Period and who were not paid overtime wages at
27 the requisite rate for overtime hours worked are all part of the "Overtime
28 Subclass" as further alleged herein;
- b. As a matter of course during all or a substantial portion of the proposed Class
Period, Plaintiff and each member of the proposed Plaintiff Class I and II were
not provided true, accurate, and properly itemized pay statements or wage
statements setting forth all hours actually caused or suffered to work and the
corresponding correct amounts of pay at the requisite agreed and legal rate as
required by Labor Code Section 226, et seq. Because Defendant did not
record or track all hours worked, Plaintiff and members of the proposed
Plaintiff Classes can reasonably estimate the amount worked as admissible
evidence at trial. Also, since Defendant had no reasonable basis to believe
that it was in compliance with applicable law in claiming a defense of exempt

1 classification, Plaintiff is informed and believes, and based thereon, alleges
2 that Defendant acted willfully and with direct knowledge that its actions, were
3 unlawful and violated California's minimum labor standards. Plaintiff and
4 members of the Proposed Plaintiff Class I and II, who were not provided
accurate itemized wage statements are all part of the "Wage Statement
Subclass" as further alleged herein;

5 c. As a matter of course during all or a substantial portion of the proposed Class
6 Period, Plaintiff and each member of the proposed Plaintiff Class I and II who
7 were not paid all wages due are owed restitution in the amount of the wages
8 for overtime hours worked at the requisite overtime rate of pay (generally 1.5x
9 the hourly rate of pay). Also, since Defendant had no reasonable basis to
10 believe that it was in compliance with applicable law in claiming a defense of
exempt classification, Plaintiff is informed and believes, and based thereon,
alleges that Defendant acted willfully and with direct knowledge that its
actions were unlawful and violated California labor standards. Plaintiff and
members of the Proposed Plaintiff Class I and II who were not timely paid all
wages due are owed restitution are each and all part of the "UCL Subclass" as
further alleged herein.

11 9. Plaintiff seeks damages and restitution for compensation for work performed and
12 moneys due to himself and to the Plaintiff Class I, Plaintiff Class II and proposed Subclasses
13 during the "Class Period," which is defined as four years prior to the filing of this action through
14 date of the commencement of the trial in the action. Based upon information and belief that the
15 Defendant's unlawful acts are continuing and will continue, Plaintiff may elect to seek
16 declaratory, and/or injunctive relief for the benefit of himself and the proposed classes he
17 represents.

18 **II.**

19 **JURISDICTION AND VENUE**

20 10. The California Superior Court has jurisdiction in this matter due to Defendant's
21 violations of Labor Code §201, et seq., Labor Code §500, et seq., Labor Code §1194, Business
22 and Professions Code §17200, et seq., the IWC Wage Order(s) and related common law
23 principles.

24 11. Venue is proper in this Judicial district and the County of Los Angeles because,
25 upon information and belief, Defendant resides in, is located in and/or is domiciled in this county
26 and maintains offices and transacts business in this county, and work was performed by members
27 of the classes made the subject of this action in the County of Los Angeles, California. Venue is
28 also proper in Los Angeles County pursuant to CCP §395(b) and/or CCP §395.5 in that Plaintiff

1 is a resident of said county and the county is the place where the harm occurred. Lastly, the
2 unlawful acts alleged herein have a direct effect on Plaintiff, and those similarly situated, within
3 the State of California and within Los Angeles County, as well as other counties located in
4 California.

5 12. On information and belief, the California Superior Court has primary and original
6 jurisdiction in this matter because there is no federal question at issue, as the issues herein are
7 based solely on California statutes and law, including the California Labor Code, Industrial
8 Welfare Commission Wage Orders, Code of Civil Procedure, Rules of Court, and Business and
9 Professions Code.

10 III.

11 THE PARTIES

12 A. The Plaintiff

13 13. Plaintiff CHRIS B. SIRKO is a California resident and remains a current
14 employee of the Defendant, and is entitled to back pay, overtime compensation, wage statement
15 penalties, interest at the rate of 10% per annum on unpaid wages, attorney's fees, and,
16 potentially PAGA penalties from the Defendant. SIRKO was employed by the Defendant for a
17 period of time during the Class Period in a salaried position, deemed exempt from the
18 requirement to pay overtime by his employer. SIRKO and the proposed Plaintiff Class I and
19 Plaintiff Class II were subjected to IBM's systematic and uniform classification policy applicable
20 to all class members without review or audit of tasks and duties, that, taken in combination with
21 other uniform policies, business practices, and procedures applicable to the proposed Classes and
22 Subclasses, render the action well suited for class action procedures and treatment as permitted
23 by Code of Civil Procedure §382 and the California Rules of Court. Indeed, IBM hired
24 employees of Kaiser Permanente, Kaiser Foundation Hospitals and/or Southern California
25 Permanente Medical Group, Inc. knowing that the prior employer had misclassified and failed to
26 pay overtime for work provided in maintaining, monitoring, troubleshooting and repairing Kaiser's
27 health information and data networks.

1 14. Each of the Plaintiff Class I and II members are numerous (approximately 300)
2 identifiable and ascertainable persons who were employed by IBM in the following categories:
3 (1) all current and former California-based "transitional exempt employees" hired by IBM from
4 Kaiser in approximately May 2009 to the present; and/or (2) all current and former California-
5 based "technical professional" employees (or similar job titles, job codes, and/or salary bands)
6 who were deemed "exempt" by IBM and assigned to the KP-IT account at any time between
7 May 2009 and the present. Each of the employees primarily engaged in the installation,
8 implementation, configuration, updating, monitoring, and troubleshooting of hardware and
9 software, computer network, applications and systems relate to Kaiser's health information
10 systems, applications, networks, and maintained such systems necessary for Kaiser's electronic
11 medical record keeping and system operations. None of the employees spent a majority of their
12 work time engaged in scientific research, nor did they design, develop, write, draft or create
13 hardware or software solutions for IBM. Most of their tasks involved merely serving a
14 maintenance and implementation of new hardware/software/network systems deployed by Kaiser
15 and serviced by IBM during the Class Period, over which, the proposed Classes had very little or
16 no input, control or design.

17 **B. The Defendants**

18 15. Plaintiff is informed and believes, and based thereon alleges, that IBM is a New
19 York corporation with one of its principal places of business operations in the State of California,
20 and is and was the employer of Plaintiff and the members of Plaintiff Classes and Subclasses
21 during the proposed Class Period. IBM maintains and transacts business as a provider of IT
22 services, applications, and business data systems and support for businesses operating in Los
23 Angeles and across many other California counties.

24 16. Plaintiff is ignorant of the true names, capacities, relationships and extent of
25 participation in the conduct herein alleged, of the Defendants sued herein as DOES 1 through
26 100, inclusive, but on information and belief alleges that said Defendants are legally responsible
27 for the payment of overtime compensation, penalties to the Plaintiff Class members by virtue of
28 their unlawful practices, and therefore sues these Defendants by such fictitious names. Plaintiff

1 will amend this complaint to allege the true names and capacities of the DOE Defendants when
2 ascertained as permitted by California Code of Civil Procedure §474.

3 17. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
4 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a
5 joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each
6 Defendant are legally attributable to the other Defendants. Plaintiff is informed and believes that
7 IBM and all DOE Defendants, for purposes of employment policies, hiring, firing, human
8 resources, wages and benefits, act as a joint employer or joint venture, such that IBM and any
9 DOE Defendant are to be jointly and severally liable for the unlawful acts as hereinafter
10 described. Further, Plaintiff is informed and believes, and based thereupon alleges, that
11 Defendants, and each of them, each had knowledge and information sufficient to them to have
12 authorized, ratified and directed the acts of one another as their conduct relates to the
13 Defendants' collective practices and treatment of the proposed classes of employees herein.

14 **IV.**

15 **GENERAL ALLEGATIONS**

16 18. California Labor Code section 1194 provides that notwithstanding any agreement
17 to work for a lesser wage, an employee receiving less than the legal overtime compensation is
18 entitled to recover in a civil action the unpaid balance of their overtime compensation, including
19 interest thereon, reasonable attorneys' fees, and costs of suit. Under California law, all
20 employees are presumed to be hourly and nonexempt, and thus entitled to all protections and
21 minimum labor standards as set forth in the California Labor Code and through enactments of
22 Industrial Welfare Commission Wage Orders, specifically, as to overtime pay, as well as certain
23 minimum non-delegable record/timekeeping requirements. It is the employer or Defendant's
24 obligation to plead and prove that an employee is "plainly and unmistakably" fit into a proper
25 exemption and that the employees spend a majority of their daily and weekly job duties engaged
26 in tasks that qualify for any proffered exemption. Exemptions, under California law, are to be
27 narrowly construed and benefits of doubtful classification inure to the benefit of employees to be
28 non-exempt and offered greater employee statutory and regulatory protections.

1 19. Further, Business and Professions Code section 17203 provides that any person
2 who engages in unfair competition may be enjoined in any court of competent jurisdiction.
3 Business and Professions Code section 17204 provides that any person who has suffered actual
4 injury and has lost money or property as a result of the unfair competition may bring an action
5 for restitution in a court of competent jurisdiction. Violations of the California Labor Code in
6 connection with an employer's obligation to pay wages serve as a legitimate predicate for
7 implication of the UCL.

8 20. During all, or a substantial portion, of the proposed Class Period, Plaintiff and
9 each member of Plaintiff Class I and Plaintiff Class II were employed by Defendants, and each
10 of them, in the State of California..

11 21. Plaintiff and each Plaintiff Class member were primarily engaged solely in IT
12 support, maintenance and repair roles and were non-exempt employees covered under one or
13 more Industrial Welfare Commission (IWC) Wage Orders, including Wage Order 4-2001
14 ("Wage Orders"), Labor Code section 510-515.5, and/or other applicable wage orders,
15 regulations and statutes, and each Plaintiff Class member was not subject to an exemption for
16 computer, executive, administrative or professional employees, which imposed an obligation on
17 the part of the Defendant to pay Plaintiff and Plaintiff Class members lawful overtime
18 compensation at the requisite legal rate for hours worked in excess of 8 hours per week and/or 40
19 per week, and were denied rest and meal period compensation for non-compliant missed, late or
20 interrupted meals and rest periods throughout the Class Period. Defendant, at the time of hire of
21 Plaintiff and members of the proposed Plaintiff Classes and Subclasses alleged herein, had actual
22 or constructive knowledge that the exempt classification it imposed was systematic, uniform, and
23 without any informed basis to justify any exemption from IWC Wage Order requirements for
24 overtime pay.

25 22. During the Class Period, Defendant was obligated to pay Plaintiff and the Plaintiff
26 Classes overtime compensation for all hours worked over eight (8) hours of work in one (1) day
27 or forty (40) hours in one week. Defendant regularly required Plaintiff and the Plaintiff Classes
28 to work overtime hours without overtime compensation.

1 23. Plaintiff and each Plaintiff Class member primarily performed non-exempt work
2 in excess of the maximum regular rate hours set by the IWC in the above Wage Orders,
3 regulations or statutes, and therefore are entitled to overtime compensation at the rate of time and
4 one-half, and when applicable, double time rates as set forth by the above Wage Orders,
5 regulations and/or statutes. Primary duties relate to routine and repetitive task work to monitor,
6 maintain, troubleshoot and repair KP-IT's networks and systems. IBM charged Kaiser by the
7 hour for such services, and received compensation on that basis; however, Plaintiff and members
8 of the Plaintiff Classes and Subclasses routinely worked 12-14 hour days, but were paid based on
9 a 40 hour week. By not paying overtime wages and calling Plaintiff and the proposed Plaintiff
10 Classes "salaried" or "exempt," IBM gained an unfair advantage in the marketplace by receiving
11 compensation from Kaiser on an hourly basis, but retaining such profits as a windfall through
12 employee misclassification.

