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11 Attorneys for Plaintiff and the Proposed Class

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN DIEGO
14 CENTRAL DIVISION

15 TERRANCE ALLAN VANN, an
Individual, On Behalf of Himself and All
16 Others Similarly Situated,

17 Plaintiff,

18 v.

19 MASSAGE ENVY FRANCHISING, LLC,
an Arizona Limited Liability Corporation;
20 CHARIS GROUP, LLC, an Arizona
Limited Liability Corporation;
21 OC ENVY GROUP, INC., a California
Corporation; and
22 DOES 1-100, Inclusive,

23 Defendants.

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
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Clerk of the Superior Court
By Calvin Beutler, Deputy Clerk

Case No.: 37-2013-00062206-CU-OE-CTL

CLASS ACTION

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

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1 Plaintiff Terrance Allan Vann (“Plaintiff”), by and through his attorneys, brings this
2 action on behalf of himself and all other persons currently or formerly employed by Massage
3 Envy Franchising, LLC (“Franchisor”), Charis Group, LLC (“Charis Group”), OC Envy
4 Group, Inc. (“OC Envy Group”), and DOES 1 through 100, inclusive (collectively
5 “Defendants” or “Massage Envy”). Plaintiff hereby alleges, on information and belief, except
6 for information based on personal knowledge, which allegations are likely to have evidentiary
7 support after further investigation and discovery, as follows.

8 **NATURE OF ACTION**

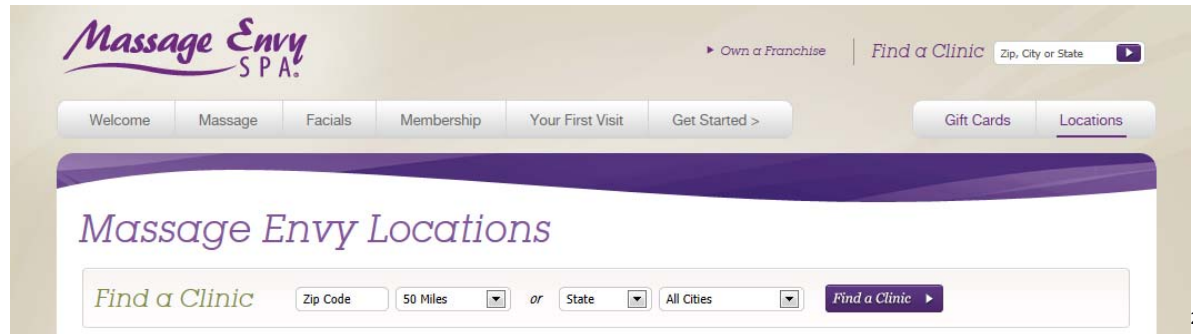
9 1. This action is brought on behalf of Plaintiff and a Class of non-exempt
10 employees employed by, or formerly employed by, Massage Envy in California. Plaintiff, one
11 of many thousands of therapists working within the Franchisor’s franchise system, worked as a
12 massage therapist for two of the Franchisor’s many California franchisees. According to the
13 Franchisor’s website, it is the largest massage therapy franchise system in the industry, with
14 over 850 locations in 45 states:



24 2. While the franchisees are independently owned, one would never know because
25 the Franchisor has control over the significant operations and policies of the franchisees and
26 their employees. The franchisees do not own or operate their own independent websites, but

27 ¹ Screen shot from <http://www.massageenvy.com/locations.aspx> (last visited August 5,
28 2013).

1 rather, the Franchisor owns and operates a single website for all of the franchisees, wherein it
 2 advertises and markets Massage Envy to the public as a single entity: “Massage Envy” or
 3 “Massage Envy Spa.” Consumers can find any of *its* locations nationwide from *its* website:



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 10 3. According to the Franchisor’s website, there are about 162 Massage Envy
 11 locations in California alone, and the number of locations is growing. Plaintiff is informed and
 12 believes each location has anywhere from 15 to 30 non-exempt employees. Unfortunately,
 13 Massage Envy’s growth and claimed success is due, in part, to their uniform policy of grossly
 14 under compensating their therapists. Among the significant operations and policies over
 15 which the Franchisor has control, the Franchisor promulgates a uniform compensation policy
 16 that unlawfully averages Plaintiff’s and putative Class members’ compensation. Massage
 17 Envy’s uniform compensation policy mandates that Plaintiff and non-exempt employees are
 18 paid on a piece-rate basis (*e.g.*, per massage), or California’s minimum wage *averaged* for the
 19 total hours worked per pay period, whichever is greater.

