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ENDORSED
FILED
ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By H. Lovett Deputy

9 Attorneys for Plaintiff JOSE F. ANDINO,
individually and on behalf of others similarly situated

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF ALAMEDA

12 JOSE F. ANDINO, individually and on behalf
13 of himself and others similarly situated,

CASE NO.: RG11580548

CLASS ACTION
FIRST AMENDED COMPLAINT FOR
DAMAGES, RESTITUTION AND
INJUNCTIVE RELIEF

14
15 Plaintiff,

16 vs.

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18 KAISER FOUNDATION HOSPITALS, a
19 California Corporation, and DOES 1 through
20 100, inclusive,

21 Defendants.

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1. Underpayment of Hourly Wages (Labor Code §200, Wage Order 5-2002)
 2. Underpayment of Overtime Wages (Labor Code §§510, 1194, Wage Order 5-2002)
 3. Failure to Pay all Overtime Wages (Labor Code §§510, 1194, Wage Order 5-2002)
 4. Failure to Provide Second Meal Periods or Compensation in Lieu Thereof (Labor Code §§ 226.7, 512 and Wage Order 5-2002 §11)
 5. Failure to Provide Accurate Itemized Wage Statements (Labor Code §§226, 1174)
 6. Failure to Timely Pay Wages to Terminated Employees (Labor Code §§201- 203)
 7. Violation of Unfair Competition Law (Business & Professions Code §17200, et seq.)
 8. Statutory Penalties (Labor Code §§558, 2699, subd. (f))

DEMAND FOR JURY TRIAL

FILED BY FAX
PURSUANT TO LOCAL RULES

1 Plaintiff JOSE F. ANDINO ("Plaintiff"), individually and on behalf of himself and others
2 similarly situated, alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff brings this class action against Defendant KAISER FOUNDATION
5 HOSPITALS and DOES 1 through 100 ("Defendants" or "KAISER") to recover underpaid
6 regular and underpaid overtime wages, as well as overtime wages for shifts which continue into
7 the next calendar day, compensation for missed statutory second meal periods. Plaintiff also seeks
8 penalties for Defendants' failure to pay all wages due to all terminated or resigned employees and
9 failure to properly itemize wage statements.

10 **JURISDICTION AND VENUE**

11 2. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
12 Civil Procedure, section 395. Defendant KAISER is a California corporation with its principal
13 place of business in Alameda County, California. Defendants employ hospital employees and
14 conduct business in Alameda County, and each Defendant is within the jurisdiction of this Court
15 for service of process purposes. The unlawful acts alleged herein have a direct effect on Plaintiff
16 and those similarly situated within the State of California and within Alameda County. Defendants
17 employ numerous Class Members in Alameda County. There is no federal question at issue, nor is
18 there diversity of citizenship, as the issues herein are based solely on California statutes and law,
19 including the Labor Code, IWC Wage Orders, Code of Civil Procedure, Civil Code, and Business
20 and Professions Code and all parties are residents of California.

21 3. Further, Business and Professions Code, section 17203 provides that any person
22 who engages in unfair competition may be enjoined in any court of competent jurisdiction.
23 Business and Professions Code, section 17204 provides that any person acting on his or her own
24 behalf may bring an action in a court of competent jurisdiction. Thus, the above entitled court
25 maintains appropriate jurisdiction to hear this matter.

26 **PARTIES**

27 4. Plaintiff JOSE F. ANDINO is a resident of the State of California. Plaintiff JOSE
28 F. ANDINO was employed by Defendants in the State of California as a Patient Transporter.

1 Plaintiff's time records were incorrectly converted to fractions of hours resulting in underpayment
2 of straight time and overtime hours worked. Moreover Plaintiff's time records show that he
3 worked shifts greater than eight (8) hours without overtime payment both on the days when the
4 shift began and ended on the same calendar day and when the shift started on one calendar day and
5 continued into the next. Additionally, Defendants failed to provide second meal periods for shifts
6 greater than twelve (12) hours without additional pay in lieu thereof. Defendants failed to timely
7 pay wages upon termination and failed to provide accurate, itemized wage statements.

8 5. Defendant KAISER is a California corporation and operates within California.
9 KAISER's principal place of business is in Alameda County and it employs numerous Class
10 Members in Alameda County. At each of its locations, KAISER employs hospital employees. As
11 a matter of company payroll practices, Defendant KAISER converts hourly time clock in/out
12 records into fractions of hours for wage payments, incorrectly shorting employees of straight time
13 and overtime worked, and not paying all daily overtime. KAISER also fails to pay appropriate
14 overtime when a shift begins on one calendar day, continues to the next calendar day and exceeds
15 eight (8) hours. Moreover, KAISER failed to provide second meal periods for shifts greater than
16 twelve hours without appropriate compensation in lieu thereof, provide accurate wage statements,
17 and failed to timely pay all wages owed to terminated or resigned employees.