13 24. Plaintiff is informed and believes, and based thereupon alleges, that Defendant
14 failed to maintain necessary records to show that it properly classified him or members of the
15 proposed Plaintiff Classes and Subclasses. Further, Defendant failed to monitor and record time
16 and tasks in such a way that it can ever establish that its employees in the proposed Plaintiff
17 Classes spent a majority of their daily and/or weekly work duties performing tasks that qualified
18 for exempt status, and in fact, by surveys, representative testimony, corporate representative
19 witnesses, and corporate HR documents, Plaintiff can and will show that Defendant cannot meet
20 its burden of proof to show that SIRKO or any of the proposed Plaintiff Class members were
21 properly classified as exempt. Many hours, particularly "on call" hours, restricted any normal
22 life activities to an unreasonable degree, and certain demands for implementation and IT fixes
23 required exhaustive shifts of work approaching 20 hours in a day, and led to worker fatigue and
24 health issues related to exhaustion. SIRKO himself suffered ill-health effects in October 2012
25 from attempting to maintain systems in accordance with IBM's work schedule and continual
26 outsourcing of staff necessary to provide an adequate level of maintenance service for the KP-IT
27 account. SIRKO is also aware of other putative class members who suffered ill-health and
28 exhaustion from extreme overtime work hours.

1 substantially identical functions under similar circumstances under
2 different job descriptions or titles) and who, from the period of 4
3 years prior to the commencement of this action until the date of
4 trial, were classified by Defendant as "exempt" as demonstrated by
5 Defendant's records.

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PLAINTIFF CLASS II:

All Defendant's California-based employees having job titles, codes and salary bands of "Technical Professional - Job Family 24A" (including employees who perform substantially identical functions under similar circumstances under different job descriptions or titles) who were assigned to work for IBM's "Kaiser Permanente Information Technology" ("KP-IT") account in non-managerial positions and who, from the period of 4 years prior to the commencement of this action until the date of trial, were classified by Defendant as "exempt" as demonstrated by Defendant's records.

29. Further, Plaintiff seeks to certify a subclass of employees composed of and defined as follows:

Plaintiff "Overtime Subclass":

All members of the Plaintiff Classes who, during the Relevant Time Period, were classified as exempt employees based on corporate records, and who were not paid at the legally requisite overtime rate for all hours worked in excess of eight (8) hours per workday and/or forty (40) hours per workweek.

30. Further, Plaintiff seeks to certify a subclass of employees composed of and defined as follows:

Plaintiff "Wage Statement Subclass":

All members of the Plaintiff Classes who, during the Relevant Time Period, to whom IBM knowingly and intentionally failed to provide accurate itemized wage statements showing all hours the said employee was actually caused or suffered to work and the corresponding regular and overtime wages to be paid.

31. Further, Plaintiff seeks to certify a subclass of employees composed of and defined as follows:

Plaintiff "UCL Subclass":

All members of the "Overtime Subclass" who (1) were subject to unlawful, illegal, unfair and/or deceptive business acts /and or practices by the Defendant and (2) are entitled to restitution of unpaid wages from the Defendant based on conduct occurring at any time from 4 years prior to the commencement of this action

1 until the commencement of trial in this action.

2 32. Plaintiff reserves the right under Rule 3.765(b), California Rules of Court, to
3 amend or modify the Class description with greater specificity or further division into subclasses
4 or limitation to particular issues.

5 33. This action has been brought and may be maintained as a class action pursuant to
6 Code of Civil Procedure section 382 because there is a well-defined common interest of many
7 persons and it is impractical to bring them all before the court.

8 34. **Ascertainable Class:** The proposed classes and each subclass are ascertainable in
9 that their members can be identified and located using information contained in Defendant's
10 payroll and personnel records.

11 35. **Numerosity:** The potential quantity of members of the Classes and Subclasses as
12 defined is so numerous that joinder of all members would be unfeasible and impractical. The
13 disposition of their claims through this class action will benefit both the parties and this Court.
14 The quantity of members of the Classes and Subclasses is unknown to Plaintiff at this time,
15 however, it is estimated that each Class and Subclass number is in excess of 100 individuals. The
16 quantity and identity of such membership is readily ascertainable via inspection of Defendant's
17 records.

18 36. **Typicality:** The claims of Plaintiff SIRKO for overtime wages, waiting time
19 penalties, interest, and attorneys' fees are typical of the claims of all members of the Classes and
20 Subclasses mentioned herein because all members of the Classes and Subclasses sustained
21 similar injuries and damages arising out of Defendant's common course of conduct in violation
22 of law and the injuries and damages of all members of the Classes and Subclasses were caused
23 by Defendant's wrongful conduct in violation of law, as alleged herein.

24 37. **Adequacy:** Plaintiff CHRIS B. SIRKO is an adequate representative of the
25 Classes and Subclasses herein, will fairly protect the interests of the members of the Classes and
26 Subclasses, has no interests antagonistic to the members of the Classes and Subclasses and will
27 vigorously pursue this suit via attorneys who are competent, skilled and experienced in litigating
28 matters of this type. Class Counsel is competent and experienced in litigating large employment

1 law class actions.

2 38. **Superiority:** The nature of this action and the nature of laws available to Plaintiff
3 make use of the class action format a particularly efficient and appropriate procedure to afford
4 relief to Plaintiff for the wrongs alleged herein, as follows:

5 a. This case involves a large corporate Defendant and a sufficient numerous
6 group of individual Class Members with many relatively small claims and
7 common issues of law and fact;

8 b. If each individual member of each of the Classes and Subclasses was required
9 to file an individual lawsuit, the large corporate Defendant would necessarily
10 gain an unconscionable advantage because Defendant would be able to exploit
11 and overwhelm the limited resources of each individual member of the
12 Classes and Subclasses with Defendant's vastly superior financial and legal
13 resources;

14 c. Requiring each individual member of each of the Classes and Subclasses to
15 pursue an individual remedy would also discourage the assertion of lawful
16 claims by the members of the Classes and Subclasses who would be
17 disinclined to pursue an action against Defendant because of an appreciable
18 and justifiable fear of retaliation and permanent damage to their lives, careers
19 and well-being;

20 d. Proof of a common business practice or factual pattern, of which the members
21 of the Classes and Subclasses experienced, is representative of the Classes and
22 Subclasses herein and will establish the right of each of the members of the
23 Classes and Subclasses to recover on the causes of action alleged herein;

24 e. The prosecution of separate actions by the individual members of the Classes
25 and Subclasses, even if possible, would create a substantial risk of
26 inconsistent or varying verdicts or adjudications with respect to the individual
27 members of the Classes and Subclasses against Defendant; and which would
28 establish potentially incompatible standards of conduct for Defendant; and/or

1 legal determinations with respect to individual members of the Classes and
2 Subclasses which would, as a practical matter, be dispositive of the interest of
3 the other members of the Classes and Subclasses who are not parties to the
4 adjudications or which would substantially impair or impede the ability of the
5 members of the Classes and Subclasses to protect their interests; and

6 f. The claims of the individual members of the Classes and Subclasses are not
7 sufficiently large to warrant vigorous individual prosecution considering all of
8 the concomitant costs and expenses attending thereto.

9 g. Furthermore, as the damages suffered by each individual member of the
10 Classes may be relatively small, the expenses and burden of individual
11 litigation would make it difficult or impossible for individual members of the
12 Classes to redress the wrongs done to them, while an important public interest
13 will be served by addressing the matter as a class action.

14 h. The cost to the court system of adjudication of such individualized litigation
15 would be substantial. Individualized litigation would also present the
16 potential for inconsistent or contradictory judgment.

17 i. Finally, the alternative of filing a claim with the California Labor Commission
18 is not superior, given the lack of discovery in such proceedings, the
19 availability of fewer remedies, and the fact that the losing party has the right
20 to a trial de novo in the Superior Court.

21 39. **Existence and Predominance of Common Questions of Fact and Law:** There
22 are common questions of law and fact as to the members of the Classes and Subclasses which
23 predominate over questions affecting only individual members of the Classes and Subclasses
24 including, without limitation:

25 a. Whether the Class Members qualify for exempt status under the
26 administrative exemption;

27 b. Whether the Class Members qualify for exempt status under the computer
28 professional exemption;

- 1 c. Whether the Class Members were improperly mis-classified by Defendant
2 without analysis as to job duties performed.
- 3 d. The extent to which Defendant analyzed the duties and responsibilities of the
4 Class Members before classifying them as exempt;
- 5 e. The number of hours per week and per day Class Members are expected to
6 work;
- 7 f. Defendant's expectations as to the duties and responsibilities of the Class
8 Members, and whether these expectations are reasonable under the
9 circumstances;
- 10 g. Whether the various tasks performed by the Class Members qualify as exempt
11 or non-exempt tasks;
- 12 h. Whether Defendant failed to keep adequate records for the members of the
13 Wage Statement Subclass pursuant to Labor Code 226(a) (and the
14 consequence for such statutory violations if Defendant did not);
- 15 i. Whether Defendant's conduct constitutes unfair competition within the
16 meaning of Business and Professions Code sections 17200 and 17203;
- 17 j. Whether members of the Classes and Subclasses are entitled to compensatory
18 damages, and if so, the means of measuring such damages;
- 19 k. Whether the members of the Classes and Subclasses are entitled to injunctive
20 and/or declaratory relief;
- 21 l. Whether the members of the Classes and Subclasses are entitled to restitution;
- 22 m. Whether Defendant is liable for pre-judgment interest; and
- 23 n. Whether Defendant is liable for attorneys' fees and costs.

24 40. **Manageability and Superiority of Class Action Procedure:** The nature of this
25 action and the nature of laws available to Plaintiff make use of the class action format a
26 particularly efficient and appropriate procedure to afford relief to Plaintiff for the wrongs alleged
27 herein. Specifically, the primary class turns upon Defendant's own uniform, systematic practice
28 of classifying all affected job positions as "salaried exempt" without any individual scrutiny of

1 tasks and duties is in compliance with Labor Code section 1194 and the presumptions against
2 employees being deemed "exempt" from overtime payment requirements. Therefore, the
3 propriety of the classification scheme applicable to all employees holding the job titles and
4 positions is a predominant question of fact that is easily cable of being discovered through
5 manageable devices of common proof such as statistical random sampling, survey evidence
6 based on scientific principles, representative testimony, documentary evidence and common
7 practices/procedures of the Defendant in treating each of the class members as a homogeneous
8 group in the payment of their wages. Furthermore, the Plaintiff Classes are comprised
9 California-based employees assigned to the KP-IT account having job titles, job codes and/or
10 descriptions easily derived and maintained by IBM and its Human Resource and or
11 Compensation Review departments. Such positions may vary in title and description, but not in
12 the fact that each employee, like SIRKO, was assigned to the installation, configuration,
13 deployment, implementation, training, updating, monitoring, maintaining and troubleshooting of
14 Kaiser Permanente's health information data networks, applications, mainframes, and operating
15 systems. Despite Defendant's efforts to use a multitude of duplicative job titles, a narrowly
16 defined group of employees whose job duties, tasks and classification scheme can be readily
17 achieved through means of common and representative proof. Once the predominant issue of
18 exempt classification is determined, then each of the derivative Subclass claims and damages, if
19 any, suffered by each member is capable of being shown by several means of common proof and
20 limited by individual showings of entitlement to recovery that can be professionally administered
21 and tailored to the facts and circumstances of the case.

22 VI.

23 CAUSES OF ACTION

24 FIRST CAUSE OF ACTION

25 **Failure To Pay Overtime Wages [Labor Code § 510, 515, 515.5, 1194]**

26 **(Plaintiff and each Member of the Overtime Subclass as against each Defendant)**

27 41. Plaintiff incorporates all preceding paragraphs by this references as though fully
28 set forth herein.