20 4. While the amount per massage session (*e.g.*, \$15.00 versus \$15.50 per one hour
 21 session) may vary based on the therapist’s experience, and/or type of massage, and/or duration
 22 of massage session, Massage Envy uniformly adheres to the same averaging compensation
 23 policy throughout all of their California locations. Massage Envy’s use of this “averaging”
 24 policy has resulted, and continues to result, in the underpayment of wages to their California
 25 non-exempt employees, namely, the failure to pay minimum wage, in violation of certain
 26 provisions of California’s Labor Code, the California Code of Regulations as contained in the

27 ² Screen shot from <http://www.massageenvy.com/locations.aspx> (last visited August 5,
 28 2013).

1 applicable Industrial Wage Commission (“IWC”) Wage Orders, and California’s Unfair
2 Competition Law (“UCL”), Cal. Bus. & Prof. Code §17200, *et seq.*

3 5. In order to redress the harms suffered, on behalf of himself and all other
4 similarly situated non-exempt employees currently and formerly employed by Massage Envy
5 in California, Plaintiff brings claims for: (1) failure to pay California-mandated minimum
6 wage in violation of Labor Code §1194; (2) failure to timely pay wages due at time of
7 termination in violation of Labor Code §§201-203; (3) failure to provide itemized employee
8 wage statements in violation of Labor Code §§226, 1174, 1175; (4) failure to provide paid rest
9 breaks in violation of Labor Code §§226.7, 1194; and (5) violation of California’s UCL, Cal.
10 Bus. & Prof. Code §§17200, *et seq.*

11 **JURISDICTION AND VENUE**

12 6. This Court has jurisdiction over all causes of action asserted herein pursuant to
13 the California Constitution, Article VI, §10, because this case is a cause not given by statute to
14 other trial courts. The monetary damages sought by Plaintiff total in excess of this Court’s
15 jurisdictional minimum.

16 7. This Court has jurisdiction over Defendants because they conduct substantial
17 business in California and have intentionally availed themselves of the laws and markets of
18 California through the operation of their business in California.

19 8. Venue is proper in this Court because a significant portion of the conduct that
20 gives rise to Defendants’ liability, as alleged herein, occurred in San Diego, County. Plaintiff
21 was employed by Defendant Charis Group and Franchisor in San Diego, County, and was a
22 victim of Massage Envy’s wrongful acts and practices complained of herein. Two of the
23 named defendants, Franchisor and the Charis Group, conduct substantial business in this
24 County.

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THE PARTIES**Plaintiff**

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3 9. Plaintiff Terrance Allan Vann currently resides in Tulare, California. Plaintiff
4 worked as a massage therapist for Defendant OC Envy Group at the Massage Envy located at
5 375 W. Birch Street, #22, Brea, California 92821 for a short period of time in and around
6 January 2011. While working for Defendant OC Envy Group, Plaintiff was paid on a piece-
7 rate basis (per massage), or California's minimum wage averaged for the total hours worked
8 per pay period, whichever was greater. Plaintiff was scheduled to work the evening shift, from
9 2:00 p.m. to 10:00 p.m., which resulted in Plaintiff working over eight hours per day. On
10 average, Plaintiff performed about four to five massages per day, or four to five piece-rate
11 hours. At times Plaintiff was not performing a massage, he was required to stay at or around
12 the work premises in case there was a walk-in customer. As a result of Defendants' unlawful
13 averaging compensation policy, Plaintiff was paid only for his massage hours, and not for the
14 time he worked per day. Defendant OC Envy Group failed to pay Plaintiff all due and owing
15 wages upon termination and has not paid all due and owing wages to date.

