

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

Norman B. Blumenthal (State Bar #068687)
Kyle R. Nordrehaug (State Bar #205975)
Aparajit Bhowmik (State Bar #248066)
Nicholas J. De Blouw (State Bar #280922)
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858)551-1223
Facsimile: (858) 551-1232
Website: www.bamlawca.com

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

22CV394401

Case No. _____

KENNETH NGUYEN, on behalf of the
State of California, as a private attorney
general,

Plaintiff,

vs.

PORT PLASTICS, INC., a California
Corporation; and DOES 1 through 50,
inclusive,

Defendants.

**REPRESENTATIVE ACTION COMPLAINT
FOR:**

1. Civil Penalties Pursuant to Labor Code
§ 2699, *et seq.* for violations of Labor
Code §§ 201, 202, 203, 204 *et seq.*, 210,
221, 226(a), 226.7, 227.3, 510, 512,
558(a)(1)(2), 1194, 1197, 1197.1, 1198,
2802, California Code of Regulations,
Title 8, Section 11040, Subdivision 5(A)-
(B), and the applicable Wage Order(s).

1 Plaintiff Kenneth Nguyen (“PLAINTIFF”), on behalf of the people of the State of
2 California and as an “aggrieved employee” acting as a private attorney general under the Labor
3 Code Private Attorney General Act of 2004, § 2699, *et seq.* (“PAGA”) only, alleges on
4 information and belief, except for his own acts and knowledge which are based on personal
5 knowledge, the following:

6 **INTRODUCTION**

7 1. PLAINTIFF brings this action against Defendant Port Plastics, Inc. (referred to
8 as “DEFENDANT”) seeking only to recover PAGA civil penalties for himself, and on behalf
9 of all current and former aggrieved employees that worked for DEFENDANT. PLAINTIFF
10 does **not seek to recover anything other than penalties as permitted by California Labor**
11 **Code § 2699**. To the extent that statutory violations are mentioned for wage violations,
12 PLAINTIFF does not seek underlying general and/or special damages for those violations, but
13 simply the civil penalties permitted by California Labor Code § 2699.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of himself and on behalf of others for PAGA penalties *only*, which is the precise and sole
16 nature of this action.

17 3. Accordingly, PLAINTIFF seeks to obtain all applicable relief for
18 DEFENDANT’s violations under PAGA and solely for the relief as permitted by PAGA – that
19 is, penalties and any other relief the Court deems proper pursuant to the PAGA. Nothing in this
20 complaint should be construed as attempting to obtain any relief that would not be available in
21 a PAGA-only action.

22 **THE PARTIES**

23 4. Defendant Port Plastics, Inc. “DEFENDANT”) is a California Corporation that
24 at all relevant times mentioned herein conducted and continues to conduct substantial business
25 in the state of California.

26 5. DEFENDANT is a plastics distribution company.

27 6. PLAINTIFF was employed by DEFENDANT in California from January of 2020
28

1 to March of 2020 and also employed by DEFENDANT from June of 2020 to October 8, 2021
2 and was at all times classified by DEFENDANT as a non-exempt employee, paid on an hourly
3 basis, and entitled to the legally required meal and rest periods and payment of minimum and
4 overtime wages due for all time worked.

5 7. PLAINTIFF, and such persons that may be added from time to time who satisfy
6 the requirements and exhaust the administrative procedures under the Private Attorney General
7 Act, brings this Representative Action on behalf of the State of California with respect to
8 himself and all individuals who are or previously were employed by DEFENDANT in
9 California and classified as non-exempt employees ("AGGRIEVED EMPLOYEES") during
10 the time period of December 9, 2020 until a date as determined by the Court (the "PAGA
11 PERIOD").

12 8. PLAINTIFF, on behalf of himself and all AGGRIEVED EMPLOYEES presently
13 or formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
14 action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for DEFENDANT's
15 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3,
16 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title
17 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s). Based upon the
18 foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved employees within
19 the meaning of Labor Code § 2699, *et seq.*

20 9. The true names and capacities, whether individual, corporate, subsidiary,
21 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently
22 unknown to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant
23 to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
24 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.
25 PLAINTIFF is informed and believes, and based upon that information and belief alleges, that
26 the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
27 responsible in some manner for one or more of the events and happenings that proximately
28 caused the injuries and damages hereinafter alleged.