42. At all relevant times, the following were applicable provisions of California law

1 that applied to Plaintiff, the proposed Plaintiff Classes and to the Defendants, and each of them:

- 2 a. Labor Code §204 establishes the fundamental right of all employees in the
3 State of California to be paid wages, including straight time and overtime, in a
4 timely fashion for their work. This precludes any waiver for unpaid due and
5 owing wages that remain unpaid at the time of separation;
- 6 b. Labor Code §510(a) states in pertinent part: "Any work in excess of eight
7 hours in one workday and any work in excess of 40 hours in any one
8 workweek ... shall be compensated at the rate of no less than one and one-half
9 times the regular rate of pay for any employee";
- 10 c. Pursuant to Labor Code §1198, it is unlawful to employ persons for longer
11 than the hours set by the Industrial Welfare Commission or under conditions
12 prohibited by the IWC Wage Order(s);
- 13 d. Wage Order No. 4, codified in California Code of Regulations, title 8, section
14 11040(1)(A)(2) regarding the Administrative Exemption" states in pertinent
15 part: "A person employed in an administrative capacity means any employee:
16 (a) Whose duties and responsibilities involve...(i) The performance of office
17 or non-manual work directly related to management policies or general
18 business operations of his/her employer or his/her employer's customers; ...
19 and (b) Who customarily and regularly exercises discretion and independent
20 judgment..."
- 21 e. 29 C.F.R. §541.202(a), as revised in 2004, states: "To qualify for the
22 administrative exemption, an employee's primary duty must include the
23 exercise of discretion and independent judgment with respect to matters of
24 significance. In general, the exercise of discretion and independent judgment
25 involves the comparison and the evaluation of possible courses of conduct,
26 and acting or making a decision after the various possibilities have been
27 considered. The term "matters of significance" refers to the level of
28 importance or consequence of the work performed."
- f. 29 C.F.R. §541.202(b), as revised in 2004, states: "The phrase "discretion and
independent judgment" must be applied in the light of all the facts involved in
the particular employment situation in which the question arises. Factors to
consider when determining whether an employee exercises discretion and
independent judgment with respect to matters of significance include, but are
not limited to:
- whether the employee has authority to formulate, affect, interpret,
or implement management policies or operating practices;
 - whether the employee carries out major assignments in conducting
the operations of the business;
 - whether the employee performs work that affects business
operations to a substantial degree, even if the employee's
assignments are related to operation of a particular segment of the
business;
 - whether the employee has authority to commit the employer in
matters that have significant financial impact;

- whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- whether the employee has authority to negotiate and bind the company on significant matters;
- whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives;
- whether the employee investigates and resolves matters of significance on behalf of management; and
- whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

43. Defendant employed Plaintiff, and the proposed Plaintiff Classes, to engage in the continued configuration, upkeep, repair, maintenance of KP-IT's systems and numerous other computer network application software tools. Said activities and job duties were non-managerial in nature and did not directly relate to the corporate operations of IBM, nor did any of the positions SIRKO and the class members hold allow for any significant degree of individual discretion and independent judgment. Neither Plaintiff, nor the proposed Plaintiff Classes, engaged in the design or the decisions as to what systems, application, network and computer hardware was necessary for the upgrade, but were merely tasked with the manual, routine and repetitive installation, configuration, and maintenance of the new system. No license, certification, or advance degree was necessary or required to perform the tasks; rather, SIRKO and the proposed classes were merely to maintain, monitor, and troubleshoot numerous parts of the KP-IT health information systems in use at Kaiser's medical facilities.

44. Plaintiff and the Plaintiff Class Members were regularly required to work overtime hours and are entitled to overtime compensation for overtime work performed for the Defendant, in an amount according to proof. Pursuant to Labor Code sections 1194 and 1198 and IWC Wage Order 4-2001, the Plaintiff Class Members seek the payment of all overtime compensation which they earned and accrued after four (4) years prior to filing of the Complaint, according to proof. Plaintiff is a current employee and all of his job duties led him to be expected to work 10-12 hour shifts, and workweeks that exceeded forty (40) hours and for which he was not paid overtime wages at the legally requisite rate. His job duties were to install,

1 configure, implement troubleshoot and maintain mainframe systems for Kaiser medical facilities.
2 Due to the large amount of work hours and the misclassification, IBM did not accurately record
3 work time nor did the Defendant monitor whether the majority of SIRKO or any class member's
4 work tasks were qualified for exempt status. In fact, SIRKO's work duties, like those of all
5 members of the Plaintiff Classes, were routine, manual and repetitive – requiring skill and
6 experience with application tools – but not requiring advance knowledge, skill and training to
7 develop, create, design or originate novel solutions to problems. Further, SIRKO and the
8 proposed Plaintiff Classes were prevented from the engagement in any significant degree of
9 discretion and independent judgment on any IT issues due to multiple levels of management and
10 the use of pre-ordained and established policies and procedures for which neither SIRKO nor the
11 proposed Classes had any role in creating, and for which neither SIRKO nor the proposed
12 Classes could not deviate without advance approval from management.

13 45. Plaintiff is informed and believes that he and the proposed Plaintiff Classes were
14 simply deemed “salaried” exempt without any justifiable factual basis by the Defendant. At the
15 very least, Defendant place personnel in the identified positions, and other equivalent positions,
16 solely based on the use of sophisticated sounding job requisition postings, but no advance or post
17 position analysis as to how each employee actually spent his or his day, the duties for which
18 comprised a majority of work time, nor did the Defendant audit or monitor whether the
19 employees met any overtime exemption. In fact, the Defendant failed to even record all work
20 hours in any way, so it cannot determine how a majority of Plaintiff's, or the proposed Plaintiff
21 Classes', work duties was spent, even if some minority of task, on occasion, qualified for exempt
22 status. Based on this and other documents, witnesses and corporate representative evidence,
23 Plaintiff contends that Defendant cannot meet its burden of proof to show that he or any
24 proposed Class member was plainly and unmistakably classified into a proper exemption, nor
25 can it deny that its system of classification was uniform and standard during the proposed Class
26 Period.

27 46. As a result, Plaintiff and the proposed Plaintiff Classes are owed wages for
28 overtime worked and can show such time through the use of schedules, surveys, representative

1 evidence, statistical sampling of work times and dates, and other means of objective proof
2 showing that Plaintiff and the classes worked overtime and that Defendant had no legitimate and
3 continuing basis to claim exemption status.

4 47. Additionally, Plaintiff and Plaintiff Classes Members are entitled to attorneys'
5 fees, and costs, pursuant to California Labor Code §1194 and prejudgment interest in an amount
6 according to proof.

7 **SECOND CAUSE OF ACTION**

8 **Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement
Provisions (Lab. Code, § 226(a))**

9 **(Plaintiff and the Wage Statement Subclass against each Defendant)**

10 48. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

11 49. Section 226(a) of the California Labor Code requires Defendant to itemize in
12 wage statements all deductions from payment of wages and to accurately report total hours
13 worked by Plaintiff and the members of the proposed Classes. Defendant has knowingly and
14 intentionally failed to comply with Labor Code section 226(a) on each and every wage statement
15 provided to Plaintiff and members of the proposed Wage Statement Subclass. To wit, Plaintiff
16 alleges that the wages statements failed to accurately set forth all hours actually caused or
17 suffered to work. Plaintiff SIRKO suffered harm because the wage statements falsely indicated
18 payment based on 8 hour days when in fact, most days require 10-12 hours worked, with certain
19 projects requiring as many as 15-20 hour shifts to resolve a particular problem. Without showing
20 all hours actually worked, IBM caused harm by not providing sufficient information to meet its
21 burden to show whether any of the KP-IT transitional exempt employees or the subsequently
22 "exempt" classified employees satisfied the necessary rate of pay requirements for exempt status
23 and particularly with regard to Labor Code Section 515.5 salary and hourly pay thresholds.

24 50. As a consequence of Defendant's knowing and intentional failure to comply with
25 Labor Code section 226(a), Plaintiff and the Wage Statement Subclass are entitled to actual
26 damages or penalties not to exceed \$4000 for each employee pursuant to Labor Code section
27 226(b), together with interest thereon and attorneys' fees and costs.

28 ///

1 ///

2 **THIRD CAUSE OF ACTION**

3 **Violations of the Unfair Competition Law**

4 **(Plaintiff and each Plaintiff Class Member and Subclass Member against each Defendant)**

5 51. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

6 52. The failure to pay lawful overtime compensation and timely pay all pay due upon
7 termination of employment to Plaintiff, and each Plaintiff Class Member and Subclass Member,
8 is an unlawful and unfair business practice within the meaning of Business and Professions Code
9 section 17200, et seq., including but not limited to a violation of the applicable State of
10 California Industrial Welfare Commission Wage Orders, regulations and statutes, or is otherwise
11 a practice which is otherwise unfair and unlawful, including that the Defendant did not pay tax
12 contributions on the accrued overtime compensation in the form of FICA, Social Security,
13 Medicare and Unemployment Insurance.

14 53. This cause of action is brought under Business and Professions Code sections
15 17203 and 17204, commonly called the Unfair Competition Law. Under this cause of action and
16 pursuant to Business and Professions Code section 17208, Plaintiff and all Plaintiff Class
17 Members seek restitution of overtime wages and other pay owed and, where applicable, penalties
18 under Labor Code section 203, where such wages were due each of the class members during the
19 Class Period, commencing four (4) years prior to filing of this complaint, according to proof.

20 54. This cause of action is brought as a cumulative remedy as provided in Business
21 and Professions Code section 17205, and is intended as an alternative remedy for restitution for
22 Plaintiff, each Plaintiff Class Member and each Plaintiff Subclass Member, for the time period,
23 or any portion thereof, commencing within four (4) years prior to the filing of this complaint, and
24 as the primary remedy for Plaintiff, each Plaintiff Class Member and each Plaintiff Subclass
25 Member for the time period of the fourth year prior to the filing of this complaint, as such one
26 year time period exceeds the statute of limitations on statutory wage claims.

27 55. As a result of the Defendant's unlawful and unfair business practice of failing to
28 pay overtime and prompt payment of wages in violation of Labor Code sections 201 and 202,

1 each Plaintiff Class Member and Subclass Member has suffered damages and is entitled to
2 restitution in an amount according to proof.

3 56. Further, Plaintiff requests the violations of the Defendant alleged herein be
4 enjoined, and other equitable relief as this court deems proper including an order for the
5 reclassification of Class Members to non-exempt status and requiring payment by the Defendant
6 of tax contributions on the accrued overtime compensation in the form of FICA, Social Security,
7 Medicare, Unemployment Insurance or other appropriate payments.

8 **VI.**

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff prays for judgment as follows:

- 11 a. That the Court issue an Order that this action may be maintained as a class action and
12 certify the Classes and Subclasses herein, appointing the named Plaintiff as
13 representative of all others similarly situated, and appointing the law firm
14 representing the named Plaintiff as counsel for the members of the Classes and
15 Subclasses;

16 **As to the First Cause of Action for Failure to Pay Hourly and Overtime Wages:**

- 17 b. For damages, as set forth in Labor Code §1194(a) and the IWC Wage Order(s),
18 including IWC Wage Order 5, section 20, regarding wages due and owing, according
19 to proof;
- 20 c. For pre-judgment interest as allowed by Labor Code §218.6, Labor Code §1194(a)
21 and Civil Code §3287;
- 22 d. For an award of reasonable attorneys' fees and costs pursuant to Labor Code §218.5
23 and Labor Code §1194(a), and pursuant to Code of Civil Procedure § 1021.5;

24 **As to the Second Cause of Action for Failure to Provide Accurate Wage Statements:**

- 25 e. For recovery as authorized by Labor Code §226(e);
- 26 f. For injunctive relief to ensure Defendant's compliance with Labor Code §226
27 pursuant to Labor Code §226(g);
- 28

- 1 g. For an award of costs and reasonable attorneys' fees pursuant to Labor Code §226(e)
2 and/or §226(g) and pursuant to Code of Civil Procedure § 1021.5;

3 **As to the Third Cause of Action for Unfair Business Practices:**

- 4 h. For an accounting, under administration of Plaintiff and/or the receiver and subject to
5 Court review, to determine the amount to be returned by Defendant, and the amounts
6 to be paid to members of the Classes who are owed monies by Defendant;
- 7 i. For an Order requiring Defendant to identify each of the members of the Classes by
8 name, home address, and home telephone number;
- 9 j. For an Order requiring Defendant to make full restitution and payment to the Classes
10 due to unfair competition, including disgorgement of its wrongfully withheld wages
11 pursuant to California Business and Professions Code sections 17203 and 17204;
- 12 k. For an Order for a preliminary and/or permanent injunction prohibiting Defendant
13 from continuing the illegal course of conduct, alleged herein;
- 14 l. That Defendant further be enjoined to cease and desist from unfair competition in
15 violation of sections 17200, et seq. of the California Business and Professions Code;
- 16 m. That Defendant be enjoined from further acts of restraint of trade or unfair
17 competition;
- 18 n. For the creation of an administrative process wherein each injured member of the
19 Classes may submit a claim in order to receive his/her money;
- 20 o. For all other appropriate injunctive, declaratory and equitable relief;
- 21 p. For interest to the extent permitted by law;
- 22 q. For an award of attorneys' fees and costs incurred in the investigation, filing and
23 prosecution of this action pursuant to Civil Code §1021.5, Business and Professions
24 Code §17200, et seq., Labor Code §1194 and/or any other applicable provision of
25 law;


26 **As to All Causes of Action:**

- 27 r. For such other and further relief as this Court may deem just and proper;
- 28 s. For reasonable attorneys' fees and costs incurred;

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Dated: February 26, 2013

COHELAN KHOURY & SINGER

By: 
Michael D. Singer, Esq.
J. Jason Hill, Esq.
Attorneys for Plaintiff CHRIS B. SIRKO

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial of his claims by jury to the extent authorized by law.

