

CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release (“the Agreement”) is entered into this 1st day of July, 2003 (“the Effective Date”), between Plaintiff Peter Plaintiff, on behalf of himself and all others similarly situated, on the one hand (collectively “Plaintiffs”), and Defendant Defendant Co., its parents, affiliates, successors and assigns on the other.

RECITALS

A. On March 1, 2002, Plaintiff filed a class action suit for unpaid overtime, interest and penalties in the United States District Court for the Northern District of California, entitled Plaintiff v. Defendant Co., which alleged causes of action for unpaid wages, waiting time penalties, violation of Bus. & Prof. Code section 17200 et seq., and fraudulent concealment. Defendant denies each of the allegations in the Lawsuit.

B. Plaintiffs and Defendant desire to settle the Lawsuit in the manner and upon the terms and conditions set forth below.

C. The parties engaged in discovery and exchanged substantial information.

TERMS OF AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, it is hereby stipulated and agreed by and among the undersigned, subject to the Court’s written approval of this settlement as fair, just, and reasonable, and having been made in good faith, that all disputes and all claims shall be settled and compromised as follows:

1. **IDENTITY OF CLASS.** The parties hereby stipulate to conditional class certification for the purposes of settling the Lawsuit. The class is defined as: “All current or former employees of Defendant who, at any time during the period of January 1, 2000 through December 31, 2004 (‘the Class Period’), served in the position of Outside Salesperson for Defendant Co. in the State of California.”

2. SETTLEMENT CONSIDERATION.

2.1. Establishment of Escrow Fund. Upon Defendant's receipt of notice of the Court's final approval of the settlement, Defendant shall have available a fund ("the Escrow Account") in the total sum of _____. The Escrow Account shall be maintained in Defendant's name, but disbursements from the Escrow Account shall be directed by the Claims Administrator (defined below). The Escrow Account may be subject to reduction only as set forth in Section 8 below.

2.2. Hiring of Accounting Firm. The firm of Ernst & Young shall act as Claims Administrator. Within three (3) business days of receipt of Proof of Claim Forms described in Section 8 of this Agreement, the Claims Administrator shall perform the calculations set forth in Section 2.3. Upon completing its calculations, the Claims Administrator shall prepare a written report setting forth the Payment Due for each class member and shall forward that report to counsel for Plaintiffs and Defendant. Plaintiffs and Defendant shall have the right to question the Claims Administrator concerning the preparation of the report.

2.3. Payment Due. The Claims Administrator shall calculate the Payment Due for each class member as follows:

2.3.1. "Work Months" shall be the number of full months that the class member was employed by Defendant as an Outside Salesperson in California during the Class Period.

2.3.2. "Total Months" shall be the number of months worked collectively by those Outside Salespersons participating in the distribution of the settlement proceeds by having timely provided the Claims Administrator with the appropriate form.

2.3.3. Formula for Calculating Payment Due. The payment due to each class member shall be calculated according to the following formula:

$$\textit{Payment Due} = (\textit{Work Months divided by Total Months}) \times (\textit{The Escrow Account})$$

2.4. Expenses of Escrow Account. The reasonable fees and costs of the Claims Administrator shall be paid by Defendant.

2.5. Names, Addresses and Months Worked. Within five (5) business days of signing the Agreement, the parties will provide the Claims Administrator with the names, Work Months and last known addresses of the class members.

3. **CLAIMS ADMINISTRATOR.** The Claims Administrator shall direct payments from the Escrow Account, carry out the notice procedure, and direct the payment of claims as provided herein.

4. **NOTICE TO CLASS MEMBERS.** Not later than ten (10) business days after the Court's preliminary approval of the settlement, and unless otherwise ordered by the court, the Claims Administrator shall mail to each class member a "Notice of Settlement of Class Action" and a "Proof of Claim Form and Release," in the forms attached hereto as Exhibits A and B, respectively. The "Notice of Settlement of Class Action" and "Proof of Claim Form and Release" shall be mailed to the class member's last known residential address provided by Defendant to the Claims Administrator. All reasonable costs of notice (including without limitation postage and copying charges) shall be paid by Defendant.

5. **PAYMENT OF ATTORNEY'S FEES, COSTS AND EXPENSES.** To compensate Plaintiffs' counsel for the attorney's fees and costs necessary to prosecute this case, Defendant shall pay Plaintiffs' counsel the sum of _____ which amount shall be due and payable within ten (10) business days of the Court's final approval of the settlement and its dismissal with prejudice of the lawsuit. Of this amount, _____ represents the reimbursement of expenses. To the extent that expenses are less than _____, the difference between actual expenses and _____ will be distributed to the class members who participate in this settlement. Defendant shall not oppose Plaintiff's application for fees and costs consistent with this Section, and Plaintiff shall not seek fees in excess of this agreed-upon amount.

7. **ENHANCED COMPENSATION FOR NAMED PLAINTIFF.** To compensate named Plaintiff, Peter Plaintiff, for his time, expense and effort in prosecuting this case, the Defendant shall pay Mr. Plaintiff the additional sum of _____ unless some other amount is ordered by the court. This payment shall be made at the same time the settlement proceeds are distributed to the participating class members.

8. **PAYMENT OF CLAIMS.** Class members shall submit a signed "Proof of Claim Form and Release" to the Claims Administrator not later than thirty three (33) calendar days from the date the Claims Administrator mailed out the forms to the class members, unless otherwise ordered by the court. The date thirty-three days from the date of mailing by the Claims Administrator is the "Deadline". The date of submission by a class member is the date the document is actually received by the Claims Administrator. The Claims Administrator is authorized to direct payment of only the claims of those class members who have not opted out and who have submitted by the Deadline a signed "Proof of Claim Form and Release," with their names clearly identified.