18 6. Plaintiff is unaware of the true names, capacities, relationships, and extent of
19 participation in the conduct alleged herein, of the Defendants sued as DOES 1 through 100, but is
20 informed and believes and thereon alleges that said Defendants are legally responsible for the
21 wrongful conduct alleged herein and therefore sue these Defendants by such fictitious names.
22 Plaintiff will amend this complaint when their true names and capabilities are ascertained.

23 7. Plaintiff is informed and believes and thereon alleges that each Defendant, directly
24 or indirectly, or through agents or other persons, employed Plaintiff and other members of the
25 class, and exercised control over their wages, hours, and working conditions. Plaintiff is informed
26 and believes and thereon alleges that each Defendant acted in all respects pertinent to this action as
27 the agent of the other Defendants, carried out a joint scheme, business plan or policy in all respects
28 pertinent hereto, and the acts of each Defendant is legally attributable to the other Defendants.

1 Plaintiff Sub-Class: All members of the Plaintiff class who were subject to a
2 company practice of failing to pay appropriate overtime for hours worked which
3 overlapped two calendar days.

4 22. Further, Plaintiff brings this action on behalf of himself and all other similarly
5 situated persons in a Sub-Class of the Plaintiff Class, which is composed of and defined as
6 follows:

7 Plaintiff Sub-Class: All members of the Plaintiff class who were subject to a
8 company practice of failing to pay meal period premium pay where time records
9 show no second meal period was taken.

10 23. Further, Plaintiff brings this action on behalf of himself and all other similarly
11 situated persons in a Sub-Class of the Plaintiff Class, which is composed of and defined as
12 follows:

13 Plaintiff Sub-Class: All members of the Plaintiff class who, within one year of the
14 filing of the Complaint, were subject to a company practice of failing to accurately
15 itemize wage statements.

16 24. Further, Plaintiff brings this action on behalf of himself and all other similarly
17 situated persons in a Sub-Class of the Plaintiff Class, which is composed of and defined as
18 follows:

19 Plaintiff Sub-Class: All members of the Plaintiff class who, within three years of
20 the filing of the Complaint, were subject to a company practice of failing to timely
21 pay wages at termination.

22 25. Further, Plaintiff brings this action on behalf of himself and all other similarly
23 situated persons in a Sub-Class of the Plaintiff Class, which is composed of and defined as
24 follows:

25 Plaintiff Sub-Class: All California Class members bringing wage claims under the
26 California Unfair Competition Law.

27 26. Further, Plaintiff brings this action on behalf of himself and all other similarly
28 situated persons in a Sub-Class of the Plaintiff Class, which is composed of and defined as
29 follows:

30 Plaintiff Sub-Class: All California Class members bringing claims who, as a result
31 of being subject to Defendants' policies and practices violating various Labor Code
32 provisions, are entitled to penalties under the California Private Attorneys General
33 Act.

34 27. Plaintiff reserves the right under California Rule of Court 3.765(b) and other
35 applicable law to amend or modify the class definition with respect to issues or in any other ways.

1 Plaintiff is the Named Representative and is a member of the Plaintiff Class. Plaintiff seeks class-
2 wide recovery based on the allegations set forth in this complaint.

3 28. This action has been brought and may be maintained as a class action pursuant to
4 Code of Civil Procedure, section 382 because there is a well-defined community of interest in the
5 litigation and the proposed Class is easily ascertainable through the records Defendants are
6 required to keep.

7 29. Numerosity. The members of the Class are so numerous that individual joinder of
8 all of them as Plaintiff is impracticable. While the exact number of the Class members is
9 unknown to Plaintiff at this time, Plaintiff is informed and believes and thereon alleges that there
10 are more than 10,000 Class members.