Dated: February 26, 2013

COHELAN KHOURY & SINGER

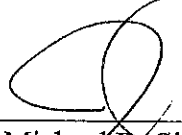
By: 
Michael D. Singer, Esq.
J. Jason Hill, Esq.
Attorneys for Plaintiff CHRIS B. SIRKO

Exhibit A

COHELAN KHOURY & SINGER

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

TIMOTHY D. COHELAN,* APLC
ISAM C. KHOURY, APC
DIANA M. KHOURY, APC
MICHAEL D. SINGER,•APLC

ATTORNEYS AT LAW

605 "C" STREET, SUITE 200
SAN DIEGO, CALIFORNIA 92101-5305
Telephone: (619) 595-3001
Facsimile: (619) 595-3000

JEFF GERACI ▲
J. JASON HILL †
KIMBERLY D. NEILSON

(* Also admitted in the District of Columbia)
(• Also-admitted in Colorado)

(† Also admitted in Illinois)
(▲ Of Counsel)

www.ckslaw.com

February 26, 2013

NOTICE OF LABOR CODE VIOLATIONS PURSUANT TO LABOR CODE SECTION 2699.3

**To: The California Labor and Workforce Development Agency and
International Business Machines Corporation (IBM)**

**From: Chris B. Sirko, on behalf of himself and on behalf of all current and/or
former Technical Professional "Exempt" Employees Assigned to the Kaiser
Permanente Information Technology (KP-IT) Account.**

Factual Statement:

Chris B. Sirko, on behalf of himself and similarly situated current and former aggrieved employees of International Business Machines Corporation (IBM), is a current Information Technology (IT) employee assigned to the Kaiser Permanente (KP-IT) account. Sirko and aggrieved employees primarily engaged in non-exempt work activity for the majority of their work time and were improperly classified as exempt employees. Sirko gives notice of his intent to bring a cause of action for violation of the Private Attorneys General Act of 2004 ("PAGA") for IBM's failure to comply with California's wage and hour minimum requirements. During the entire course of their employment, IBM failed to provide said employees and those similarly situated with overtime pay meal periods, rest breaks, accurate pay records or timely termination pay. As a consequence, IBM has failed to comply with Labor Code Section 201-203, 221-222, 226.7, Labor Code Sections 510, 512, 515, 515.5, 1194, 221-223, and Industrial Welfare Commission Wage Orders 4-2001. IBM has and continues to fail to provide accurate, timely and itemized pay stub accounting records to Sirko in violation of Labor Code Section 226(a). Sirko is informed and believes that such violations are ongoing, systematic and continuous. He intends to bring an action against IBM under the Private Attorney General Act ("PAGA") to recover wages and penalties as provided by California law.¹

¹ Without limitation, Sirko, if permitted, will seek any and all penalties otherwise capable of being collected by the Commission. This includes, each of the following, as is set forth in Labor Code Section 2699.5, which states:

The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3,

NOTICE OF LABOR CODE VIOLATIONS

Re: International Business Machines Corporation

February 26, 2013

Page 2

Theories of Labor Code Violations and Remedies:

Sirko continues to be employed in a position as an Information Technology (IT) employee at IBM in California and is assigned to maintain and monitor computer systems for the KP-IT account. He was a transitional exempt employee hired from KP in May of 2009 and then in July 2009 was placed in job code 499K as a Technical Professional (Advanced), with Salary Band 7. He and other aggrieved employees are charged primarily with the duties to install, configure, maintain, troubleshoot and upkeep of applications and computer systems for Kaiser Permanente's medical records and data systems account. The positions, while having varied job titles, essentially involved identical functions and tasks for which a majority of the employees' work time was spent engaged in tasks that were not consistent with any recognized exemption from the general requirement to pay overtime wages. IBM, for a period of at least four years prior to the date of this Notice, unlawfully failed to pay such employees overtime wages, but yet regularly required employees to work in excess of eight hours per day and/or forty hours per week without premium pay under Labor Code Section 1194. Claimant contends that IBM did not and does not have sufficient cause or reason to maintain the employee classifications as exempt and to avoid paying overtime required on a daily and weekly basis to upkeep and maintain Kaiser's electronic data systems, applications, and networks.

Claimants (which includes Sirko and all other similarly aggrieved employees) were at all times also entitled to uninterrupted paid meal periods or compensation lieu thereof. IBM failed to provide meal periods for claimant and all other similarly situated employees as required by Labor Code Section 226.7, Labor Code Section 512, and Industrial Welfare Commission Wage Orders 4-2001(11) and/or 9-2001(11.) Therefore, Claimants are entitled to recover wages and/or penalties as provided by Labor Code Section 558 and applicable IWC Wage Orders. Furthermore, since IBM required Sirko and others similarly situated to work during their meal period in violation of Labor Code Section 226.7(a), Claimants seek wages of one additional hour of pay as permitted by Labor Code Section 226.7(b) as well as all available penalties as set forth in Labor Code Section 2699(f.)

Aggrieved employees were also entitled rest breaks. IBM used its mis-classification of employees as a basis to refuse and to not authorize or permit rest breaks for claimant and all other similarly situated employees engaged in the same tasks and function as required by Labor Code Section 226.7, Labor Code Section 512, and Industrial Welfare Commission Wage Orders. Therefore, Claimants are entitled to recover wages and/or penalties as provided by Labor Code Section 558 and applicable IWC Wage Orders. Furthermore, since IBM required its IT employees to work during rest periods in violation of Labor Code Section 226.7(a), Claimants seek wages of one additional hour of pay as permitted by Labor Code Section 226.7(b) as well as all available penalties as set forth in Labor Code Section 2699(f.)

Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, paragraphs (1), (2), and (3) of subdivision (a) of and subdivision (e) of Section 1701.4, subdivision (a) of Section 1701.5, Sections 1701.8, 1701.10, 1701.12, 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3095, 6310, 6311, and 6399.

NOTICE OF LABOR CODE VIOLATIONS

Re: International Business Machines Corporation

February 26, 2013

Page 3

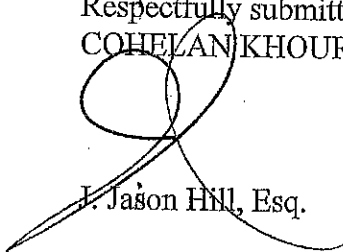
IBM's uniform failure to pay overtime wages, allow rest and meal periods to Sirko and other IT employees during their workday was also done without any payment of an additional one-hour's wage per day to said Claimants at their regular rate of pay, or alternatively, premium compensation, if applicable, pursuant to Labor Code Section 1194. IBM's failure to provide such compensation in lieu of meals violated Labor Code Section 204 and 204(b), such that penalties are recoverable as set forth in Labor Code Section 210 and/or Section 1194, *et.seq.*

Claimants are entitled to recover unpaid wages, with interest, and are entitled to an award of attorneys' fees as permitted by Labor Code Section 1194, and other penalties, as permitted by Labor Code Section 2699, Labor Code Section 210, and waiting time penalties for former employees, pursuant to Labor Code Section 203.

A copy of the lawsuit being filed without PAGA claims is attached in draft to this letter. The suit is being filed as of the date of this letter, and if after 33 days has elapsed, the LWDA does not take action or declines to intervene, Sirko will amend the Complaint to add a cause of action for violations of PAGA and proceed as a representative action, as permitted by law.

Thank you for your attention to this matter.

Respectfully submitted,
COHELAN/KHOURY & SINGER



J. Jason Hill, Esq.

VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT

Marty Morgenstern, Secretary
California Labor and Workforce Development Agency
800 Capitol Mall, Suite 500 MIC-55
Sacramento, CA 95814

International Business Machines Corporation
c/o Agent for Service of Process in California
CT CORPORATION SYSTEM
818 W. Seventh Street
Los Angeles, California 90017

International Business Machines Corporation
New Orchard Road
Armonk, New York, 10504

1 **COHELAN KHOURY & SINGER**

Timothy D. Cohelan (SBN 60827)

2 Isam C. Khoury (SBN 58759)

Michael D. Singer (SBN 115301)

3 J. Jason Hill (SBN 179630)

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4 San Diego, CA 92101

Telephone: (619) 595-3001

5 Facsimile: (619) 595-3000

6 Attorneys for Plaintiff CHRIS B. SIRKO, on behalf of himself
all others similarly situated and the general public

7 **SUPERIOR COURT OF CALIFORNIA**

8 **COUNTY OF LOS ANGELES - CENTRAL**

9 CHRIS B. SIRKO, on behalf of himself,)
10 all others similarly situated and the general)
public)

Case No. _____

11 Plaintiffs,

**CLASS ACTION COMPLAINT FOR
DAMAGES, RESTITUTION, PENALTIES
AND INJUNCTIVE RELIEF**

12 v.

**1. Failure to Pay Overtime Wages (Lab.
Code §§204, 515, 1194, 1198);**

13 INTERNATIONAL BUSINESS)
14 MACHINES CORPORATION, a New)
15 York Corporation, and DOES 1 through)
16 100, Inclusive,)

**2. Failure to Provide Accurate Itemized
Wage Statements (Lab. Code §226);**

**3. Unfair Business Practices
(Bus. & Prof. Code §§17200-17208)**

17 Defendants

DEMAND FOR JURY TRIAL

18 Plaintiff CHRIS B. SIRKO (hereinafter "Plaintiff" or "SIRKO"), on behalf of himself,
19 the general public, and all others similarly-situated, complains and alleges as follows:
20

21 **I.**

22 **INTRODUCTION**

23 1. This case arises out of Defendant's systematic and uniform mis-classification of
24 proposed class members as exempt from overtime pay, resulting in the non-payment of overtime
25 compensation to certain California-based Information-Technology (IT) employees of Defendant
26 INTERNATIONAL BUSINESS MACHINES CORPORATION (hereinafter referred to as "IBM"
27 or "Defendant") for hours worked in excess of 8 hours per day and/or in excess of 40 hours per
28 week. The job titles for these proposed IBM class members may have changed through the years

1 encompassed by the action; however the job tasks and functions are substantially identical and have
2 changed very little, if at all. The proposed Plaintiff Class I covers all Defendant's current or former
3 employees performing work in the State of California having job titles, job codes or descriptions as
4 it relates to approximately 313 persons who were hired as "transitional exempt employees" from
5 Kaiser Permanente (KP), Kaiser Foundation Hospitals (KPH) or from Southern California
6 Permanente Medical Group, Inc. (SCPMG) on approximately May 1, 2009, and who were assigned
7 by IBM to service and maintain the Kaiser Permanente Information Technology ("KP-IT") account.
8 Plaintiff Class II covers all Defendant's current or former employees performing work in the State
9 of California having job titles, job codes or job descriptions of "Technical Professional" and/or
10 similar job titles, job codes, salary grades or position descriptions, who were assigned to service and
11 maintain the KP-IT account, and who IBM classified as "exempt" employees based on company
12 records. The positions are devoted to maintaining KP-IT's health and data systems, applications
13 and networks. Although the precise system and software application tools differ, the core and
14 essential functional aspects of the job titles and job codes are virtually identical and all were
15 uniformly and systematically classified by Defendant as exempt from overtime without justification.
16 Like SIRKO, all persons in these positions that were based in the State of California spent a
17 majority of their work time engaged in non-exempt functions for the Defendant and were mis-
18 classified as exempt employees during the proposed "Class Period," which is defined as four years
19 prior to the filing of the Complaint through the date of commencement of trial.

20 2. In fact, during the relevant time period covered by this suit, Plaintiff is informed
21 and believes that he and members of the proposed Plaintiff Classes, regularly worked side-by-
22 side with contract employees, borrowed servants and hourly employees performing substantially
23 identical tasks and duties. While those contract employees, borrowed servants and hourly
24 employees were paid overtime, Plaintiff and the proposed classes were not. Further, Plaintiff is
25 informed and believes, and based thereon alleges, that Defendant has engaged in conduct to re-
26 classify some, but not all, individuals within the proposed Plaintiff Classes as hourly or non-
27 exempt from applicable statutes, regulations and Wage Orders relating to employee benefits and
28 protections otherwise presumed to exist.