16 10. Plaintiff also worked as a massage therapist for Defendant Charis Group at the
17 Massage Envy located at 878 Eastlake Parkway, Suite 912, Chula Vista, California 91914,
18 from about May 26, 2011 through January 3, 2013. While working for Defendant Charis
19 Group, Plaintiff was paid on a piece-rate basis (per massage), or California's minimum wage
20 averaged for the total hours worked per pay period, whichever was greater. From about May
21 26, 2011 through December 2012, Plaintiff was scheduled to work from about 4:00 p.m. to
22 10:00 p.m. During this period, on average, Plaintiff performed about four to five massages per
23 day. Plaintiff's schedule then changed to 2:00 p.m. to 10:00 p.m. on the weekdays, and 1:00
24 p.m. to 9:00 p.m. on the weekends, which remained in effect until the end of his employment.
25 During this period, on average, Plaintiff performed five to seven massages per day. At times
26 Plaintiff was not performing a massage, he was required to stay at or around the work premises
27 in case if there was a walk-in customer. Plaintiff was required to stay and clean, organize, and
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1 do laundry for about 30 to 60 minutes after his scheduled shift. As a result of Defendants'
2 unlawful averaging compensation policy, Plaintiff was paid only for his massage hours, and
3 not for the time he worked per day. Defendant Charis Group failed to pay Plaintiff all due and
4 owing wages upon termination and has not paid all due and owing wages to date.

5 Defendants

6 11. Defendant Massage Envy Franchising, LLC (“Franchisor”) is a Delaware
7 Limited Liability Company headquartered at 14350 N. 87th Street, Suite 200, Scottsdale,
8 Arizona 85260. The Franchisor’s managing member is Massage Envy, LLC, which is
9 headquartered at the same address as the Franchisor. Defendant Franchisor is a national sales
10 organization of independently owned franchised locations (franchisees). At all relevant times,
11 Franchisor was Plaintiff’s employer and/or the franchisees were the agents of the Franchisor
12 and the Franchisor is vicariously liable for the acts of the franchisees as alleged herein.

13 12. Defendant OC Envy Group, Inc. is a franchisee and agent of the Franchisor and
14 based on information and belief does business as and operates at least three Massage Envy
15 locations: (a) 375 W. Birch Street, #22, Brea, California 92821; (b) 122 Yorba Linda
16 Boulevard, Placentia, California 92870; and (c) 5769 East Santa Ana Canyon Road, Anaheim,
17 California 92807.

18 13. Defendant Charis Group, LLC is a franchisee and agent of the Franchisor.
19 While Charis Group’s headquarters is 5654 E. Hedgehog Place, Scottsdale, Arizona 85262,
20 based on information and belief Charis Group owns and operates, *inter alia*, two Massage
21 Envy locations in San Diego: (a) 1091 K Street, San Diego, California 92101; and (b) 878
22 Eastlake Parkway, Suite 912, Chula Vista, California 91914. Charis Group, LLC does
23 business under the name “Massage Envy Spa” at both its downtown San Diego and Chula
24 Vista locations, however, it has not filed a fictitious business name with the San Diego County
25 Clerk’s Office.

26 14. At all relevant times, Defendants did, and still do, transact and conduct business
27 in the State of California, including, but not limited to, the County of San Diego, and within
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1 the jurisdiction of this Court, the Central Division. At all times relevant to this Complaint,
2 Defendants were Plaintiff’s employer for purposes of the California wage-and-hour laws at
3 issue in this action. Defendants’ violations as described in this complaint were knowing,
4 intentional, deliberate, and willful.

5 15. The true names and capacities of the defendants named herein under California
6 Code of Civil Procedure (“C.C.P.”) §474 as DOES 1 through 100 are presently unknown to
7 Plaintiff, who therefore sues them by such fictitious names. Plaintiff will amend this
8 Complaint to allege the true names and capacities of these defendants when they have been
9 determined. Each of the fictitiously named defendants is responsible in some manner for the
10 conduct alleged herein. The DOE defendants are private individuals, associations,
11 partnerships, corporations, or institutes who participated in the wrongful conduct alleged
12 herein in ways which are unknown to Plaintiff at this time.