10. The agents, servants and/or employees of the Defendants and each of them acting on behalf of the Defendants acted within the course and scope of his, her or its authority as the agent, servant and/or employee of the Defendants, and personally participated in the conduct alleged herein on behalf of the Defendants with respect to the conduct alleged herein. Consequently, the acts of each Defendant are legally attributable to the other Defendants and all Defendants are jointly and severally liable to PLAINTIFF and the other AGGRIEVED EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants' agents, servants and/or employees.

THE CONDUCT

11. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT was required to pay PLAINTIFF and other AGGRIEVED EMPLOYEES for all their time worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work. DEFENDANT required PLAINTIFF and other AGGRIEVED EMPLOYEES to work without paying them for all the time they were under DEFENDANT's control. Among other things, DEFENDANT required PLAINTIFF to work while clocked out during what was supposed to be PLAINTIFF's off-duty meal break. PLAINTIFF was from time to time interrupted by work assignments while clocked out for what should have been PLAINTIFF's off-duty meal break. PLAINTIFF and other AGGRIEVED EMPLOYEES also worked off the clock with respect to time spent undergoing mandatory drug testing or any other testing and/or examination required as a condition of employment. DEFENDANT, as a matter of established company policy and procedure, administered a uniform practice of rounding the actual time worked and recorded by PLAINTIFF and other AGGRIEVED EMPLOYEES, always to the benefit of DEFENDANT, so that during the course of their employment, PLAINTIFF and other AGGRIEVED EMPLOYEES were paid less than they would have been paid had they been paid for actual recorded time rather than "rounded" time. Additionally, DEFENDANT engaged in the practice of requiring PLAINTIFF and other AGGRIEVED EMPLOYEES to perform work off the clock in that DEFENDANT, as a

1 condition of employment, required these employees to submit to mandatory temperature checks
2 and symptom questionnaires for COVID-19 screening prior to clocking into DEFENDANT's
3 timekeeping system for the workday. As a result, the PLAINTIFF and the other AGGRIEVED
4 EMPLOYEES forfeited time worked by working without their time worked being correctly
5 recorded and without compensation being paid for all hours worked, including overtime
6 worked. As a result, PLAINTIFF and other AGGRIEVED EMPLOYEES forfeited minimum
7 wage, overtime wage compensation, and off-duty meal breaks by working without their time
8 being correctly recorded and without compensation at the applicable rates. DEFENDANT's
9 policy and practice not to pay PLAINTIFF and other AGGRIEVED EMPLOYEES for all time
10 worked, is evidenced by DEFENDANT's business records.

11 12. State law provides that employees must be paid overtime and meal and rest break
12 premiums at one-and-one-half times their "regular rate of pay." PLAINTIFF and other
13 AGGRIEVED EMPLOYEES were compensated at an hourly rate plus incentive pay that was
14 tied to specific elements of an employee's performance.

15 13. The second component of PLAINTIFF's and other AGGRIEVED EMPLOYEES'
16 compensation is DEFENDANT's non-discretionary incentive program that paid PLAINTIFF
17 and other AGGRIEVED EMPLOYEES incentive wages based on their performance for
18 DEFENDANT. The non-discretionary incentive program provided all employees paid on an
19 hourly basis with incentive compensation when the employees met the various performance
20 goals set by DEFENDANT. However, when calculating the regular rate of pay in order to pay
21 overtime and meal and rest break premiums to PLAINTIFF and other AGGRIEVED
22 EMPLOYEES, DEFENDANT failed to include the incentive compensation as part of the
23 employees' "regular rate of pay" for purposes of calculating overtime pay and meal and rest
24 break premium pay. Management and supervisors described the incentive program to potential
25 and new employees as part of the compensation package. As a matter of law, the incentive
26 compensation received by PLAINTIFF and other AGGRIEVED EMPLOYEES must be
27 included in the "regular rate of pay." The failure to do so has resulted in a underpayment of
28 overtime compensation and meal and rest break premiums to PLAINTIFF and other

1 AGGRIEVED EMPLOYEES by DEFENDANT.

2 14. As a result of their rigorous work schedules, PLAINTIFF and other AGGRIEVED
3 EMPLOYEES were from time to time unable to take thirty (30) minute off duty meal breaks
4 and were not fully relieved of duty for their meal periods. PLAINTIFF and other AGGRIEVED
5 EMPLOYEES were required from time to time to perform work as ordered by DEFENDANT
6 for more than five (5) hours during some shifts without receiving a meal break. Further,
7 DEFENDANT from time to time failed to provide PLAINTIFF and other AGGRIEVED
8 EMPLOYEES with a second off-duty meal period for some workdays in which these employees
9 were required by DEFENDANT to work ten (10) hours of work. DEFENDANT also engaged
10 in the practice of rounding the meal period times to avoid paying penalties to PLAINTIFF and
11 other AGGRIEVED EMPLOYEES. PLAINTIFF and other AGGRIEVED EMPLOYEES
12 therefore forfeit meal breaks without additional compensation and in accordance with
13 DEFENDANT's corporate policy and practice.