1 3. By this action, SIRKO, on behalf of himself, on behalf of the general public, and
2 on behalf of all other similarly situated current and former employees based in California, seeks
3 damages and restitution in the recovery of unpaid overtime wages for hours worked in excess of
4 eight (8) hours per day and/or forty (40) hours per week for himself and each of the putative
5 class members. SIRKO also seeks payment of "premium wages" for non-compliant meal periods
6 and rest periods, "waiting time" penalty wages for formerly employed putative class members
7 who were not paid all wages due at the time of separation from IBM, penalties for Defendant's
8 failure to provide accurate itemized wage statements, penalties, in a representative capacity, as
9 provided by the Private Attorney General Act ("PAGA") and declaratory/injunctive relief, to the
10 extent permitted by law, that the positions identified and the tasks/duties performed fail to
11 plainly and unmistakably meet the requirements of any recognized exemption under California
12 law.

13 4. By sending the appropriate notice to the California Labor and Workforce
14 Development Agency (LWDA), Plaintiff intends to bring this case as a representative action
15 seeking penalties for the State of California in a representative capacity, as provided by the
16 Private Attorneys General Act ("PAGA") to the extent permitted by law, as an aggrieved
17 employee who held the positions identified and was mis-classified despite the fact that the
18 tasks/duties performed fail to plainly and unmistakably meet the requirements of any recognized
19 exemption under California law. A true and correct copy of the Notice correspondence showing
20 compliance with Labor Code §2699.3 is attached hereto as Exhibit "A." Plaintiff gives notice of
21 intent to file a First Amended Complaint as a "Representative Action" as provided by California
22 Code of Civil Procedure as specifically permitted and authorized by Labor Code
23 §2699.3(a)(2)(C) if within 33-days from the date of the Notice to the LWDA, the agency does
24 not intervene, declines to investigate, or fails to take actions proscribed by the applicable statute.

25 5. Plaintiff brings this as a class action pursuant to California Code of Civil
26 Procedure Section 382, and under the Unfair Competition Law, California Labor Code sections
27 201-204, 226, 226.7, 515, 518, and 1194, applicable Wage Orders of the Industrial Welfare
28 Commission (IWC), Title 8 of the California Code of Regulations, section 11050, et seq., and

1 pursuant to Business & Professions Code, section 17200, et seq. The Plaintiff Classes sought to
2 be certified consists of the following:

3 PLAINTIFF CLASS I:

4 All Defendant's California-based employees who were assigned to
5 work for IBM's "Kaiser Permanente Information Technology"
6 ("KP-IT") account in non-managerial positions as "transitional
7 exempt employees" (including employees who perform
8 substantially identical functions under similar circumstances under
9 different job descriptions or titles) and who, from the period of 4
10 years prior to the commencement of this action until the date of
11 trial, were classified by Defendant as "exempt" as demonstrated by
12 Defendant's records.

9 PLAINTIFF CLASS II:

10 All Defendant's California-based employees having job titles,
11 codes and salary bands of "Technical Professional - Job Family
12 24A" (including employees who perform substantially identical
13 functions under similar circumstances under different job
14 descriptions or titles) who were assigned to work for IBM's
15 "Kaiser Permanente Information Technology" ("KP-IT") account
16 in non-managerial positions and who, from the period of 4 years
17 prior to the commencement of this action until the date of trial,
18 were classified by Defendant as "exempt" as demonstrated by
19 Defendant's records.

20 6. The "Overtime Subclass" includes members of Plaintiff Class I and Plaintiff Class
21 II who worked in excess of 8 hours per day and/or 40 hours per week, and who were not paid
22 overtime compensation as required by applicable orders of the Industrial Welfare Commission
23 ("IWC"). The "Wage Statement Subclass" includes members of Plaintiff Class I and Plaintiff
24 Class II who, by virtue of their "exempt" classification, were not provided with accurate itemized
25 wages statements showing all hours actually cause or suffered to work and the corresponding
26 pay, including pay at the requisite overtime rate for overtime hours worked. The "UCL
27 Subclass" includes members of Plaintiff Class I and Plaintiff Class II who are owed restitution as
28 a result of IBM's misclassification and unpaid overtime wages.

29 7. As used herein, the term "Plaintiff" means CHRIS B. SIRKO, who is the named
30 Plaintiff Class representative; the term "Plaintiff Classes" includes the Plaintiff and all members
31 of the proposed Classes and Subclasses. Plaintiff held positions for which recovery is sought and
32 worked hours of overtime in excess of 8 per day and/or 40 per week without commensurate pay
33 as required by the California Labor Code and/or applicable Wage Orders of the IWC, alleged

1 here to be IWC Wage Order 2001-4. During Plaintiff's employment, Defendant has knowingly
2 and intentionally failed to properly and accurately itemize his wage statements to reflect all hours
3 worked and has failed to provide statements that show all overtime hours worked and the
4 requisite overtime rate required to be paid. In short, Plaintiff has suffered injury and loss as a
5 result of Defendant's conduct and mis-classification, and Defendant has unjustly retained wages
6 such that recovery for said sums, plus interest at the legal rate, is due. Plaintiff's injury in fact
7 provides his standing to sue both on his own behalf, and as a proposed class representative on
8 behalf of others similarly situated in the proposed Plaintiff Classes and Subclasses.

9 8. The obligations and responsibilities of Defendant's exempt positions assigned to
10 the KP-IT account are virtually identical from region to region, district to district, facility to
11 facility, and employee to employee in the State of California. Any differences in job activities
12 between the different individuals in these positions were and are legally insignificant to the
13 issues presented by this action. Defendant's records and acts relating to mis-classification are a
14 matter of systematic and uniform practice for which individual issues do not predominate, and in
15 fact, all issues are systematically linked, related and common, both in terms of facts and law, for
16 Plaintiff and each of the proposed members of the Plaintiff Classes during the proposed Class
17 Period. To wit, each of the following is alleged:

- 18 a. As a matter of course during all or a substantial portion of the proposed
19 Class Period, Plaintiff and each member of the proposed Plaintiff Class I and
20 II, were regularly, uniformly, and systematically required by Defendant to
21 work in excess of eight (8) hours per day and/or required to work in excess of
22 forty (40) hours per week during the proposed Class Period without being paid
23 the requisite overtime wage required by California Labor Code Section 510,
24 515, 515.5, 1194 and applicable IWC Wage Order. Plaintiff, and each
25 member of the proposed Plaintiff Classes, who were classified as "exempt"
26 during the proposed Class Period and who were not paid overtime wages at
27 the requisite rate for overtime hours worked are all part of the "Overtime
28 Subclass" as further alleged herein;
- b. As a matter of course during all or a substantial portion of the proposed Class
Period, Plaintiff and each member of the proposed Plaintiff Class I and II were
not provided true, accurate, and properly itemized pay statements or wage
statements setting forth all hours actually caused or suffered to work and the
corresponding correct amounts of pay at the requisite agreed and legal rate as
required by Labor Code Section 226, et seq. Because Defendant did not
record or track all hours worked, Plaintiff and members of the proposed
Plaintiff Classes can reasonably estimate the amount worked as admissible
evidence at trial. Also, since Defendant had no reasonable basis to believe
that it was in compliance with applicable law in claiming a defense of exempt

1 classification, Plaintiff is informed and believes, and based thereon, alleges
2 that Defendant acted willfully and with direct knowledge that its actions, were
3 unlawful and violated California's minimum labor standards. Plaintiff and
4 members of the Proposed Plaintiff Class I and II, who were not provided
5 accurate itemized wage statements are all part of the "Wage Statement
6 Subclass" as further alleged herein;

7
8 c. As a matter of course during all or a substantial portion of the proposed Class
9 Period, Plaintiff and each member of the proposed Plaintiff Class I and II who
10 were not paid all wages due are owed restitution in the amount of the wages
11 for overtime hours worked at the requisite overtime rate of pay (generally 1.5x
12 the hourly rate of pay). Also, since Defendant had no reasonable basis to
13 believe that it was in compliance with applicable law in claiming a defense of
14 exempt classification, Plaintiff is informed and believes, and based thereon,
15 alleges that Defendant acted willfully and with direct knowledge that its
16 actions were unlawful and violated California labor standards. Plaintiff and
17 members of the Proposed Plaintiff Class I and II who were not timely paid all
18 wages due are owed restitution are each and all part of the "UCL Subclass" as
19 further alleged herein.

20 9. Plaintiff seeks damages and restitution for compensation for work performed and
21 moneys due to himself and to the Plaintiff Class I, Plaintiff Class II and proposed Subclasses
22 during the "Class Period," which is defined as four years prior to the filing of this action through
23 date of the commencement of the trial in the action. Based upon information and belief that the
24 Defendant's unlawful acts are continuing and will continue, Plaintiff may elect to seek
25 declaratory, and/or injunctive relief for the benefit of himself and the proposed classes he
26 represents.

27 JURISDICTION AND VENUE

28 10. The California Superior Court has jurisdiction in this matter due to Defendant's
violations of Labor Code §201 et seq., Labor Code §500, et seq., Labor Code §1194, Business
and Professions Code §17200 et seq., the IWC Wage Order(s) and related common law
principles.

11. Venue is proper in this Judicial district and the County of Los Angeles because,
upon information and belief, Defendant resides in, is located in and/or is domiciled in this county
and maintains offices and transacts business in this county, and work was performed by members
of the classes made the subject of this action in the County of Los Angeles, California. Venue is
also proper in Los Angeles County pursuant to CCP §395(b) and/or CCP §395.5 in that Plaintiff

1 is a resident of said county and the county is the place where the harm occurred. Lastly, the
2 unlawful acts alleged herein have a direct effect on Plaintiff, and those similarly situated, within
3 the State of California and within Los Angeles County, as well as other counties located in
4 California.

5 12. On information and belief, the California Superior Court has primary and original
6 jurisdiction in this matter because there is no federal question at issue, as the issues herein are
7 based solely on California statutes and law, including the California Labor Code, Industrial
8 Welfare Commission Wage Orders, Code of Civil Procedure, Rules of Court, and Business and
9 Professions Code.

10 **III.**
11 **THE PARTIES**

12 **A. The Plaintiff**

13 13. Plaintiff CHRIS B. SIRKO is a California resident and remains a current
14 employee of the Defendant, and is entitled to back pay, overtime compensation, wage statement
15 penalties, interest at the rate of 10% per annum on unpaid wages, attorney's fees, and,
16 potentially PAGA penalties from the Defendant. SIRKO was employed by the Defendant for a
17 period of time during the Class Period in a salaried position, deemed exempt from the
18 requirement to pay overtime by his employer. SIRKO and the proposed Plaintiff Class I and
19 Plaintiff Class II were subjected to IBM's systematic and uniform classification policy applicable
20 to all class members without review or audit of tasks and duties, that, taken in combination with
21 other uniform policies, business practices, and procedures applicable to the proposed Classes and
22 Subclasses, render the action well suited for class action procedures and treatment as permitted
23 by Code of Civil Procedure §382 and the California Rules of Court. Indeed, IBM hired
24 employees of Kaiser Permanente, Kaiser Foundation Hospitals and/or Southern California
25 Permanente Medical Group, Inc. knowing that the prior employer had misclassified and failed to
26 pay overtime for work provided in maintaining, monitoring, troubleshooting and repairing Kaiser's
27 health information and data networks.

1 14. Each of the Plaintiff Class I and II members are numerous (approximately 300)
2 identifiable and ascertainable persons who were employed by IBM in the following categories:
3 (1) all current and former California-based "transitional exempt employees" hired by IBM from
4 Kaiser in approximately May 2009 to the present; and/or (2) all current and former California-
5 based "technical professional" employees (or similar job titles, job codes, and/or salary bands)
6 who were deemed "exempt" by IBM and assigned to the KP-IT account at any time between
7 May 2009 and the present. Each of the employees primarily engaged in the installation,
8 implementation, configuration, updating, monitoring, and troubleshooting of hardware and
9 software, computer network, applications and systems relate to Kaiser's health information
10 systems, applications, networks, and maintained such systems necessary for Kaiser's electronic
11 medical record keeping and system operations. None of the employees spent a majority of their
12 work time engaged in scientific research, nor did they design, develop, write, draft or create
13 hardware or software solutions for IBM. Most of their tasks involved merely serving a
14 maintenance and implementation of new hardware/software/network systems deployed by Kaiser
15 and serviced by IBM during the Class Period, over which, the proposed Classes had very little or
16 no input, control or design.

