

AUG 28 2009

ALAN CARLSON, Clerk of the Court

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27 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

28 **FOR THE COUNTY OF ORANGE**

29 SPENCER DE LA CRUZ, as an individual and
30 on behalf of all others similarly situated,

31 Plaintiff,

32 vs.

33 ABERCROMBIE & FITCH CO., a Delaware
34 corporation; ABERCROMBIE & FITCH
35 STORES, INC., an Ohio corporation, and
36 DOES 1 through 100, inclusive,

Case No.: 30-2007-00036240

CLASS ACTION

**SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE
RELIEF FOR:**

- (1) FAILURE TO PROVIDE MEAL PERIODS (LABOR CODE § 226.7);
- (2) FAILURE TO PAY WAGES;
- (3) FAILURE TO PAY VACATION

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Defendants.

WAGES;

- (4) WAITING TIME PENALTIES (LABOR CODE § 201-203);**
- (5) VIOLATION OF LABOR CODE § 2802;**
- (6) VIOLATION OF LABOR CODE § 226;**
- (7) VIOLATION OF IWC WAGE ORDER NO. 7 § 5 – FAILURE TO PAY REPORTING TIME PAY;**
- (8) FAILURE TO PAY MINIMUM WAGE**
- (9) UNFAIR BUSINESS PRACTICES (Violation of California Business & Professions Code §17200 et seq.).**

DEMAND FOR JURY TRIAL

Plaintiffs Spencer De La Cruz, James Branchik, Heather Alfsen, Josef Andre Jones, Sarah Ward, Daniel Guajardo, Michael Nokchan (Also Known As Somsak Nokchan), Jason Wool, Alicia Garcia, Charles Nieman, and Jacob Canedo (hereinafter referred to as "Plaintiffs"), hereby submit their Second Amended Class Action Complaint against Defendants ABERCROMBIE & FITCH CO. and ABERCROMBIE & FITCH STORES, INC. and DOES 1-100 (hereinafter collectively referred to as "DEFENDANTS") on behalf of themselves and the class of all other similarly situated current and former employees of DEFENDANTS for meal period wages, vacation wages, reimbursements, and wages owed as well as waiting time penalties, and penalties or damages for failure to keep accurate records, penalties under California Labor Code statutes, and for restitution and injunctive relief as follows:

INTRODUCTION

1. This class action is within the Court's jurisdiction under California Labor Code §§ 201-204, 226, 226.7, 227.3, 1194, 2802, Industrial Welfare Commission ("IWC") Wage Order No. 7 § 5, and California Business and Professions Code § 17200, et seq., (Unfair Practices Act).

2. This complaint challenges systemic illegal employment practices resulting in

1 violations of the California Labor Code and Business and Professions Code against employees of
2 DEFENDANTS.

3 3. Plaintiff is informed and believes and based thereon alleges DEFENDANTS, joint
4 and severally have acted intentionally and with deliberate indifference and conscious disregard to
5 the rights of all employees in receiving all wages due for meal period violations, all regular
6 wages, all vacation wages, all reimbursements for work-related expenses, all final wages due
7 upon termination of employment, and in connection with DEFENDANTS' failure to keep all
8 proper pay roll records of Plaintiff and Class Members.

9 4. Plaintiff is informed and believes and based thereon alleges DEFENDANTS have
10 engaged in, among other things a system of willful violations of the California Labor Code,
11 Business and Professions Code and applicable IWC wage orders by creating and maintaining
12 policies, practices and customs that knowingly deny employees the above stated rights and
13 benefits.

14 5. The policies, practices and customs of defendants described above and below have
15 resulted in unjust enrichment of DEFENDANTS and an unfair business advantage over
16 businesses that routinely adhere to the strictures of the California Labor Code, Business and
17 Professions Code.

18 **JURISDICTION AND VENUE**

19 6. The Court has jurisdiction over the violations of the California Labor Code §§ 201-
20 204, 226, 226.7, 227.3, 1194, 2802, IWC Wage Order No. 7 § 5, and California Business and
21 Professions Code § 17200, et seq., (Unfair Practices Act).