11 30. Commonality. Common questions of law and fact exist as to all Class members
12 and predominate over any questions that affect only individual members of the Class. These
13 common questions include, but are not limited to:

- 14 a. Did Defendants violate Labor Code sections 204 by improperly converting
15 hours worked into fractions of hours resulting in underpayment of straight
16 time wages?
- 17 b. Did Defendants violate Labor Code sections 510 or 1194 by improperly
18 converting hours worked into fractions of hours resulting in underpayment
19 of overtime time wages?
- 20 c. Did Defendants violate Labor Code sections 510 or 1194 by improperly
21 failing to pay the applicable overtime rate of pay when an employee begins
22 the shift on one calendar day and ends the same day when the shift exceeds
23 eight (8) hours?
- 24 d. Did Defendants violate Labor Code sections 510 or 1194 by improperly
25 failing to pay the applicable overtime rate of pay when an employee begins
26 the shift on one calendar day and continues working into the next calendar
27 day when the shift exceeds eight (8) hours?
- 28 e. Did Defendants violate Labor Code sections 226.7, 512 and Wage Order 5-

1 2002(11) by not providing the Class Members meal periods for shifts
2 greater than twelve (12) hour and not paying them an additional hour's of
3 pay in lieu thereof?

4 f. Did Defendants violate Labor Code section 226 by knowingly and
5 intentionally failing to provide accurate itemized wage statements?

6 g. Did Defendants violate Labor Code sections 201 and/or 202 by not paying
7 Class Members who are no longer employed by Defendants all earned
8 wages, including straight time wages, overtime wages, and wages due under
9 Labor Code section 226.7 and 512, upon their termination of employment?
10 If so, were such violations "willful" within the meaning of Labor Code
11 section 203?

12 h. Did Defendants violate the Unfair Competition Law, Business &
13 Professions Code, section 17200, et seq., by engaging in the conduct alleged
14 in this complaint?

15 i. Whether Defendants violated California Labor Code §§558, 2699?

16 j. What are the effects and the extent of any injuries sustained by the Plaintiff
17 Class and Plaintiff Sub-Class members and appropriate type and/or measure
18 of damages?

19 k. What is the amount of restitution owed by the Defendants attributable to
20 their violation of the Unfair Competition Law by failure to pay overtime
21 compensation to the class members, and other wage violations?

22 l. What is the appropriateness and nature of relief to each Plaintiff Class and
23 Sub-Class member?

24 m. What is the extent of liability of each Defendant, including DOE
25 defendants, to each Plaintiff Class and Sub-Class member?

26 n. Is injunctive relief appropriate to ensure Defendants' compliance with the
27 requirements of the Labor Code with respect to members of the Class who
28 are still currently employed by Defendants?

1 31. Typicality. Plaintiff's claims are typical of the claims of the other members of the
2 Class. Plaintiff and other members of the Class were subject to the same policy and practice of
3 improperly converting time records to fractions of hours, resulting in underpayment for straight
4 time and overtime hours. Defendants failed to pay Plaintiff and members of the Plaintiff Class
5 overtime compensation for hours worked over eight (8) hours per day when the shift begins on
6 one calendar day and continues into the next calendar day. Defendants failed to provide Plaintiff
7 and members of the Plaintiff Class with statutory second meal periods for shifts greater than
8 twelve (12) hours. Defendants failed to provide accurate, itemized wage statements to Plaintiff and
9 members of the Plaintiff Class. Finally, Defendants failed to pay all wages owed to Plaintiff and
10 Plaintiff Class members upon termination of employment.

11 32. Adequacy. Plaintiff will adequately and fairly protect the interests of the members
12 of the Class. Plaintiff has no interest adverse to the interests of absent Class members. Plaintiff is
13 represented by attorneys who have substantial class action experience in wage-and-hour and class
14 action law.

15 33. Superiority. A class action is superior to other available means for fair and
16 efficient adjudication of the claims of the Class and would be beneficial for the parties and the
17 Court. Class action treatment will allow a large number of similarly situated persons to prosecute
18 their common claims in a single forum, simultaneously, efficiently, and without the unnecessary
19 duplication of effort and expense that numerous individual actions would require. The damages
20 suffered by each Class member are relatively small in the sense pertinent to class action analysis,
21 and the expense and burden of individual litigation would make it extremely difficult or
22 impossible for the individual Class members to seek and obtain individual relief. A class action
23 will serve an important public interest by permitting such individuals to effectively pursue
24 recovery of the sums owed to them. Further, class litigation prevents the potential for inconsistent
25 or contradictory judgments raised by individual litigation.

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1 49. Labor Code section 226.7 provides as follows:

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

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

9 50. Wage Order 5-2002, section 11(A) provides, in pertinent part: "No employer shall
10 employ any person for a work period of more than five (5) hours without a meal period of not less
11 than 30 minutes"

12 51. Defendants failed to provide the Class members with second meal periods as
13 provided in Labor Code sections 226.7 and 512, and failed to pay them the additional pay at the
14 employee's regular rate of compensation for each work day in lieu of providing off-duty meal
15 period(s).