13 16. At all times mentioned in the causes of action alleged herein, each and every
14 defendant was an agent and/or employee of each and every other defendant. In doing the
15 things alleged in the causes of action stated herein, each and every defendant was acting within
16 the course and scope of this agency or employment and was acting with the consent,
17 permission, and authorization of each of the remaining defendants. All actions of each
18 defendant, as alleged in the causes of action stated herein, were ratified and approved by every
19 other defendant or its officers or managing agents.

20 **MESSAGE ENVY’S UNLAWFUL CONDUCT**

21 17. Massage Envy touts that throughout the past decade it has “become the largest
22 massage therapy franchise system in the industry and continues to expand its nationwide
23 presence.” The Franchisor promises the franchisees to provide a business plan with “strong
24 margins and attractive returns with average annual unit volume of more than \$1.2 million.*”
25 A necessary component of achieving these “strong margins” and “attractive returns” is
26 minimizing the cost of labor. As a part of this plan, the Franchisor has promulgated a uniform
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1 compensation policy that unlawfully averages Massage Envy's non-exempt California
2 employees' compensation.

3 18. The Franchisor enters into agreements with the franchisees whereby the
4 Franchisor has the power to control, and in fact controls, the overall business operations of the
5 franchisees, including without limitation: (a) creating and providing the franchisees' overall
6 business plan; (b) providing comprehensive training and marketing to the franchisees; (c)
7 providing a robust support system that includes everything from field training to massage
8 therapist recruitment support; (d) providing direction in all phases of the start-up process, from
9 site selection to grand opening promotions, creating the business plan, and everything in
10 between; (e) providing the hours of operation; (f) dictating the compensation methodology for
11 non-exempt employees; and (g) providing business operations, policies, and procedures
12 manuals. The Franchisor supports the franchisees throughout the life of their massage therapy
13 franchise. In return, the franchisees are required to comply with the Franchisor's policies,
14 procedures, and practices, including the compensation policy set forth herein.

15 19. Massage Envy's uniform compensation policy mandates that Plaintiff and non-
16 exempt employees are paid on a piece-rate basis (*e.g.*, per massage), or California's minimum
17 wage *averaged* for the total hours worked per pay period, whichever is greater:

18 *At the end of each pay period we take your total hours times \$8.00 per hour and compare that to how much you earned doing massage, without*
19 *tips, and you get whichever amount is greater.* ³

20 20. The inequitable and unlawful result of Massage Envy's compensation plan is a
21 failure to pay Plaintiff and putative Class members for all non-piece-rate hours. For example,
22 Plaintiff was typically subject to Massage Envy's control for more than eight hours per day,
23 but he was compensated only for the time spent actually performing a massage even through
24 the time spent massaging was less than the total hours he worked. Plaintiff and putative Class
25 members should have been, but were not, paid for the entire time during which they were
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27 ³ Snippet from Massage Therapist Compensation/Bonus/Benefits Breakdown
28 Compensation Plan, dated 10/2010.

1 subject to the control of Massage Envy, including all the time they were suffered or permitted
2 to work, whether or not required to do so.

3 21. To make matters worse, Massage Envy failed to, among other things, itemize
4 on Plaintiff's and the putative Class members' wage statements the hours they worked for each
5 pay period and/or the number of piece-rate units earned and any applicable piece rate, making
6 it difficult for Plaintiff and the putative Class to determine and calculate the unpaid wages
7 owed.

8 22. As a direct and proximate result of the unlawful actions of Massage Envy,
9 Plaintiff and putative Class members have suffered, and continue to suffer, from loss of wages
10 in amounts as yet unascertained, but subject to proof at trial in amounts in excess of the
11 minimum jurisdiction of this Court.