22 7. Venue is proper because the DEFENDANTS do business in Orange County.

23 **PARTIES**

24 8. Plaintiff SPENCER DE LA CRUZ was employed by DEFENDANTS from 2004
25 until on or about October 26, 2007 as a sales associate and then as an assistant manager at one of
26 DEFENDANTS' Abercrombie & Fitch retail stores in California, which is a property owned
27 and/or operated by DEFENDANTS. Plaintiff JAMES BRANCHIK was employed by
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1 DEFENDANTS in California from on or about July 2005 to on our about August 2007 as a
2 manager in training, assistant manager, and store manager. Plaintiff HEATHER ALFSEN was
3 employed by DEFENDANTS in California ending in the Summer of 2008 when she resigned her
4 employment in Sacramento County as a non-exempt employee.. Plaintiff JOSEF ANDRE
5 JONES was employed by DEFENDANTS from on or about February 2008 to October 2008 as a
6 non-exempt model in Carlsbad, California.. Plaintiff SARAH R. WARD was employed by
7 DEFENDANTS in 2006 with her employment ending in 2007 as a non-exempt employee
8 working full-time hours. Plaintiff DANIEL GUAJARDO worked for DEFENDANTS as a non-
9 exempt model in Temecula, California from August 2008 to December 2008. Plaintiff
10 MICHAEL NOKCHAN (also known as Somsak Nokchan) is a current non-exempt employee of
11 DEFENDANTS in California. Plaintiff JASON WOOL was employed by DEFENDANTS in
12 California to 2007 as a non-exempt employee. Plaintiff ALICIA GARCIA has been employed
13 with DEFENDANTS since January 2008 and is still currently employed by DEFENDANTS.
14 Plaintiff Charles Nieman was employed by DEFENDANTS during the class period in San
15 Francisco, California. Plaintiff Jacob Canedo was employed by DEFENDANTS during the class
16 period in San Francisco, California. (Plaintiffs De la Cruz, Branchik, Alfsen, Jones, Ward,
17 Guajardo, Nokchan, Wool, Garcia, Nieman, and Canedo shall collectively be referred to as
18 "Plaintiffs"). Plaintiffs were and are the victims of the policies, practices, and customs of
19 DEFENDANTS complained of in this action in ways that have deprived them of the rights
20 guaranteed to them by California Labor Code §§ 201-204, 226, 226.7, 227.3, 1194, 2802, IWC
21 Wage Order No. 7 § 5, and California Business and Professions Code §17200, et seq., (Unfair
22 Practices Act).

24 9. Plaintiffs are informed and believe and based thereon allege Defendant
25 ABERCROMBIE & FITCH CO. (hereafter "DEFENDANT") dba *Abercrombie & Fitch*,
26 *Abercrombie and Hollister Co.* was and is a Delaware corporation doing business in the State of
27 California with retail stores in California and across the United States selling clothing and
28 clothing accessories to the public on the retail level, including owning and operating retail stores

1 in Orange County, California. Plaintiffs are informed and believe and based thereon allege
2 Defendant ABERCROMBIE & FITCH STORES, INC. (hereafter "DEFENDANT") dba
3 *Abercrombie & Fitch, Abercrombie and Hollister Co.* was and is an Ohio corporation that is a
4 wholly owned subsidiary of ABERCROMBIE & FITCH CO. doing business in the State of
5 California with retail stores in California and across the United States selling clothing and
6 clothing accessories to the public on the retail level, including owning and operating retail stores
7 in Orange County, California.

8 10. Plaintiffs are informed and believe and based thereon allege that at all times herein
9 mentioned DEFENDANTS and DOES 1 through 100, are and were corporations, business
10 entities, individuals, and partnerships, licensed to do business and actually doing business in the
11 State of California.

12 11. As such, and based upon all the facts and circumstances incident to
13 DEFENDANTS' business in California, DEFENDANTS are subject to California Labor Code
14 §§ 201-204, 226, 226.7, 227.3, 1194, 2802, IWC Wage Order No. 7 § 5, and California Business
15 and Professions Code § 17200, et seq., (Unfair Practices Act).