17 **B. The Defendants**

18 15. Plaintiff is informed and believes, and based thereon alleges, that IBM is a New
19 York corporation with one of its principal places of business operations in the State of California,
20 and is and was the employer of Plaintiff and the members of Plaintiff Classes and Subclasses
21 during the proposed Class Period. IBM maintains and transacts business as a provider of IT
22 services, applications, and business data systems and support for businesses operating in Los
23 Angeles and across many other California counties.

24 16. Plaintiff is ignorant of the true names, capacities, relationships and extent of
25 participation in the conduct herein alleged, of the Defendants sued herein as DOES 1 through
26 100, inclusive, but on information and belief alleges that said Defendants are legally responsible
27 for the payment of overtime compensation, penalties to the Plaintiff Class members by virtue of
28 their unlawful practices, and therefore sues these Defendants by such fictitious names. Plaintiff

1 will amend this complaint to allege the true names and capacities of the DOE Defendants when
2 ascertained as permitted by California Code of Civil Procedure §474.

3 17. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
4 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a
5 joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each
6 Defendant are legally attributable to the other Defendants. Plaintiff is informed and believes that
7 IBM and all DOE Defendants, for purposes of employment policies, hiring, firing, human
8 resources, wages and benefits, act as a joint employer or joint venture, such that IBM and any
9 DOE Defendant are to be jointly and severally liable for the unlawful acts as hereinafter
10 described. Further, Plaintiff is informed and believes, and based thereupon alleges, that
11 Defendants, and each of them, each had knowledge and information sufficient to them to have
12 authorized, ratified and directed the acts of one another as their conduct relates to the
13 Defendants' collective practices and treatment of the proposed classes of employees herein.

14 IV

15 GENERAL ALLEGATIONS

16 18. California Labor Code section 1194 provides that notwithstanding any agreement
17 to work for a lesser wage, an employee receiving less than the legal overtime compensation is
18 entitled to recover in a civil action the unpaid balance of their overtime compensation, including
19 interest thereon, reasonable attorneys' fees, and costs of suit. Under California law, all
20 employees are presumed to be hourly and nonexempt, and thus entitled to all protections and
21 minimum labor standards as set forth in the California Labor Code and through enactments of
22 Industrial Welfare Commission Wage Orders, specifically, as to overtime pay, as well as certain
23 minimum non-delegable record/timekeeping requirements. It is the employer or Defendant's
24 obligation to plead and prove that an employee is "plainly and unmistakably" fit into a proper
25 exemption and that the employees spend a majority of their daily and weekly job duties engaged
26 in tasks that qualify for any proffered exemption. Exemptions, under California law, are to be
27 narrowly construed and benefits of doubtful classification inure to the benefit of employees to be
28 non-exempt and offered greater employee statutory and regulatory protections.

1 19. Further, Business and Professions Code section 17203 provides that any person
2 who engages in unfair competition may be enjoined in any court of competent jurisdiction.
3 Business and Professions Code section 17204 provides that any person who has suffered actual
4 injury and has lost money or property as a result of the unfair competition may bring an action
5 for restitution in a court of competent jurisdiction. Violations of the California Labor Code in
6 connection with an employer's obligation to pay wages serve as a legitimate predicate for
7 implication of the UCL.

8 20. During all, or a substantial portion, of the proposed Class Period, Plaintiff and
9 each member of Plaintiff Class I and Plaintiff Class II were employed by Defendants, and each
10 of them, in the State of California..

11 21. Plaintiff and each Plaintiff Class member were primarily engaged solely in IT
12 support, maintenance and repair roles and were non-exempt employees covered under one or
13 more Industrial Welfare Commission (IWC) Wage Orders, including Wage Order 4-2001
14 ("Wage Orders"), Labor Code section 510-515.5 and/or other applicable wage orders,
15 regulations and statutes, and each Plaintiff Class member was not subject to an exemption for
16 computer, executive, administrative or professional employees, which imposed an obligation on
17 the part of the Defendant to pay Plaintiff and Plaintiff Class members lawful overtime
18 compensation at the requisite legal rate for hours worked in excess of 8 hours per week and/or 40
19 per week, and were denied rest and meal period compensation for non-compliant missed, late or
20 interrupted meals and rest periods throughout the Class Period. Defendant, at the time of hire of
21 Plaintiff and members of the proposed Plaintiff Classes and Subclasses alleged herein, had actual
22 or constructive knowledge that the exempt classification it imposed was systematic, uniform, and
23 without any informed basis to justify any exemption from IWC Wage Order requirements for
24 overtime pay.

25 22. During the Class Period, Defendant was obligated to pay Plaintiff and the Plaintiff
26 Classes overtime compensation for all hours worked over eight (8) hours of work in one (1) day
27 or forty (40) hours in one week. Defendant regularly required Plaintiff and the Plaintiff Classes
28 to work overtime hours without overtime compensation.

1 23. Plaintiff and each Plaintiff Class member primarily performed non-exempt work
2 in excess of the maximum regular rate hours set by the IWC in the above Wage Orders,
3 regulations or statutes, and therefore are entitled to overtime compensation at the rate of time and
4 one-half, and when applicable, double time rates as set forth by the above Wage Orders,
5 regulations and/or statutes. Primary duties relate to routine and repetitive task work to monitor,
6 maintain, troubleshoot and repair KP-IT's networks and systems. IBM charged Kaiser by the
7 hour for such services, and received compensation on that basis; however, Plaintiff and members
8 of the Plaintiff Classes and Subclasses routinely worked 12-14 hour days, but were paid based on
9 a 40 hour week. By not paying overtime wages and calling Plaintiff and the proposed Plaintiff
10 Classes "salaried" or "exempt," IBM gained an unfair advantage in the marketplace by receiving
11 compensation from Kaiser on an hourly basis, but retaining such profits as a windfall through
12 employee misclassification.

13 24. Plaintiff is informed and believes, and based thereupon alleges, that Defendant
14 failed to maintain necessary records to show that it properly classified him or members of the
15 proposed Plaintiff Classes and Subclasses. Further, Defendant failed to monitor and record time
16 and tasks in such a way that it can ever establish that its employees in the proposed Plaintiff
17 Classes spent a majority of their daily and/or weekly work duties performing tasks that qualified
18 for exempt status, and in fact, by surveys, representative testimony, corporate representative
19 witnesses, and corporate HR documents, Plaintiff can and will show that Defendant cannot meet
20 its burden of proof to show that SIRKO or any of the proposed Plaintiff Class members were
21 properly classified as exempt. Many hours, particularly "on call" hours, restricted any normal
22 life activities to an unreasonable degree, and certain demands for implementation and IT fixes
23 required exhaustive shifts of work approaching 20 hours in a day, and led to worker fatigue and
24 health issues related to exhaustion. SIRKO himself suffered ill-health effects in October 2012
25 from attempting to maintain systems in accordance with IBM's work schedule and continual
26 outsourcing of staff necessary to provide an adequate level of maintenance service for the KP-IT
27 account. SIRKO is also aware of other putative class members who suffered ill-health and
28 exhaustion from extreme overtime work hours.

1 25. During the Class Period, the Defendants, and each of them, required Plaintiff and
2 Plaintiff Class members to work overtime without lawful compensation, in violation of the
3 various above applicable Wage Orders, regulations and statutes, and the Defendants: (1) willfully
4 failed and refused, and continue to fail and refuse to pay lawful overtime compensation to the
5 Plaintiff Class members; and (2) willfully failed and refused, and continue to fail and refuse to
6 pay wages promptly when due upon termination of employment to each of the Plaintiff Class
7 members.

8 26. Plaintiff Class members performed primarily non-exempt functions for the
9 Defendant and were mis-classified as exempt employees. They do not qualify under the
10 corporate professional exemption because they are not paid statutory minimum pay to qualify for
11 this exemption. They are not employed to manage Defendant's enterprise in managerial duties.
12 They do not perform work related to Defendant's general business operation but primarily
13 perform functions related to the product or service provided by Defendant and do not exercise
14 discretion and/or independent judgment to be exempt in an administrative capacity. Further,
15 they are not employed on an hourly basis with pay not less than the statutory rate set by the IWC
16 Wage Orders and premium overtime pay. Hence, the work performed in these employee
17 positions is not exempt work but rather is non-exempt work.

18 27. Class members are likewise entitled to penalties for Defendant's failure to provide
19 accurate itemized wage statements concerning hours worked and meal periods taken.

20 V.

21 CLASS ACTION ALLEGATIONS

22 28. Plaintiff brings this action on behalf of himself, the general public and all other
23 similarly-situated persons as a class action pursuant to California Code of Civil Procedure
24 section 382. The classes which Plaintiff seeks to represent are composed of and defined as
25 follows:

26 PLAINTIFF CLASS I:

27 All Defendant's California-based employees who were assigned to
28 work for IBM's "Kaiser Permanente Information Technology"
("KP-IT") account in non-managerial positions as "transitional
exempt employees" (including employees who perform

1 substantially identical functions under similar circumstances under
2 different job descriptions or titles) and who, from the period of 4
3 years prior to the commencement of this action until the date of
4 trial, were classified by Defendant as "exempt" as demonstrated by
5 Defendant's records.

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PLAINTIFF CLASS II:

All Defendant's California-based employees having job titles, codes and salary bands of "Technical Professional - Job Family 24A" (including employees who perform substantially identical functions under similar circumstances under different job descriptions or titles) who were assigned to work for IBM's "Kaiser Permanente Information Technology" ("KP-IT") account in non-managerial positions and who, from the period of 4 years prior to the commencement of this action until the date of trial, were classified by Defendant as "exempt" as demonstrated by Defendant's records.

29. Further, Plaintiff seeks to certify a subclass of employees composed of and defined as follows:

Plaintiff "Overtime Subclass":

All members of the Plaintiff Classes who, during the Relevant Time Period, were classified as exempt employees based on corporate records, and who were not paid at the legally requisite overtime rate for all hours worked in excess of eight (8) hours per workday and/or forty (40) hours per workweek.

30. Further, Plaintiff seeks to certify a subclass of employees composed of and defined as follows:

Plaintiff "Wage Statement Subclass":

All members of the Plaintiff Classes who, during the Relevant Time Period, to whom IBM knowingly and intentionally failed to provide accurate itemized wage statements showing all hours the said employee was actually caused or suffered to work and the corresponding regular and overtime wages to be paid.

31. Further, Plaintiff seeks to certify a subclass of employees composed of and defined as follows:

Plaintiff "UCL Subclass":

All members of the "Overtime Subclass" who (1) were subject to unlawful, illegal, unfair and/or deceptive business acts /and or practices by the Defendant and (2) are entitled to restitution of unpaid wages from the Defendant based on conduct occurring at any time from 4 years prior to the commencement of this action

1 until the commencement of trial in this action.

2 32. Plaintiff reserves the right under Rule 3.765(b), California Rules of Court, to
3 amend or modify the Class description with greater specificity or further division into subclasses
4 or limitation to particular issues.

5 33. This action has been brought and may be maintained as a class action pursuant to
6 Code of Civil Procedure section 382 because there is a well-defined common interest of many
7 persons and it is impractical to bring them all before the court.

8 34. Ascertainable Class: The proposed classes and each subclass are ascertainable in
9 that their members can be identified and located using information contained in Defendant's
10 payroll and personnel records.

11 35. Numerosity: The potential quantity of members of the Classes and Subclasses as
12 defined is so numerous that joinder of all members would be unfeasible and impractical. The
13 disposition of their claims through this class action will benefit both the parties and this Court.
14 The quantity of members of the Classes and Subclasses is unknown to Plaintiff at this time,
15 however, it is estimated that each Class and Subclass number is in excess of 100 individuals. The
16 quantity and identity of such membership is readily ascertainable via inspection of Defendant's
17 records.

18 36. Typicality: The claims of Plaintiff SIRKO for overtime wages, waiting time
19 penalties, interest, and attorneys' fees are typical of the claims of all members of the Classes and
20 Subclasses mentioned herein because all members of the Classes and Subclasses sustained
21 similar injuries and damages arising out of Defendant's common course of conduct in violation
22 of law and the injuries and damages of all members of the Classes and Subclasses were caused
23 by Defendant's wrongful conduct in violation of law, as alleged herein.