12 **CLASS ACTION ALLEGATIONS**

13 23. Plaintiff realleges and incorporates herein by reference each and every
14 allegation in the preceding and subsequent paragraphs.

15 24. Plaintiff brings this action on behalf of himself and all others pursuant to
16 California Code of Civil Procedure §382 because there is a well-defined community of interest
17 in the litigation and the proposed Class is easily ascertainable. Plaintiff seeks to represent the
18 following Class:

19 All massage therapists and estheticians who are employed or have been employed
20 by Massage Envy in California within four (4) years of the filing of this
Complaint through the date of final disposition of this action.

21 25. On information and belief, the legal and factual issues are common to the Class
22 and affected all members of the Class. Plaintiff reserves the right to amend or modify the Class
23 description with greater specificity, and/or further division into subclasses, and/or limitation to
24 particular issues.

25 26. The members of the Class as defined are so numerous that joinder of all the
26 members of the Class is impracticable. While the precise number of Class members has not
27 been determined at this time, Plaintiff is informed and believes that Massage Envy during the
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1 relevant time period likely employed more than 3,000 massage therapists and estheticians in
2 California who are, or have been, affected by Massage Envy’s unlawful practices as alleged
3 herein. With turnover, the size of the Class could potentially be much higher.

4 27. Upon information and belief, Plaintiff alleges that Massage Envy’s employment
5 records would provide information as to the number and location of all Class members.
6 Joinder of all members of the proposed Class is not practicable.

7 28. There are questions of law and fact common to the Class predominating over
8 any questions affecting only individual Class members. These common questions of law and
9 fact include, without limitation:

10 (a) Whether Massage Envy violated the Labor Code and IWC Wage Orders
11 as a result of the allegations described in this complaint;

12 (b) Whether Massage Envy violated the Labor Code and IWC Wage Orders
13 by compensating Plaintiff and other Class members at rates below the required minimum wage
14 rate;

15 (c) Whether Massage Envy violated the Labor Code and IWC Wage Orders
16 by failing to, among other things, maintain accurate records of Plaintiff and other Class
17 members’ earned wages and work periods, itemize all hours worked and wages earned, and
18 accurately maintain other records pertaining to Plaintiff and the other Class members;

19 (d) Whether Massage Envy violated the Labor Code and IWC Wage Orders
20 by failing to pay all earned wages due and/or premium wages due and owing at the time that
21 the employment of any Class members, including Plaintiff ended;

22 (e) Whether Massage Envy failed to pay Class members, including
23 Plaintiff, statutory penalties pursuant to Labor Code §§201, 202, 203;

24 (f) Whether Defendant violated the Labor Code and IWC Wage Orders by
25 failing to provide paid rest periods to Plaintiff and other Class members and/or pay appropriate
26 compensation in lieu of, in violation of California law;

27 (g) Whether Massage Envy violated the UCL;

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1 (h) Whether Plaintiff and other Class members are entitled to damages,
2 restitution, wages, statutory penalties, premium wages, declaratory, injunctive and declaratory
3 relief, attorneys’ fees, interest, costs, and other relief pursuant to the Labor Code, IWC Wage
4 Orders, and the UCL.

5 29. There are no individualized factual or legal issues for the court to resolve that
6 would prevent this case from proceeding as a class action.

7 30. The claims of the named Plaintiff are typical of the claims of the Class.
8 Plaintiff and all members of the Class sustained injuries and damages arising out of and caused
9 by Massage Envy’s common course of conduct in violation of California laws, regulations,
10 and statutes as alleged herein.

11 31. Plaintiff will fairly and adequately represent and protect the interests of the
12 members of the Class. Plaintiff has no interests that are adverse to the Class. Counsel who
13 represent Plaintiff are competent and experienced in litigating large class actions.

14 32. A class action is superior to other available means for the fair and efficient
15 adjudication of this controversy. Individual joinder of all Class members is not practicable,
16 and questions of law and fact common to the Class predominate over any questions affecting
17 only individual members of the Class. Each member of the Class has been damaged and is
18 entitled to recovery by reason of Massage Envy’s unlawful policy and/or practices described
19 herein.