16 12. Plaintiffs do not know the true names or capacities, whether individual, partner or
17 corporate, of the DEFENDANTS sued herein as DOES 1 through 100, inclusive, and for that
18 reason, said DEFENDANTS are sued under such fictitious names, and Plaintiffs pray for leave to
19 amend this complaint when the true names and capacities are known. Plaintiffs are informed and
20 believe and based thereon allege that each of said fictitious DEFENDANTS was responsible in
21 some way for the matters alleged herein and proximately caused Plaintiffs and members of the
22 general public and class to be subject to the illegal employment practices, wrongs and injuries
23 complained of herein.

24 13. At all times herein mentioned, each of said DEFENDANTS participated in the
25 doing of the acts hereinafter alleged to have been done by the named DEFENDANTS; and
26 furthermore, the DEFENDANTS, and each of them, were the agents, servants and employees of
27 each of the other DEFENDANTS, as well as the agents of all DEFENDANTS, and at all times
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1 statements;

2 (2) a subclass of all of DEFENDANTS' past and present employees whom
3 DEFENDANTS classified as non-exempt employees in California during the
4 period from December 19, 2003 to the present whose time records do not show
5 him/her taking an unpaid break of at least 30 minutes during the initial five hours
6 of any shift of more than 5 hours;

7 (3) a subclass of all of DEFENDANTS' past and present employees whom
8 DEFENDANTS classified as non-exempt employees in California during the
9 period from December 19, 2003 to the present whose time records do not show
10 him/her taking an unpaid break of at least 30 minutes for any shift of more than 6
11 hours;

12 (4) a subclass of all of DEFENDANTS' past and present assistant managers in
13 California during the period from December 19, 2003 to the present whose time
14 records do not show him/her taking an unpaid break of at least 30 minutes during
15 the initial five hours of any shift of more than 5 hours;

16 (5) a subclass of all of DEFENDANTS' past and present assistant managers in
17 California during the period from December 19, 2003 to the present whose time
18 records do not show him/her taking an unpaid break of at least 30 minutes during
19 any shift of more than 6 hours;

20 (6) a subclass of all of DEFENDANTS' past and present employees whom
21 DEFENDANTS classified as non-exempt employees in California during the
22 period from December 19, 2003 to the present whose payroll records show
23 him/her receiving meal premium pay at less than his/her required rate of meal
24 premium pay;

25 (7) a subclass of all of DEFENDANTS' past and present California employees
26 who, from DEFENDANTS' records, did not have all vested and unused vacation
27 wages, including all vested and unused personal day wages, paid out at the end of
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1 employment or within 72 hours thereof during the period from December 19,
2 2003 to the present; and

3 (8) a subclass of all of DEFENDANTS' past and present California employees
4 who incurred work related travel costs for Abercrombie beyond the normal work
5 commute costs and who were not reimbursed for such costs during the period
6 from December 19, 2003 to the present;

7 (9) a subclass of all of DEFENDANTS' past California employees whose
8 employment ended at any time between December 19, 2003 to the present and
9 who were not paid all wages on termination or within 72 hours thereof;

10 (10) a subclass of all of DEFENDANTS past and present employees whom
11 DEFENDANTS classified as non-exempt employees in California during the
12 period from December 19, 2003 to the present whom, upon showing up for their
13 scheduled shift, had their scheduled work shift(s) cancelled and/or reduced to less
14 than half of the original scheduled shift;

15 (11) a subclass of all of DEFENDANTS past and present employees whom
16 DEFENDANTS classified as non-exempt in California during the period from
17 December 19, 2003 to the present and who were subjected to uncompensated
18 security checks;

19 (12) a subclass of all of DEFENDANTS past and present employees whom
20 DEFENDANTS classified as non-exempt in California during the period from
21 December 19, 2003 to the present and who performed work related travel for
22 Abercrombie beyond the normal work commute without compensation; and

23 (13) a subclass of all of DEFENDANTS past and present employees whom
24 DEFENDANTS classified as non-exempt in California during the period from
25 December 19, 2003 to the present and who were not paid wages at the minimum
26 wage for each hour worked.
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28 **18. Numerosity:** Plaintiffs allege that there are well over 1000 sales associates and