14 15. During the PAGA PERIOD, PLAINTIFF and other AGGRIEVED EMPLOYEES
15 were also required from time to time to work in excess of four (4) hours without being provided
16 ten (10) minute rest periods. Further, these employees were denied their first rest periods of at
17 least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours from time to
18 time, a first and second rest period of at least ten (10) minutes for some shifts worked of
19 between six (6) and eight (8) hours from time to time, and a first, second and third rest period
20 of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time.
21 PLAINTIFF and other AGGRIEVED EMPLOYEES were also not provided with one hour
22 wages in lieu thereof. Additionally, the applicable California Wage Order requires employers
23 to provide employees with off-duty rest periods, which the California Supreme Court defined
24 as time during which an employee is relieved from all work related duties and free from
25 employer control. In so doing, the Court held that the requirement under California law that
26 employers authorize and permit all employees to take rest period means that employers must
27 relieve employees of all duties and relinquish control over how employees spend their time
28 which includes control over the locations where employees may take their rest period.

1 Employers cannot impose controls that prohibit an employee from taking a brief walk - five
2 minutes out, five minutes back. Here, DEFENDANT's policy restricted PLAINTIFF and other
3 AGGRIEVED EMPLOYEES from unconstrained walks and is unlawful based on
4 DEFENDANT's rule which states PLAINTIFF and other AGGRIEVED EMPLOYEES cannot
5 leave the work premises during their rest period.

6 16. During the PAGA PERIOD, DEFENDANT failed to accurately record and pay
7 PLAINTIFF and other AGGRIEVED EMPLOYEES for the actual amount of time these
8 employees worked. Pursuant to the Industrial Welfare Commission Wage Orders,
9 DEFENDANT was required to pay PLAINTIFF and other AGGRIEVED EMPLOYEES for
10 all time worked, meaning the time during which an employee was subject to the control of an
11 employer, including all the time the employee was permitted or suffered to permit this work.
12 DEFENDANT required these employees to work off the clock without paying them for all the
13 time they were under DEFENDANT's control. As such, DEFENDANT knew or should have
14 known that PLAINTIFF and the other AGGRIEVED EMPLOYEES were under compensated
15 for all time worked. As a result, PLAINTIFF and other AGGRIEVED EMPLOYEES forfeited
16 time worked by working without their time being accurately recorded and without compensation
17 at the applicable minimum wage and overtime wage rates. To the extent that the time worked
18 off the clock does not qualify for overtime premium payment, DEFENDANT fails to pay
19 minimum wages for the time worked off-the-clock in violation of Cal. Lab. Code §§ 1194,
20 1197, and 1197.1.

21 17. From time to time, DEFENDANT also failed to provide PLAINTIFF and the
22 other AGGRIEVED EMPLOYEES with complete and accurate wage statements which failed
23 to show, among other things, the correct gross and net wages earned. Cal. Lab. Code § 226
24 provides that every employer shall furnish each of his or her employees with an accurate
25 itemized wage statement in writing showing, among other things, gross wages earned and all
26 applicable hourly rates in effect during the pay period and the corresponding amount of time
27 worked at each hourly rate. PLAINTIFF and other AGGRIEVED EMPLOYEES were paid on
28 an hourly basis. As such, the wage statements should reflect all applicable hourly rates during

1 the pay period and the total hours worked, and the applicable pay period in which the wages
2 were earned pursuant to California Labor Code Section 226(a). The wage statements
3 DEFENDANT provided to PLAINTIFF and other AGGRIEVED EMPLOYEES failed to
4 identify such information. More specifically, the wage statements failed to identify the accurate
5 total hours worked each pay period. When the hours shown on the wage statements were added
6 up, they did not equal the actual total hours worked during the pay period. Aside, from the
7 violations listed above in this paragraph, DEFENDANT failed to issue to PLAINTIFF an
8 itemized wage statement that lists all the requirements under California Labor Code 226 *et seq.*
9 As a result, DEFENDANT from time to time provided PLAINTIFF and the other AGGRIEVED
10 EMPLOYEES with wage statements which violated Cal. Lab. Code § 226.