20 33. Class action treatment will allow those similarly situated persons to litigate
21 their claims in the manner that is most efficient and economical for the parties and the judicial
22 system. Plaintiff is unaware of any difficulties that are likely to be encountered in the
23 management of this action that would preclude its maintenance as a class action.

24 **FIRST CAUSE OF ACTION**

25 **Failure to Pay California-Mandated Minimum Wages**
26 **In Violation of Labor Code §1197 and IWC Wage Order 2-2001**

27 34. Plaintiff realleges and incorporates herein by reference each and every
28 allegation in the preceding and subsequent paragraphs.

1 35. Labor Code §1197 states: “The minimum wage for employees fixed by the
2 commission is the minimum wage to be paid to employees, and the payment of a less wage
3 than the minimum so fixed is unlawful.”

4 36. Plaintiff and the Class are classified as members of the Personal Service
5 Industry governed by California Wage Order 2-2001 (“Wage Order No. 4”), 8 C.C.R.
6 §11040(4)(B). Subdivision 4(B) of Wage Order No. 4 provides as follows:

7 Every employer shall pay to each employee, on the established payday for the
8 period involved, not less than the applicable minimum wage for all hours
9 worked in the payroll period, whether the remuneration is measured by time,
piece, commission, or otherwise.

10 37. “Hours worked” is defined in subdivision 2(K) of Wage Order No. 4 as “the
11 time during which an employee is subject to the control of an employer, and includes all the
12 time the employee is suffered or permitted to work, whether or not required to do so.”

13 38. In California, using a method of averaging employees’ hours worked in a given
14 pay period in order to compute minimum wage obligations violates the minimum wage law.
15 *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013); *Armenta v. Osmose, Inc.*,
16 135 Cal. App. 4th 314 (2005).

17 39. Massage Envy’s compensation policy violates IWC Wage Order No. 4 because
18 this uniform compensation policy mandates that non-exempt employees are paid on a piece-
19 rate basis (*e.g.*, per massage), or California’s minimum wage *averaged* for the total hours
20 worked per pay period. Defendants’ policy permits Massage Envy to extract lengthy work
21 weeks from its employees without paying them for all hours worked. Massage Envy did in
22 fact extract lengthy work weeks from Plaintiff and the Class without paying them for all hours
23 worked.

24 40. Pursuant to Labor Code §1194, “... any employee receiving less than the legal
25 minimum wage ... applicable to the employee is entitled to recover in a civil action the unpaid
26 balance of the full amount of this minimum wage ... including interest thereon, reasonable
27 attorney’s fees, and costs of suit.” Because Plaintiff and the Class suffered damage as a direct
28 result of Massage Envy’s unlawful compensation policy, Plaintiff and the Class are entitled to

1 recovery of the full amount of the difference between what they were paid and what they were
2 required to be paid, including interest thereon, reasonable attorneys’ fees, and costs of suit.

3 41. In addition, pursuant to Labor Code §1194.2(a), Plaintiff and the Class are
4 entitled to “recover liquidated damages in an amount equal to the wages unlawfully unpaid and
5 interest thereon.”

6 42. Also, pursuant to Labor Code §1197.1, Plaintiff and the Class are entitled to
7 claim all applicable civil penalties as a direct result of Massage Envy’s policy and practice of
8 paying Plaintiff and the Class a wage less than the minimum fixed by an order of the
9 commission.

10 **SECOND CAUSE OF ACTION**

11 **Failure to Timely Pay Wages After Termination or Resignation**
12 **In Violation of Labor Code §§201, 202, and 203**

13 43. Plaintiff realleges and incorporates herein by reference each and every
14 allegation in the preceding and subsequent paragraphs.

15 44. Labor Code §201(a) states: “If an employer discharges an employee, the wages
16 earned and unpaid at the time of discharge are due and payable immediately.”