1 well over 500 assistant managers who would be part of the proposed classes. The members of
2 the classes are so numerous that joinder of all members would be impractical, if not impossible.
3 The identity of the members of the class is readily ascertainable by review of DEFENDANTS'
4 records, including payroll records. Plaintiffs are informed and believe and based thereon allege
5 that DEFENDANTS failed to (a) pay all final wages upon termination of employment, (b)
6 provide proper meal periods in violation of Labor Code § 226.7, (c) pay all minimum and regular
7 wages, (d) pay all earned vacation wages, (e) reimburse its employees for work-related expenses,
8 (f) keep proper payroll records in violation of Labor Code § 226, (g) pay proper reporting time
9 pay, and (h) engaged in Unfair Business Practices, all in violation of IWC Wage Order No 7-
10 2001.

11 **19. Adequacy of Representation:** The named Plaintiffs are fully prepared to take all
12 necessary steps to represent fairly and adequately the interests of the class defined above.
13 Plaintiffs' attorneys are ready, willing and able to fully and adequately represent the class and
14 individual Plaintiffs. Plaintiffs' attorneys have prosecuted and settled wage-and-hour class
15 actions in the past and currently have a number of wage-and-hour class actions pending in
16 California courts.

17 **20.** DEFENDANTS uniformly administered a corporate policy, practice of failing to
18 (a) provide or allow Plaintiffs and Class Members to take meal periods in compliance with
19 California Labor Code 226.7 and applicable IWC Wage Orders, (b) pay Plaintiffs and Class
20 Members all final wages upon termination of employment, (c) pay all minimum and regular
21 wages, (d) pay all earned vacation wages, (e) reimburse its employees for work-related expenses,
22 (f) keep proper payroll records in violation of Labor Code § 226 for Plaintiffs and Class
23 Members, and (g) engaging in Unfair Business Practices, all in violation of IWC Wage Orders.

24 **21.** Plaintiffs are informed and believe and based thereon allege that DEFENDANTS,
25 in violation of California Labor Code §§ 201 to 204, respectfully, had a consistent and uniform
26 policy, practice of willfully failing to comply with Labor Code § 203. Plaintiffs and other
27 members of the class did not secret or absent themselves from DEFENDANTS, nor refuse to
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1 accept the earned and unpaid wages from DEFENDANTS. Accordingly, DEFENDANTS are
2 liable for waiting time compensation for the unpaid wages to separated employees pursuant to
3 California Labor Code § 203.

4 **22. Common Question of Law and Fact:** There are predominant common questions
5 of law and fact and a community of interest amongst Plaintiffs and the claims of the class
6 concerning DEFENDANTS' failure to (a) pay to Plaintiffs and the class members all final wages
7 upon termination of employment, (b) provide proper meal periods in violation of Labor Code §
8 226.7 to Plaintiffs and the class members, (c) pay all minimum and regular wages, (d) pay all
9 earned vacation wages, (e) reimburse its employees for work-related expenses, (f) keep proper
10 payroll records in violation of Labor Code § 226 for Plaintiff and the class members, (g) pay
11 reporting time pay, and (h) engaging in Unfair Business Practices, all in violation of IWC Wage
12 Order No 7-2001.

13 **23. Typicality:** The claims of Plaintiffs are typical of the claims of all members of
14 the class in that Plaintiffs have suffered the harms alleged in this Complaint in a similar and
15 typical manner as the class members. Plaintiffs were denied the opportunity to take meal periods
16 in compliance with California law. Plaintiffs were denied proper minimum and regular wages.
17 Plaintiffs were denied their earned and unused vacation wages, including personal day wages.
18 Plaintiffs were not reimbursed for their work-related expenses. Plaintiffs were not paid their
19 reporting time pay. Plaintiffs were not paid their final wages in a timely fashion and
20 DEFENDANTS did not keep accurate records of the hours worked, the rates of pay, wages
21 earned, net wages earned, the hours and wages earned in proper pay periods in violation of
22 California law. Plaintiffs are members of the Classes and has suffered the alleged violations of
23 California Labor Code §§ 201-204, 226, 226.7, 227.3, 1194, 2802, and IWC Wage Order No. 7-
24 California Labor Code §§ 201-204, 226, 226.7, 227.3, 1194, 2802, and IWC Wage Order No. 7-
25 2001.