24 37. Adequacy: Plaintiff CHRIS B. SIRKO is an adequate representative of the
25 Classes and Subclasses herein, will fairly protect the interests of the members of the Classes and
26 Subclasses, has no interests antagonistic to the members of the Classes and Subclasses and will
27 vigorously pursue this suit via attorneys who are competent, skilled and experienced in litigating
28 matters of this type. Class Counsel is competent and experienced in litigating large employment

1 law class actions.

2 38. **Superiority:** The nature of this action and the nature of laws available to Plaintiff
3 make use of the class action format a particularly efficient and appropriate procedure to afford
4 relief to Plaintiff for the wrongs alleged herein, as follows:

5 a. This case involves a large corporate Defendant and a sufficient numerous
6 group of individual Class Members with many relatively small claims and
7 common issues of law and fact;

8 b. If each individual member of each of the Classes and Subclasses was required
9 to file an individual lawsuit, the large corporate Defendant would necessarily
10 gain an unconscionable advantage because Defendant would be able to exploit
11 and overwhelm the limited resources of each individual member of the
12 Classes and Subclasses with Defendant's vastly superior financial and legal
13 resources;

14 c. Requiring each individual member of each of the Classes and Subclasses to
15 pursue an individual remedy would also discourage the assertion of lawful
16 claims by the members of the Classes and Subclasses who would be
17 disinclined to pursue an action against Defendant because of an appreciable
18 and justifiable fear of retaliation and permanent damage to their lives, careers
19 and well-being;

20 d. Proof of a common business practice or factual pattern, of which the members
21 of the Classes and Subclasses experienced, is representative of the Classes and
22 Subclasses herein and will establish the right of each of the members of the
23 Classes and Subclasses to recover on the causes of action alleged herein;

24 e. The prosecution of separate actions by the individual members of the Classes
25 and Subclasses, even if possible, would create a substantial risk of
26 inconsistent or varying verdicts or adjudications with respect to the individual
27 members of the Classes and Subclasses against Defendant; and which would
28 establish potentially incompatible standards of conduct for Defendant; and/or

1 legal determinations with respect to individual members of the Classes and
2 Subclasses which would, as a practical matter, be dispositive of the interest of
3 the other members of the Classes and Subclasses who are not parties to the
4 adjudications or which would substantially impair or impede the ability of the
5 members of the Classes and Subclasses to protect their interests; and

6 f. The claims of the individual members of the Classes and Subclasses are not
7 sufficiently large to warrant vigorous individual prosecution considering all of
8 the concomitant costs and expenses attending thereto.

9 g. Furthermore, as the damages suffered by each individual member of the
10 Classes may be relatively small, the expenses and burden of individual
11 litigation would make it difficult or impossible for individual members of the
12 Classes to redress the wrongs done to them; while an important public interest
13 will be served by addressing the matter as a class action.

14 h. The cost to the court system of adjudication of such individualized litigation
15 would be substantial. Individualized litigation would also present the
16 potential for inconsistent or contradictory judgment.

17 i. Finally, the alternative of filing a claim with the California Labor Commission
18 is not superior, given the lack of discovery in such proceedings, the
19 availability of fewer remedies, and the fact that the losing party has the right
20 to a trial de novo in the Superior Court.

21 39. Existence and Predominance of Common Questions of Fact and Law: There

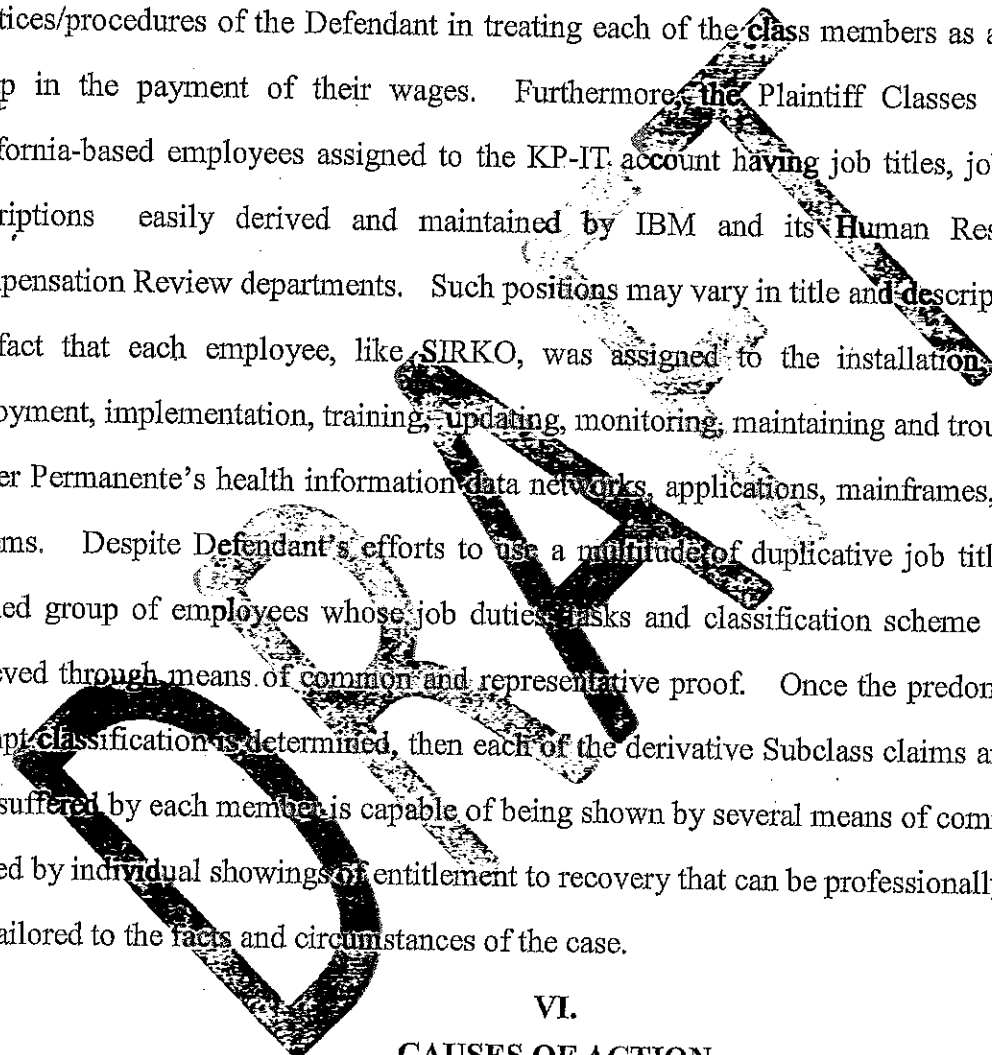
22 are common questions of law and fact as to the members of the Classes and Subclasses which
23 predominate over questions affecting only individual members of the Classes and Subclasses
24 including, without limitation:

- 25 a. Whether the Class Members qualify for exempt status under the
26 administrative exemption;
- 27 b. Whether the Class Members qualify for exempt status under the computer
28 professional exemption;

- 1 c. Whether the Class Members were improperly mis-classified by Defendant
2 without analysis as to job duties performed.
- 3 d. The extent to which Defendant analyzed the duties and responsibilities of the
4 Class Members before classifying them as exempt;
- 5 e. The number of hours per week and per day Class Members are expected to
6 work;
- 7 f. Defendant's expectations as to the duties and responsibilities of the Class
8 Members, and whether these expectations are reasonable under the
9 circumstances;
- 10 g. Whether the various tasks performed by the Class Members qualify as exempt
11 or non-exempt tasks;
- 12 h. Whether Defendant failed to keep adequate records for the members of the
13 Wage Statement Subclass pursuant to Labor Code 226(a) (and the
14 consequence for such statutory violations if Defendant did not);
- 15 i. Whether Defendant's conduct constitutes unfair competition within the
16 meaning of Business and Professions Code sections 17200 and 17203;
- 17 j. Whether members of the Classes and Subclasses are entitled to compensatory
18 damages, and also, the means of measuring such damages;
- 19 k. Whether the members of the Classes and Subclasses are entitled to injunctive
20 and/or declaratory relief;
- 21 l. Whether the members of the Classes and Subclasses are entitled to restitution;
- 22 m. Whether Defendant is liable for pre-judgment interest; and
- 23 n. Whether Defendant is liable for attorneys' fees and costs.

24 40. **Manageability and Superiority of Class Action Procedure:** The nature of this
25 action and the nature of laws available to Plaintiff make use of the class action format a
26 particularly efficient and appropriate procedure to afford relief to Plaintiff for the wrongs alleged
27 herein. Specifically, the primary class turns upon Defendant's own uniform, systematic practice
28 of classifying all affected job positions as "salaried exempt" without any individual scrutiny of

1 tasks and duties is in compliance with Labor Code section 1194 and the presumptions against
2 employees being deemed "exempt" from overtime payment requirements. Therefore, the
3 propriety of the classification scheme applicable to all employees holding the job titles and
4 positions is a predominant question of fact that is easily cable of being discovered through
5 manageable devices of common proof such as statistical random sampling, survey evidence
6 based on scientific principles, representative testimony, documentary evidence and common
7 practices/procedures of the Defendant in treating each of the ~~class~~ members as a homogeneous
8 group in the payment of their wages. Furthermore, ~~the~~ Plaintiff Classes are comprised
9 California-based employees assigned to the KP-IT account ~~having~~ job titles, job codes and/or
10 descriptions easily derived and maintained by IBM and its Human Resource and or
11 Compensation Review departments. Such positions may vary in title and ~~description~~, but not in
12 the fact that each employee, like SIRKO, was assigned to the installation, configuration,
13 deployment, implementation, training, updating, monitoring, maintaining and troubleshooting of
14 Kaiser Permanente's health information data networks, applications, mainframes, and operating
15 systems. Despite Defendant's efforts to use a multitude of duplicative job titles, a narrowly
16 defined group of employees whose job duties, tasks and classification scheme can be readily
17 achieved through means of common and representative proof. Once the predominant issue of
18 exempt classification is determined, then each of the derivative Subclass claims and damages, if
19 any, suffered by each member is capable of being shown by several means of common proof and
20 limited by individual showings of entitlement to recovery that can be professionally administered
21 and tailored to the facts and circumstances of the case.



22 VI.
23 CAUSES OF ACTION
24 FIRST CAUSE OF ACTION

25 Failure To Pay Overtime Wages [Labor Code § 510, 515, 515.5, 1194]
26 (Plaintiff and each Member of the Overtime Subclass as against each Defendant)

- 27 41. Plaintiff incorporates all preceding paragraphs by this references as though fully
28 set forth herein.
42. At all relevant times, the following were applicable provisions of California law

1 that applied to Plaintiff, the proposed Plaintiff Classes and to the Defendants, and each of them:

- 2 a. Labor Code §204 establishes the fundamental right of all employees in the
3 State of California to be paid wages, including straight time and overtime, in a
4 timely fashion for their work. This precludes any waiver for unpaid due and
5 owing wages that remain unpaid at the time of separation;
- 6 b. Labor Code §510(a) states in pertinent part: "Any work in excess of eight
7 hours in one workday and any work in excess of 40 hours in any one
8 workweek ... shall be compensated at the rate of no less than one and one-half
9 times the regular rate of pay for any employee";
- 10 c. Pursuant to Labor Code §1198, it is unlawful to employ persons for longer
11 than the hours set by the Industrial Welfare Commission or under conditions
12 prohibited by the IWC Wage Order(s);
- 13 d. Wage Order No. 4, codified in California Code of Regulations, title 8, section
14 11040(1)(A)(2) regarding the Administrative Exemption states in pertinent
15 part: "A person employed in an administrative capacity means any employee:
16 (a) Whose duties and responsibilities involve... (i) The performance of office
17 or non-manual work directly related to management policies or general
18 business operations of his/her employer or his/her employer's customers; ...
19 and (b) Who customarily and regularly exercises discretion and independent
20 judgment..."
- 21 e. 29 C.F.R. §541.202(a), as revised in 2004, states: "To qualify for the
22 administrative exemption, an employee's primary duty must include the
23 exercise of discretion and independent judgment with respect to matters of
24 significance. In general, the exercise of discretion and independent judgment
25 involves the comparison and the evaluation of possible courses of conduct,
26 and acting or making a decision after the various possibilities have been
27 considered. The term "matters of significance" refers to the level of
28 importance or consequence of the work performed."
- 29 f. 29 C.F.R. §541.202(b), as revised in 2004, states: "The phrase "discretion and
30 independent judgment" must be applied in the light of all the facts involved in
31 the particular employment situation in which the question arises. Factors to
32 consider when determining whether an employee exercises discretion and
33 independent judgment with respect to matters of significance include, but are
34 not limited to:
 - 35 - whether the employee has authority to formulate, affect, interpret,
36 or implement management policies or operating practices;
 - 37 - whether the employee carries out major assignments in conducting
38 the operations of the business;
 - 39 - whether the employee performs work that affects business
40 operations to a substantial degree, even if the employee's
41 assignments are related to operation of a particular segment of the
42 business;
 - 43 - whether the employee has authority to commit the employer in
44 matters that have significant financial impact;

- whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- whether the employee has authority to negotiate and bind the company on significant matters;
- whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives;
- whether the employee investigates and resolves matters of significance on behalf of management; and
- whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

43. Defendant employed Plaintiff, and the proposed Plaintiff Classes, to engage in the continued configuration, upkeep, repair, maintenance of KP-IT's systems and numerous other computer network application software tools. Said activities and job duties were non-managerial in nature and did not directly relate to the corporate operations of IBM, nor did any of the positions SIRKO and the class members hold allow for any significant degree of individual discretion and independent judgment. Neither Plaintiff nor the proposed Plaintiff Classes, engaged in the design or the decisions as to what systems, application, network and computer hardware was necessary for the upgrade, but were merely tasked with the manual, routine and repetitive installation, configuration, and maintenance of the new system. No license, certification, or advance degree was necessary or required to perform the tasks; rather, SIRKO and the proposed classes were merely to maintain, monitor, and troubleshoot numerous parts of the KP-IT health information systems in use at Kaiser's medical facilities.