17 45. Labor Code §202(a) states:
18 If an employee not having a written contract for a definite period quits his or
19 her employment, his or her wages shall become due and payable not later than
20 72 hours thereafter, unless the employee has given 72 hours previous notice of
21 his or her intention to quit, in which case the employee is entitled to his or her
22 wages at the time of quitting. Notwithstanding any other provision of law, an
employee who quits without providing a 72- hour notice shall be entitled to
receive payment by mail if he or she so requests and designates a mailing
address. The date of the mailing shall constitute the date of payment for
purposes of the requirement to provide payment within 72 hours of the notice of
quitting.

23 46. Massage Envy willfully failed to timely pay Plaintiff and a large portion of the
24 proposed Class all of their wages due for work performed and this failure continued through
25 the time in which Plaintiff and many Class members quit or were discharged from their
26 employment with Massage Envy. As a result, Massage Envy violated Labor Code §§201 and
27 202.

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47. Labor Code §203 states:

(a) If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.

(b) Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.

48. Plaintiff and the Class they seek to represent are entitled to compensation for all forms of wages earned, but to date have not received such compensation therefore entitling them to penalties under Labor Code §203.

49. More than 30 days have passed since Plaintiff and many affected Class members have left Massage Envy’s employ, and on information and belief, have not received payment pursuant to Labor Code §§201, 202 and 203. As a consequence of Massage Envy’s willful conduct in not paying all earned wages, Plaintiff and many Class members are entitled to 30 days’ wages as a premium wage or penalty under Labor Code §203.

THIRD CAUSE OF ACTION

**Failure to Provide Itemized Employee Wage Statements
In Violation of Labor Code §§226, 1174, 1175, and IWC Wage Orders**

50. Plaintiff realleges and incorporates herein by reference each and every allegation in the preceding and subsequent paragraphs.

51. Labor Code §226(a) requires Massage Envy to, *inter alia*, itemize in wage statements: gross wages earned; total hours worked by the employee; the number of piece-rate unites earned and any applicable piece rate if the employee is paid on a piece-rate basis; all deductions from payment of wages; and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

FOURTH CAUSE OF ACTION

**Failure to Provide Paid Rest Periods and/or
Pay Appropriate Compensation in Lieu Thereof
In Violation of Labor Code §§226.7 and 1194 and IWC Wage Orders**

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57. The allegations of each of the preceding paragraphs are realleged and incorporated herein by reference.

58. Labor Code §226.7 states:

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

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

59. IWC Wage Order 2-2001 §12 states with regards to rest periods:

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

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

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

60. Defendant violated Labor Code §226.7 and the wage orders by failing to schedule and permit paid rest periods and by failing to provide one hour of additional wages at the employees’ regular rate of compensation for each work day that the paid rest periods were not permitted. *See Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864, 872 (2013) (“a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law.”).

1 (c) Violation of Labor Code §204 by failing to pay all wages due and
2 payable twice during each calendar month;

3 (d) Violation of Labor Code §206 by failing to pay, without condition and
4 within the time set by the applicable article, all wages, or parts thereof, conceded by Massage
5 Envy to be due;

6 (e) Violation of Labor Code §216 by willfully refusing to pay wages due
7 and payable, by falsely denying the amount or validity thereof, or that the same is due, with
8 intent to secure for itself any discount upon such indebtedness, and with intent to annoy,
9 harass, oppress, hinder, delay, or defraud, the Class members to whom such indebtedness is
10 due;

11 (f) Violation of Labor Code §223 by secretly paying a lower wage to
12 Plaintiff and Class members while purporting to pay the wage designated by statute or by
13 contract;

14 (g) Violation of Labor Code §§226 and 1194 by failing to provide Class
15 members with accurate wage statements;

16 (h) Violation of Labor Code §1197 and IWC Wage Order No. 2-2001 No. 4
17 by failing to pay the minimum wage fixed by law; and

18 (i) Violation of Labor Code §§226. 7, 1194 and IWC Wage Order 2-2001,
19 §12 by failing to provide paid rest periods to Plaintiff and other Class members and failing to
20 compensate said employees for failure to do so.