11 18. Cal. Lab. Code § 204(d) provides, the requirements of this section shall be
12 deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the
13 wages are paid not more than seven calendar days following the close of the payroll period.
14 Cal. Lab. Code § 210 provides:

15 [I]n addition to, and entirely independent and apart from, any other penalty provided in
16 this article, every person who fails to pay the wages of each employee as provided in
17 Sections. . . 204. . . shall be subject to a civil penalty as follows: (1) For any initial
18 violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each
19 subsequent violation, or any willful or intentional violation, two hundred dollars (\$200)
20 for each failure to pay each employee, plus 25 percent of the amount unlawfully
21 withheld.

19 19. DEFENDANT from time to time failed to pay PLAINTIFF and other
20 AGGRIEVED EMPLOYEES within seven (7) days of the close of the payroll period in
21 accordance with Cal. Lab. Code § 204(d).

22 20. DEFENDANT underpaid sick pay wages to PLAINTIFF and other AGGRIEVED
23 EMPLOYEES by failing to pay such wages at the regular rate of pay in violation of Cal. Lab.
24 Code Section 246. Specifically, PLAINTIFF and other non-exempt employees earn non-
25 discretionary remuneration. Rather than pay sick pay at the regular rate of pay, DEFENDANT
26 underpaid sick pay to PLAINTIFF and other AGGRIEVED EMPLOYEES at their base rates
27 of pay.

28 21. Cal. Lab. Code Section 246(1)(2) requires that paid sick time for nonexempt

1 employees be calculated by dividing the employee's total wages, not including overtime
2 premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days
3 of employment.

4 22. DEFENDANT violated Cal. Lab. Code Section 246 by failing to pay sick pay at
5 the regular rate of pay. PLAINTIFF and other AGGRIEVED EMPLOYEES routinely earned
6 non-discretionary incentive wages which increased their regular rate of pay. However, when
7 sick pay was paid, it was paid at the base rate of pay for PLAINTIFF and other AGGRIEVED
8 EMPLOYEES, as opposed to the correct, higher regular rate of pay, as required under Cal. Lab.
9 Code Section 246.

10 23. As a pattern and practice, DEFENDANT regularly failed to pay PLAINTIFF and
11 other AGGRIEVED EMPLOYEES their correct wages and accordingly owe waiting time
12 penalties pursuant to Cal. Lab. Code Section 203. Further, PLAINTIFF is informed and believes
13 and based thereon alleges that such failure to pay sick pay at regular rate was willful, such that
14 PLAINTIFF and other AGGRIEVED EMPLOYEES whose employment has separated are
15 entitled to waiting time penalties pursuant to Cal. Lab. Code Sections 201-203.

16 24. Pursuant to Cal. Lab. Code Section 221, "It shall be unlawful for any employer
17 to collect or receive from an employee any part of wages theretofore paid by said employer to
18 said employee." DEFENDANT failed to pay all compensation due to PLAINTIFF and other
19 AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
20 PLAINTIFF and other AGGRIEVED EMPLOYEES, failed to disclose all aspects of the
21 deductions from compensation payable to PLAINTIFF and other AGGRIEVED EMPLOYEES,
22 and thereby failed to pay these employees all wages due at each applicable pay period and upon
23 termination. PLAINTIFF and other AGGRIEVED EMPLOYEES seek recovery of all illegal
24 deductions from wages according to proof, related penalties, interest, attorney fees and costs.

25 25. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
26 PLAINTIFF and the other AGGRIEVED EMPLOYEES for required business expenses
27 incurred by the PLAINTIFF and other AGGRIEVED EMPLOYEES in direct consequence of
28 discharging their duties on behalf of DEFENDANT. Under California Labor Code Section

1 2802, employers are required to indemnify employees for all expenses incurred in the course
2 and scope of their employment. Cal. Lab. Code § 2802 expressly states that "an employer shall
3 indemnify his or her employee for all necessary expenditures or losses incurred by the employee
4 in direct consequence of the discharge of his or her duties, or of his or her obedience to the
5 directions of the employer, even though unlawful, unless the employee, at the time of obeying
6 the directions, believed them to be unlawful."

7 26. In the course of their employment PLAINTIFF and other AGGRIEVED
8 EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal
9 cellular phones as a result of and in furtherance of their job duties as employees for
10 DEFENDANT but are not reimbursed or indemnified by DEFENDANT for the cost associated
11 with the use of their personal cellular phones for DEFENDANT's benefit. Specifically,
12 PLAINTIFF and other AGGRIEVED EMPLOYEES were required by DEFENDANT to use
13 their personal cellular phones. As a result, in the course of their employment with
14 DEFENDANT, PLAINTIFF and other AGGRIEVED EMPLOYEES incurred unreimbursed
15 business expenses which included, but were not limited to, costs related to the use of their
16 personal cellular phones all on behalf of and for the benefit of DEFENDANT.