26 **24.** The California Labor Code and upon which Plaintiffs base their claims are
27 broadly remedial in nature. These laws and labor standards serve an important public interest in
28 establishing minimum working conditions and standards in California. These laws and labor

1 standards protect the average working employee from exploitation by employers who may seek
2 to take advantage of superior economic and bargaining power in setting onerous terms and
3 conditions of employment.

4 **25.** The nature of this action and the format of laws available to Plaintiffs and
5 members of the class identified herein make the class action format a particularly efficient and
6 appropriate procedure to redress the wrongs alleged herein. If each employee were required to
7 file an individual lawsuit, the corporate DEFENDANTS would necessarily gain an
8 unconscionable advantage since it would be able to exploit and overwhelm the limited resources
9 of each individual plaintiff with their vastly superior financial and legal resources. Requiring
10 each class member to pursue an individual remedy would also discourage the assertion of
11 lawful claims by employees who would be disinclined to file an action against their former
12 and/or current employer for real and justifiable fear of retaliation and permanent damage to their
13 careers at subsequent employment.

14 **26.** The prosecution of separate actions by the individual class members, even if
15 possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect
16 to individual class members against the DEFENDANTS and which would establish potentially
17 incompatible standards of conduct for the DEFENDANTS, and/or (b) adjudications with respect
18 to individual class members which would, as a practical matter, be dispositive of the interest of
19 the other class members not parties to the adjudications or which would substantially impair or
20 impede the ability of the class members to protect their interests. Further, the claims of the
21 individual members of the class are not sufficiently large to warrant vigorous individual
22 prosecution considering all of the concomitant costs and expenses.

24 **27.** Such a pattern, practice and uniform administration of corporate policy regarding
25 illegal employee compensation described herein is unlawful and creates an entitlement to
26 recovery by the Plaintiff and the class identified herein, in a civil action, for the unpaid balance
27 of the full of meal break period premiums, unpaid regular and vacation wages, unpaid
28 reimbursements, including interest thereon, applicable penalties, reasonable attorney's fees, and

1 excess of five (5) hours per day and accordingly had a right to take a 30-minute meal period each
2 day worked in excess of five (5) hours. Furthermore, Plaintiffs and other members of Subclasses
3 2, 3, 4, 5 and 6 who worked in excess of ten (10) hours per day had a right to take a second 30-
4 minute meal period each day worked in excess of ten (10) hours.

5 33. Plaintiffs in Subclass 6, to the extent paid missed meal premium wages were paid
6 such missed meal premium wages below the required rate for meal premium pay.

7 34. As a pattern and practice, DEFENDANTS regularly required employees to work
8 through their meal periods without proper compensation and denied Plaintiffs and their
9 employees the right to take proper meal periods as required by law.

10 35. This policy of requiring employees to work through their legally mandated meal
11 periods and not allowing them to take proper meal periods is a violation of California law.

12 36. Plaintiffs are informed and believe and based thereon allege that DEFENDANTS
13 willfully failed to pay employees who were not provided the opportunity to take meal breaks the
14 premium compensation set out in Labor Code § 226.7 and IWC Wage Order No. 7 § 11(B) and
15 that Plaintiffs and those employees similarly situated as her are owed wages for the meal period
16 violations set forth above. Plaintiffs are informed and believe and based thereon allege
17 DEFENDANTS' willful failure to provide Plaintiffs and other members of Subclasses 2, 3, 4, 5
18 and 6 the wages due and owing them upon separation from employment results in a continued
19 payment of wages up to thirty (30) days from the time the wages were due. Therefore, Plaintiffs
20 and other members of Subclasses 2, 3, 4, 5 and 6 who have separated from employment are
21 entitled to compensation pursuant to Labor Code § 203.