16 52. As a result of Defendants' failure to comply with their obligations under Labor
17 Code sections 512 and 226.7 and Wage Order 5-2002, Plaintiff and the other members of the
18 Class have suffered damages in an amount, subject to proof, to the extent they were not paid
19 additional pay owed for Defendants' failure to provide meal periods as required by the law.
20 Pursuant to Labor Code section 218, Plaintiff and other members of the Class are entitled to
21 recover the full amount of their unpaid additional pay for Defendants' failure to provide second
22 meal periods as required by law. Pursuant to Labor Code section 218.6, Plaintiff and other
23 members of the Class are entitled to recover prejudgment interest on the amount of the additional
24 pay owed.

25 53. WHEREFORE, Plaintiff and the Class he seeks to represent request relief as
26 described below.

27 **FIFTH CAUSE OF ACTION**

28 **FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS**

(Plaintiff and Plaintiff Class against each Defendant)

54. Plaintiff incorporates the preceding paragraphs.

1 compensation for regular pay, overtime pay, unprovided second meal periods but to date have not
2 received such compensation.

3 62. More than 30 days have passed since Plaintiff and certain members of the Plaintiff
4 Class have left Defendants' employ.

5 63. As a consequence of Defendants' willful conduct in not paying wages owed,
6 certain members of the Plaintiff Class are entitled to 30 days' wages as a penalty under Labor
7 Code section 203 for failure to pay legal wages, together with interest thereon and attorneys' fees
8 and costs.

9 64. WHEREFORE, Plaintiff and the members of the Plaintiff Class request relief as
10 described below.

11 **SEVENTH CAUSE OF ACTION**

12 **VIOLATION OF BUSINESS & PROFESSIONS CODE §§17200, ET SEQ.**

13 **(Plaintiff and Plaintiff Class against each Defendant)**

14 65. Plaintiff incorporates the preceding paragraphs.

15 66. The unlawful conduct of Defendants alleged herein constitutes unfair competition
16 within the meaning of Business & Professions Code, section 17200, et seq. Due to their unlawful
17 and unfair business practices in violation of the Labor Code Defendants have gained a competitive
18 advantage over other comparable companies doing business in the State of California that comply
19 with their obligations to properly pay employees for all earned wages as required by law.

20 67. As a result of Defendants' unfair competition as alleged herein, Plaintiff and other
21 members of the Class have suffered injury in fact and lost money or property. Plaintiff and other
22 members of the Class have been deprived of their rights to wages due as alleged herein.

23 68. Pursuant to Business & Professions Code, section 17203, Plaintiff and other
24 members of the Class are entitled to restitution of all wages and other moneys owed and belonging
25 to them, including interest thereon that Defendants wrongfully withheld from them and retained
26 for themselves by means of their unlawful and unfair business practices.

27 69. Pursuant to Business & Professions Code, section 17203, Plaintiff and other
28 members of the Class are entitled to an injunctive relief to prevent the continuance of Defendants'

1 employee on behalf of himself and other hourly, non-exempt employees is entitled to collect all
2 civil penalties owed, attorneys' fees, expenses, and costs of suit.

3 75. Labor Code section 2699.5 identifies, inter alia, Labor Code sections 201-203, 226,
4 226.7, 510, 512, 1174 and 1194 as statutes to which Sections 2699.3's procedural requirements
5 must be met before a penalty may be assessed under Section 2699 subdivision (f). Plaintiff has
6 complied with the procedural requirements specified in Labor code section 2699.3 by providing
7 written notice by certified mail to the Labor and Workforce Development Agency (LWDA). No
8 notice of intent to investigate the alleged violation was provided within 33 calendar days of the
9 postmark date of Plaintiff's notice to the LWDA. As a consequence, Plaintiff has exhausted
10 administrative remedies, and on behalf of himself and all other aggrieved current and former
11 employees of Defendants. Plaintiff, therefore, pursues this cause of action as permitted by Labor
12 Code sections 2699, et seq.