21 67. Massage Envy’s activities also constitute unfair practices in violation of Cal.
22 Bus. & Prof. Code §17200, *et seq.*, because Massage Envy’s practices violate the above noted
23 laws, and/or violate an established public policy, and/or the practice is immoral, unethical,
24 oppressive, unscrupulous, and substantially injurious to Plaintiff and the Class.

25 68. As a result of Massage Envy’s violations of the Labor Code, Plaintiff has
26 suffered injury-in-fact and has lost money or property as a result of Massage Envy’s practices.
27 This injury-in-fact and loss of money or property consists of the lost wages and other
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1 restitutionary remedies provided by the Labor Code as detailed in this complaint and other
2 resulting harms. A tally of these damages cannot readily be determined as the employment
3 records are held exclusively or nearly exclusively in Massage Envy's control. Plaintiff is
4 entitled to restitution, an injunction, declaratory and other equitable relief against such
5 unlawful practices to prevent future damage for which there is no adequate remedy at law, and
6 to avoid a multiplicity of lawsuits. Plaintiff is also seeking in the alternative, by this class
7 action, restitutionary disgorgement of such monies into a fluid recovery fund.

8 69. As a result of their unlawful acts, Massage Envy has reaped, and continues to
9 reap, unfair benefits and unlawful profits at the expense of Plaintiff and the Class he seeks to
10 represent. Massage Envy should be enjoined from this activity and made to disgorge these ill-
11 gotten gains and restore to Plaintiff and the members of the Class the wrongfully withheld
12 wages pursuant to Bus. & Prof. Code §17203. Plaintiff is informed and believes, and thereon
13 alleges, that Massage Envy is unjustly enriched through their failure to pay legal wages, and/or
14 other remedies. Plaintiff is informed and believes, and thereon alleges, that Plaintiff and
15 members of the Class are prejudiced by Massage Envy's unfair trade practices.

16 70. As a direct and proximate result of the unfair business practices of Massage
17 Envy, Plaintiff, individually and on behalf of all employees similarly situated, are entitled to
18 equitable and injunctive relief, including full restitution and/or disgorgement of all wages
19 which have been unlawfully withheld from Plaintiff and members of the Class as a result of
20 the business acts and practices described herein, and enjoining Massage Envy to cease and
21 desist from engaging in the practices described herein for the maximum time permitted
22 pursuant to Bus. & Prof. Code §17208, including any tolling.

23 71. The unlawful and unfair conduct alleged herein is continuing, and there is no
24 indication that Massage Envy will refrain from such activity in the future. Plaintiff believes
25 and alleges that if Massage Envy is not enjoined from the conduct set forth in this complaint,
26 they will continue to violate California laws. Plaintiff further requests that the court issue a
27 preliminary and permanent injunction.

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PRAYER FOR RELIEF

- A. WHEREFORE, Plaintiff prays for judgment as follows:
- B. That the Court determine that this action may be maintained as a class action with the named Plaintiff appointed as Class representative;
- C. For the attorneys appearing on the above caption to be named Class counsel;
- D. For nominal, actual, and compensatory damages;
- E. For restitution of all monies, wages, expenses, and benefits due to Plaintiff and the proposed Class;
- F. For disgorged profits from the unfair and unlawful business practices of Massage Envy;
- G. For interest accrued to date;
- H. For interest pursuant to Labor Code §218.6;
- I. For penalties pursuant to Labor Code §§203, 226 and 558;
- J. For punitive and exemplary damages;
- K. For costs of suit and expenses incurred herein pursuant to Labor Code §§218.5, 226, and 1194;
- L. For reasonable attorneys’ fees pursuant to Labor Code §§218.5, 226, and 1194, and C.C.P. §1021.5;
- M. For appropriate injunctive relief;
- N. For appropriate equitable relief;
- O. For appropriate declaratory relief; and
- P. For all such other and further relief that the Court may deem just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff, individually, and on behalf of all other similarly situated current and former employees of Massage Envy in the State of California, hereby demand a jury trial.

Dated: August 12, 2013

ZELDES HAEGGQUIST & ECK, LLP
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AARON M. OLSEN

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