22 37. Such a pattern, practice and uniform administration of corporate policy as
23 described herein is unlawful and creates an entitlement to recovery by the Plaintiffs and other
24 members of Subclasses 2, 3, 4, 5 and 6 identified herein, in a civil action, for the unpaid balance
25 of the unpaid premium compensation pursuant to Labor Code § 226.7 and IWC Wage Order No.
26 7 § 11(B), including interest thereon, penalties, reasonable attorney's fees, and costs of suit.
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1 owing, including interest thereon, attorneys fees, and costs of suit according to the mandate of
2 California Labor Code § 218.5.

3 **THIRD CAUSE OF ACTION**

4 **FOR FORFEITURE OF VACATION WAGES**

5 **IN VIOLATION OF LABOR CODE § 227.3**

6 **(AGAINST ALL DEFENDANTS BY PLAINTIFFS ON BEHALF OF SUBCLASS 7)**

7 **44.** Plaintiffs re-allege and incorporate by reference paragraphs 1 through 43 as
8 though fully set for herein.

9 **45.** This cause of action is brought pursuant to Labor Code § 227.3 which prohibits
10 employers from forfeiting the vested vacation wages of their employees.

11 **46.** Plaintiffs had unused vested vacation wages that were not paid out to them in a
12 timely fashion at the end of their employment in violation of Labor Code § 227.3.

13 **47.** As a matter of uniform corporate policy and procedure and practices
14 DEFENDANTS violated Labor Code § 227.3 by failing to pay Plaintiffs and Subclass 4
15 members all vested vacation wages, including Personal Day vacation wages, at the end of their
16 employment. The uniform policy of not paying Plaintiffs and Subclass 7 members all vested
17 vacation wages at the end of their employment caused a forfeiture of vested vacation wages in
18 violation of Labor Code § 227.3.

19 **48.** The conduct of DEFENDANTS and their agents and employees as described
20 herein was willful and was done in conscious disregard of Plaintiffs and Subclass 7 members'
21 rights, and done by managerial employees of DEFENDANTS and supports an award of up to 30
22 days of pay, under Labor Code § 203, as penalties for Plaintiffs and each former employee of
23 DEFENDANTS who were not paid out all vested vacation wages.

24 **49.** Such a pattern, practice and uniform administration of corporate policy regarding
25 illegal employee compensation as described herein is unlawful and creates an entitlement to
26 recovery by Plaintiffs and Subclass 7 members in a civil action for damages and wages owed and
27 for costs and attorney's fees and interest pursuant to Labor Code §§ 215.5 and 218.6.
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- 1 9. Upon the Sixth Cause of Action, for damages or penalties pursuant to statute as set forth
2 in California Labor Code § 226, and for costs and attorney's fees;
- 3 10. Upon the Seventh Cause of Action, for reporting time pay and for waiting time penalties
4 according to proof pursuant to California Labor Code § 203;
- 5 11. Upon the Eighth Cause of Action, for all minimum wages owed and for waiting time
6 penalties according to proof pursuant to California Labor Code § 203
- 7 12. Upon the Ninth Cause of Action, for restitution to Plaintiff and other similarly effected
8 members of the general public of all funds unlawfully acquired by Defendants by means
9 of any acts or practices declared by this Court to be in violation of Business and
10 Professions Code § 17200 et seq., for an injunction to prohibit Defendants to engage in
11 the unfair business practices complained of herein, for an injunction requiring Defendants
12 to give notice to persons to whom restitution is owing of the means by which to file for
13 restitution;
- 14 13. On all causes of action for attorneys fees and costs as provided by California Labor Code
15 §§ 218.5, 226, 226.7, 1194, and Code of Civil Procedure § 1021.5 and for such other and
16 further relief the Court may deem just and proper.

17
18 **Dated: July 31, 2009**

LAW OFFICES OF PETER M. HART

19
20
21 By: 

Peter M. Hart, Esq. *By C. Hart*
Attorney for Plaintiffs

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24 **DEMAND FOR JURY TRIAL**

25 Plaintiffs, for themselves and the class, hereby demand a jury trial as provided
26 by California law.

1 DATED: July 31, 2009

LAW OFFICES OF PETER M. HART

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3 By: Peter M. Hart
4 Peter M. Hart (By COA)
5 Attorney for Plaintiffs
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