Not later than ten (10) business days after the Deadline, the Claims Administrator shall deliver a written report to counsel for Plaintiffs and Defendant setting forth: (1) the name of each class member who has timely submitted a "Proof of Claim Form and Release" and the amount that class member is entitled to receive under the terms of the Agreement; (2) the name of each class member who has not responded; and (3) the name of each class member who has opted out of the settlement and whether or not the class member intends to bring an action against Defendant.

Within ten (10) business days following the Court's final approval of the settlement, the Claims Administrator shall make sure that distributions from the Escrow Account are completed in accordance with this Agreement, unless otherwise ordered by the Court. Half (50%) of each such distribution shall have deductions taken for appropriate federal and California taxes, while the remaining half shall be payable in a lump sum representing interest (25%) and penalties (25%). Any amounts remaining in the Escrow Account after 150 days from

the distribution of the settlement proceeds shall revert to Defendant, and any class member who does not opt out of the settlement or file a Proof of Claim Form within the response period agreeing to the settlement shall be deemed to have forfeited his or her share of the settlement.

In the event that class members opt out of the settlement or fail to respond such that the collective number of months of employment during the Class Period of those opting out and not responding total more than 322, the Escrow Account shall be reduced by any additional opt-outs in an amount calculated as follows: (months of employment of opt-outs in excess of 322) divided by (Total Months) times the Escrow Account. Any such reduction shall revert to Defendant.

9. **RELEASE OF CLAIMS.** Plaintiffs and the class (hereinafter “Releasing Parties”), in consideration of the promises set forth herein, hereby release and discharge any and all claims for:

- (1) unpaid overtime wages;
- (2) unpaid straight time wages in excess of 7.25 hours per day;
- (3) waiting time penalties relating to the alleged failure to pay overtime or straight time wages;
- (4) interest on alleged unpaid wages;
- (5) costs and attorney’s fees associated with the recovery of alleged unpaid wages;
- (6) any other damages relating to the alleged failure to pay overtime or straight time wages; and
- (7) fraud regarding their exempt or non-exempt status,

that the Releasing Parties may have had arising from their employment with Defendant, its parents, subsidiaries or affiliates, in any Defendant Co. position within the State of California. It is understood and agreed that, as a condition of this release, Plaintiffs and the class knowingly

waive any and all claims, rights, or benefits they may have under Cal. Civil Code section 1542 with respect to the released claims. Section 1542 provides as follows:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

10. STIPULATION FOR COURT APPROVAL. Promptly after execution of this Agreement, Plaintiffs and Defendant shall execute and file the “Stipulation and Order Certifying Class for Settlement Purposes Only,” attached hereto as Exhibit C, and the “Stipulation and Order Granting Preliminary Approval of Settlement and Setting Hearing for Final Approval,” attached hereto as Exhibit D. The parties and their counsel agree to execute all such further and additional documents as the Court may require to carry out the provisions of this Agreement.

11. NO RETALIATION AGAINST CLASS MEMBERS. Defendant will not threaten, discriminate or retaliate against, either directly or indirectly, any class member because of his or her participation or non-participation in this settlement.

12. DISMISSAL OF LAWSUIT. The Lawsuit shall be dismissed concurrent with the Court’s final approval of the settlement. The dismissal shall be with prejudice with respect to the Releasing Parties. The court shall retain jurisdiction to enforce and monitor the settlement.

13. MISCELLANEOUS.

13.1. Entire Agreement. This instrument constitutes the entire agreement and understanding between the parties hereto concerning the subject matter hereof, and supersedes and replaces all prior negotiations and proposed agreements, written and oral, relating thereto. Plaintiffs and Defendant may waive, release or alter any provision of this Agreement, but in no event will such waiver, release or alteration be valid unless it is in writing and signed by duly authorized representatives of Plaintiffs and Defendant and approved in writing by the Court. No waiver of any term, provision or condition of this Agreement, whether

by conduct or otherwise, in any one or more instance shall be deemed to be or construed as a further or continuing waiver of any such term.

13.2. Authority. The undersigned counsel and the parties represent that they are authorized to enter into and execute this Agreement.

13.3. Best Efforts. Each of the undersigned agrees to use his or her best efforts to take, or cause to be taken, all actions as may be reasonably required in order to effectuate this Agreement.

13.4. No Admissions. This Agreement, the settlement and any proceedings or documents in connection therewith shall not be construed as an admission of truth of any allegation or the validity of any claim asserted or of any liability therein; nor shall this Agreement, nor the settlement, nor any papers related to them, nor any of the terms hereof be offered or received in evidence or in any way referred to in any civil, criminal or administrative action or proceeding other than such proceedings as may be necessary to consummate or enforce this Agreement; nor shall they be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing.

13.5. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and together shall constitute one and the same instrument and when each party has signed at least one such counterpart, this Agreement shall become binding and effective as to all parties as of the day and year first above written.

13.6. Governing Law. This Agreement shall be interpreted and enforced under the laws of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

Plaintiff:

Peter Plaintiff

Defendant:

Defendant Co.

By: _____

Title: _____

APPROVED AS TO FORM:

The Law Offices Of Plaintiff's Attorney

Plaintiff's Attorney
Attorneys for Plaintiffs

THELEN REID & PRIEST LLP

Attorneys for Defendant Co.