17 27. All of the conduct and violations alleged herein occurred during the PAGA
18 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
19 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that
20 affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.* 2018.

21 **JURISDICTION AND VENUE**

22 28. This Court has jurisdiction over this Action pursuant to California Code of Civil
23 Procedure, Section 410.10.

24 29. Venue is proper in this Court pursuant to California Code of Civil Procedure,
25 Sections 395 and 395.5, because PLAINTIFF worked in this County for DEFENDANT and
26 DEFENDANT (i) currently maintains and at all relevant times maintained offices and facilities
27 in this County and/or conducts substantial business in this County, and (ii) committed the
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1 wrongful conduct herein alleged in this County against PLAINTIFF and other AGGRIEVED
2 EMPLOYEES.

3
4 **FIRST CAUSE OF ACTION**

5 **For Violation of the Private Attorneys General Act**

6 **[Cal. Lab. Code §§ 2698, *et seq.*]**

7 **(By PLAINTIFF and Against All Defendants)**

8 30. PLAINTIFF realleges and incorporates by this reference, as though fully set
9 forth herein, the prior paragraphs of this Complaint.

10 31. PAGA is a mechanism by which the State of California itself can enforce state
11 labor laws through the employee suing under the PAGA who do so as the proxy or agent of
12 the state's labor law enforcement agencies. An action to recover civil penalties under
13 PAGA is fundamentally a law enforcement action designed to protect the public and not to
14 benefit private parties. The purpose of the PAGA is not to recover damages or restitution,
15 but to create a means of "deputizing" citizens as private attorneys general to enforce the
16 Labor Code. In enacting PAGA, the California Legislature specified that "it was ... in the
17 public interest to allow aggrieved employees, acting as private attorneys general to recover
18 civil penalties for Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA
19 claims cannot be subject to arbitration.

20 32. PLAINTIFF, and such persons that may be added from time to time who
21 satisfy the requirements and exhaust the administrative procedures under the Private
22 Attorney General Act, brings this Representative Action on behalf of the State of California
23 with respect to himself and all individuals who are or previously were employed by
24 DEFENDANT in California and classified as non-exempt employees ("AGGRIEVED
25 EMPLOYEES") during the time period of December 9, 2020 until a date as determined by
26 the Court (the "PAGA PERIOD").

27 33. On December 9, 2021, PLAINTIFF gave written notice by electronic mail to
28 the Labor and Workforce Development Agency (the "Agency") and by certified mail to the

1 employer of the specific provisions of this code alleged to have been violated as required by
2 Labor Code § 2699.3. The statutory waiting period for PLAINTIFF to add these allegations
3 to the Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now
4 commence a representative civil action under PAGA pursuant to Section 2699 as the proxy
5 of the State of California with respect to all AGGRIEVED EMPLOYEES as herein defined.

6 34. The policies, acts and practices heretofore described were and are an unlawful
7 business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the
8 other AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to properly
9 record and provide legally required meal and rest periods, (c) failed to pay minimum wages,
10 (d) failed to pay overtime wages and sick pay wages, (e) failed to reimburse employees for
11 required expenses, and (f) failed to pay wages when due, all in violation of the applicable
12 Labor Code sections listed in Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a),
13 226.7, 227.3, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of
14 Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage
15 Order(s), and thereby gives rise to civil penalties as a result of such conduct.¹ PLAINTIFF
16 hereby seeks recovery of only civil penalties as prescribed by the Labor Code Private
17 Attorney General Act of 2004 as the representative of the State of California for the illegal
18 conduct perpetrated on PLAINTIFF and the other AGGRIEVED EMPLOYEES.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, PLAINTIFF prays for judgment against each Defendant, jointly and
21 severally, as follows:

22 1. On behalf of the State of California and with respect to all AGGRIEVED
23 EMPLOYEES:

24 A) Recovery of civil penalties as prescribed by the Labor Code Private
25 Attorneys General Act of 2004; and,

26 B) An award of attorneys' fees and cost of suit, as allowable under the

27 ¹Plaintiff specifically excludes and/or does not allege any claims under California Labor
28 Code §558(a)(3).

1 law, including, but not limited to, pursuant to Labor Code §2699.

2 Dated: February 15, 2022 BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW
3 LLP

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5 By: /s/ Nicholas De Blouw
6 Nicholas J. De Blouw

7 Attorneys for Plaintiff
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