44. Plaintiff and the Plaintiff Class Members were regularly required to work overtime hours and are entitled to overtime compensation for overtime work performed for the Defendant, in an amount according to proof. Pursuant to Labor Code sections 1194 and 1198 and IWC Wage Order 4-2001, the Plaintiff Class Members seek the payment of all overtime compensation which they earned and accrued after four (4) years prior to filing of the Complaint, according to proof. Plaintiff is a current employee and all of his job duties led him to be expected to work 10-12 hour shifts, and workweeks that exceeded forty (40) hours and for which he was not paid overtime wages at the legally requisite rate. His job duties were to install,

1 configure, implement troubleshoot and maintain mainframe systems for Kaiser medical facilities.
2 Due to the large amount of work hours and the misclassification, IBM did not accurately record
3 work time nor did the Defendant monitor whether the majority of SIRKO or any class member's
4 work tasks were qualified for exempt status. In fact, SIRKO's work duties, like those of all
5 members of the Plaintiff Classes, were routine, manual and repetitive -- requiring skill and
6 experience with application tools -- but not requiring advance knowledge, skill and training to
7 develop, create, design or originate novel solutions to problems. Further, SIRKO and the
8 proposed Plaintiff Classes were prevented from the engagement in any significant degree of
9 discretion and independent judgment on any IT issues due to multiple levels of management and
10 the use of pre-ordained and established policies and procedures for which neither SIRKO nor the
11 proposed Classes had any role in creating, and for which neither SIRKO nor the proposed
12 Classes could not deviate without advance approval from management.

13 45. Plaintiff is informed and believes that he and the proposed Plaintiff Classes were
14 simply deemed "salaried" exempt without any justifiable factual basis by the Defendant. At the
15 very least, Defendant place personnel in the identified positions, and other equivalent positions,
16 solely based on the use of sophisticated sounding job requisition postings, but no advance or post
17 position analysis as to how each employee actually spent his or his day, the duties for which
18 comprised a majority of work time, nor did the Defendant audit or monitor whether the
19 employees met any overtime exemption. In fact, the Defendant failed to even record all work
20 hours in any way, so it cannot determine how a majority of Plaintiff's, or the proposed Plaintiff
21 Classes', work duties was spent even if some minority of task, on occasion, qualified for exempt
22 status. Based on this and other documents, witnesses and corporate representative evidence,
23 Plaintiff contends that Defendant cannot meet its burden of proof to show that he or any
24 proposed Class member was plainly and unmistakably classified into a proper exemption, nor
25 can it deny that its system of classification was uniform and standard during the proposed Class
26 Period.

27 46. As a result, Plaintiff and the proposed Plaintiff Classes are owed wages for
28 overtime worked and can show such time through the use of schedules, surveys, representative

1 evidence, statistical sampling of work times and dates, and other means of objective proof
2 showing that Plaintiff and the classes worked overtime and that Defendant had no legitimate and
3 continuing basis to claim exemption status.

4 47. Additionally, Plaintiff and Plaintiff Classes Members are entitled to attorneys'
5 fees, and costs, pursuant to California Labor Code §1194 and prejudgment interest in an amount
6 according to proof.

7 **SECOND CAUSE OF ACTION**

8 **Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement
Provisions (Lab. Code §226(a))**

9 **(Plaintiff and the Wage Statement Subclass against each Defendant)**

10 48. Plaintiff incorporates all preceding paragraphs as thoughtfully set forth herein.

11 49. Section 226(a) of the California Labor Code requires Defendant to itemize in
12 wage statements all deductions from payment of wages and to accurately report total hours
13 worked by Plaintiff and the members of the proposed Classes. Defendant has knowingly and
14 intentionally failed to comply with Labor Code section 226(a) on each and every wage statement
15 provided to Plaintiff and members of the proposed Wage Statement Subclass. To wit, Plaintiff
16 alleges that the wages statements failed to accurately set forth all hours actually caused or
17 suffered to work. Plaintiff SIRK61 suffered harm because the wage statements falsely indicated
18 payment based on 8 hour days when in fact, most days require 10-12 hours worked, with certain
19 projects requiring as many as 15-20 hour shifts to resolve a particular problem. Without showing
20 all hours actually worked, IBM caused harm by not providing sufficient information to meet its
21 burden to show whether any of the KP-IT transitional exempt employees or the subsequently
22 "exempt" classified employees satisfied the necessary rate of pay requirements for exempt status
23 and particularly with regard to Labor Code Section 515.5 salary and hourly pay thresholds.

24 50. As a consequence of Defendant's knowing and intentional failure to comply with
25 Labor Code section 226(a), Plaintiff and the Wage Statement Subclass are entitled to actual
26 damages or penalties not to exceed \$4000 for each employee pursuant to Labor Code section
27 226(b), together with interest thereon and attorneys' fees and costs.

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2 **THIRD CAUSE OF ACTION**

3 **Violations of the Unfair Competition Law**

4 **(Plaintiff and each Plaintiff Class Member and Subclass Member against each Defendant)**

5 51. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

6 52. The failure to pay lawful overtime compensation and timely pay all pay due upon
7 termination of employment to Plaintiff, and each Plaintiff Class Member and Subclass Member,
8 is an unlawful and unfair business practice within the meaning of Business and Professions Code
9 section 17200, et seq., including but not limited to a violation of the applicable State of
10 California Industrial Welfare Commission Wage Orders, regulations and statutes, or is otherwise
11 a practice which is otherwise unfair and unlawful including that the Defendant did not pay tax
12 contributions on the accrued overtime compensation in the form of FICA, Social Security,
13 Medicare and Unemployment Insurance.

14 53. This cause of action is brought under Business and Professions Code sections
15 17203 and 17204, commonly called the Unfair Competition Law. Under this cause of action and
16 pursuant to Business and Professions Code section 17208, Plaintiff and all Plaintiff Class
17 Members seek restitution of overtime wages and other pay owed and, where applicable, penalties
18 under Labor Code section 203, where such wages were due each of the class members during the
19 Class Period, commencing four (4) years prior to filing of this complaint, according to proof.

20 54. This cause of action is brought as a cumulative remedy as provided in Business
21 and Professions Code section 17205, and is intended as an alternative remedy for restitution for
22 Plaintiff, each Plaintiff Class Member and each Plaintiff Subclass Member, for the time period,
23 or any portion thereof, commencing within four (4) years prior to the filing of this complaint, and
24 as the primary remedy for Plaintiff, each Plaintiff Class Member and each Plaintiff Subclass
25 Member for the time period of the fourth year prior to the filing of this complaint, as such one
26 year time period exceeds the statute of limitations on statutory wage claims.

27 55. As a result of the Defendant's unlawful and unfair business practice of failing to
28 pay overtime and prompt payment of wages in violation of Labor Code sections 201 and 202,

1 each Plaintiff Class Member and Subclass Member has suffered damages and is entitled to
2 restitution in an amount according to proof.

3 56. Further, Plaintiff requests the violations of the Defendant alleged herein be
4 enjoined, and other equitable relief as this court deems proper including an order for the
5 reclassification of Class Members to non-exempt status and requiring payment by the Defendant
6 of tax contributions on the accrued overtime compensation in the form of FICA, Social Security,
7 Medicare, Unemployment Insurance or other appropriate payments.

8 VI.

9 PRAYER FOR RELIEF

10 WHEREFORE, Plaintiff prays for judgment as follows:

11 a. That the Court issue an Order that this action may be maintained as a class action and
12 certify the Classes and Subclasses herein appointing the named Plaintiff as
13 representative of all others similarly situated, and appointing the law firm
14 representing the named Plaintiff as counsel for the members of the Classes and
15 Subclasses;

16 **As to the First Cause of Action for Failure to Pay Hourly and Overtime Wages:**

17 b. For damages, as set forth in Labor Code §1194(a) and the IWC Wage Order(s),
18 including IWC Wage Order 5, section 20, regarding wages due and owing, according
19 to proof;

20 c. For pre-judgment interest as allowed by Labor Code §218.6, Labor Code §1194(a)
21 and Civil Code §3287;

22 d. For an award of reasonable attorneys' fees and costs pursuant to Labor Code §218.5
23 and Labor Code §1194(a), and pursuant to Code of Civil Procedure § 1021.5;

24 **As to the Second Cause of Action for Failure to Provide Accurate Wage Statements:**

25 e. For recovery as authorized by Labor Code §226(e);

26 f. For injunctive relief to ensure Defendant's compliance with Labor Code §226
27 pursuant to Labor Code §226(g);
28

- 1 g. For an award of costs and reasonable attorneys' fees pursuant to Labor Code §226(e)
2 and/or §226(g) and pursuant to Code of Civil Procedure § 1021.5;

3 **As to the Third Cause of Action for Unfair Business Practices:**

- 4 h. For an accounting, under administration of Plaintiff and/or the receiver and subject to
5 Court review, to determine the amount to be returned by Defendant, and the amounts
6 to be paid to members of the Classes who are owed monies by Defendant;
- 7 i. For an Order requiring Defendant to identify each of the members of the Classes by
8 name, home address, and home telephone number;
- 9 j. For an Order requiring Defendant to make full restitution and payment to the Classes
10 due to unfair competition, including disgorgement of its wrongfully withheld wages
11 pursuant to California Business and Professions Code sections 17203 and 17204;
- 12 k. For an Order for a preliminary and/or permanent injunction prohibiting Defendant
13 from continuing the illegal course of conduct, alleged herein;
- 14 l. That Defendant further be enjoined to cease and desist from unfair competition in
15 violation of sections 17200, et seq. of the California Business and Professions Code;
- 16 m. That Defendant be enjoined from further acts of restraint of trade or unfair
17 competition;
- 18 n. For the creation of an administrative process wherein each injured member of the
19 Classes may submit a claim in order to receive his/her money;
- 20 o. For all other appropriate injunctive, declaratory and equitable relief;
- 21 p. For interest to the extent permitted by law;
- 22 q. For an award of attorneys' fees and costs incurred in the investigation, filing and
23 prosecution of this action pursuant to Civil Code §1021.5, Business and Professions
24 Code §17200, et seq., Labor Code §1194 and/or any other applicable provision of
25 law;

26 **As to All Causes of Action:**

- 27 r. For such other and further relief as this Court may deem just and proper;
- 28 s. For reasonable attorneys' fees and costs incurred;

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Dated: February 25, 2013

COHELAN KHOURY & SINGER

By: _____
Michael D. Singer, Esq.
J. Jason Hill, Esq.
Attorneys for Plaintiff CHRIS B. SIRKO

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial of his claims by jury to the extent authorized by law.

Dated: February 25, 2013

COHELAN KHOURY & SINGER

By: _____
Michael D. Singer, Esq.
J. Jason Hill, Esq.
Attorneys for Plaintiff CHRIS B. SIRKO