13 76. Enforcement of statutory provisions enacted to protect workers and to ensure
14 proper and prompt payment of wages due to employees is a fundamental public interest in
15 California. Consequently, Plaintiff's success in this action will result in the enforcement of
16 important rights as affecting the public interest and will confer a significant benefit upon the
17 general public. Private enforcement of the rights enumerated herein is necessary, as no public
18 agency has pursued enforcement. Plaintiff is incurring a financial burden in pursuing this action
19 and it would be against the interests of justice to require the payment of attorneys' fees and costs
20 from any recovery that might be obtained herein, pursuant to, inter alia, Labor Code sections
21 218.5, 226, 1194 and 2699, Wage Order 5-2002, and Code of Civil Procedure section 1021.5.

22 77. In addition, if Plaintiff succeeds in enforcing these rights affecting the public
23 interest, then attorneys' fees may be awarded to Plaintiff and against Defendant under Code of
24 Civil Procedure section 1021.5 and other applicable law in part because:

25 a. A successful outcome in this action will result in the enforcement of
26 important rights affecting the public interest by requiring Defendants to comply with the wage and
27 hour laws and California's unfair business practice law;

28 b. This action will result in a significant benefit to Plaintiff, the Class, and the

1 general public by bringing to a halt unlawful and/or unfair activity and by causing the return of
2 ill-gotten gains obtained by Defendants;

3 c. Unless this action is prosecuted, members of the Class and general public
4 will not recover those moneys, and many of Defendants' employees would not be aware that the
5 acts and practices they were subjected to by Defendants were wrongful;

6 d. Unless this action is prosecuted, Defendants will continue to mislead their
7 employees about the true nature of their rights and remedies under the wage and hour laws; and

8 e. An award of attorneys' fees and costs is necessary for the prosecution of this
9 action and will result in a benefit to Plaintiff, the Class, and to consumers in general by preventing
10 Defendants from continuing to circumvent the wage and hour statutes and frustrate the
11 long-standing recognition by the California legislature and the courts that such statutes, as pled
12 herein, are not merely a matter of private concern between employer and employee to be
13 eviscerated by considerations of waiver, contributory negligence, good or bad faith, and private
14 agreements. Rather, the wage and hour statutes have been described as a matter of public concern,
15 were designed to provide minimum substantive guarantees to individual workers, and are essential
16 to public welfare.

17 Wherefore, Plaintiff and Class members request relief as hereinafter prayed for.

18 **PRAYER**

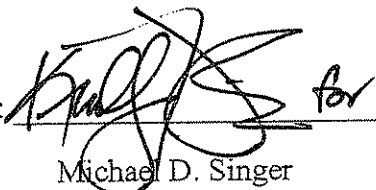
19 WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays for
20 relief and judgment against Defendants, jointly and severally, as follows:

- 21 A. For certification of this action as a class action;
- 22 B. For appointment of Plaintiff as the representative of the Class;
- 23 C. For appointment of counsel for Plaintiff as Class Counsel;
- 24 D. For unpaid overtime wages;
- 25 E. For unpaid regular wages;
- 26 F. For unpaid wages pursuant to Labor Code section 226.7;
- 27 G. For remedies under Labor Code section 203;
- 28 H. For remedies under Labor Code section 226(e) and (g);

- 1 I. For penalties for failure to timely pay wages to terminated or resigned employees;
- 2 J. For prejudgment interest;
- 3 K. For penalties pursuant to Labor Code section 558;
- 4 L. For penalties pursuant to Labor Code section 2699, subd. (f);
- 5 M. For reasonable attorneys' fees and costs of suit pursuant to Labor Code section
- 6 1194;
- 7 N. For reasonable attorneys' fees and costs of suit pursuant to Labor Code section
- 8 1021.5;
- 9 O. For injunctive relief; and
- 10 P. For such other relief the Court deems just and proper.

11
12 Dated: August 9, 2011

COHELAN KHOURY & SINGER
LAW OFFICES OF SAHAG MAJARIAN II

13
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15 By:  for
16 Michael D. Singer

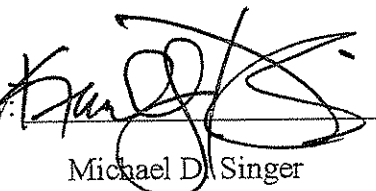
17 Attorneys for Plaintiff JOSE F. ANDINO,
18 individually and on behalf of others similarly
19 situated

20 **DEMAND FOR JURY TRIAL**

21 Plaintiff demands jury trial for all claims so triable.

22 Dated: August 9, 2011

COHELAN KHOURY & SINGER
LAW OFFICES OF SAHAG MAJARIAN II

23
24
25 By: 
26 Michael D. Singer

27 Attorneys for Plaintiff JOSE F. ANDINO,
28 individually and on behalf of others similarly
situated