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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

15 **TRISTAN GOLDSTEIN** and  ) Case No.: CGC-02-410967  
16 , on behalf of themselves, )  
17 the general public, and all others similarly ) FIRST AMENDED CLASS ACTION AND  
18 situated, ) REPRESENTATIVE ACTION COMPLAINT  
19 ) FOR OVERTIME COMPENSATION FOR  
20 ) CALIFORNIA RETAIL STORE  
21 ) MANAGERS  
22 )  
23 ) CALIFORNIA BUSINESS AND  
24 ) PROFESSIONS CODE §17200 ET SEQ.  
25 )  
26 )  
27 )  
28 )

18 Plaintiffs,

19 v.

20 **EINSTEIN AND NOAH CORP.** a )  
21 corporation doing business in California under )  
22 the names of **NOAH'S NEW YORK** )  
23 **BAGELS** and **EINSTEIN BROS. BAGELS**; )  
24 **ROBERT M. HARTNETT**, an individual; )  
25 **PAUL J. B. MURPHY III**, an individual; **W.** )  
26 **ERIC CARLBORG**, an individual; **PAULA** )  
27 **MANLEY**, an individual; **ROBERT C.** )  
28 **ELLIS**, an individual; and DOES 1 through )  
50,

Defendants.

1 Come now Plaintiffs **TRISTAN GOLDSTEIN** and   
2 (“Plaintiffs”) on behalf of themselves and all others similarly situated, and the general public  
3 and allege:

4  
5 **JURISDICTION AND VENUE**

6 1. This Court has jurisdiction over the claims alleged herein pursuant to Section 17200  
7 of the California Business and Professions Code. The underlying acts of unfair competition  
8 giving rise to the claims for equitable relief are founded upon Defendants’ violation of  
9 California state law including, but not limited to, violations of the California Labor Code and  
10 the California Code of Regulations (Industrial Welfare Commission Orders) and  
11 misrepresentations by way of direct dealing with an uncertified class that they needed to sign  
12 a release in order to receive overtime compensation under federal law. The amount in  
13 controversy for each class representative, including their claims for compensatory damages  
14 and pro rata share of attorney fees, are less than \$75,000.

15  
16 2. Venue is proper in this Court because Defendants own and operate retail bagel stores  
17 throughout California and in San Francisco County where Defendants have misclassified  
18 class members as exempt. Defendants, and each of them, employed Plaintiffs in San  
19 Francisco, California. The Class has suffered damages and will continue to suffer the same  
20 harm as the Representative Plaintiffs as a result of Defendants’ wrongful conduct unless  
21 relief is granted.  
22

23  
24 **PARTIES AND BACKGROUND**

25 3. Defendant, **EINSTEIN AND NOAH CORP.**, is a corporation doing business in  
26 California under the names of **NOAH’S NEW YORK BAGELS** and **EINSTEIN BROS.**  
27 **BAGELS**. The allegations in this First Amended Complaint with respect to **EINSTEIN**  
28 **AND NOAH CORP.**, solely, are limited to all times after June 19, 2001, the closing date of

1 **EINSTEIN AND NOAH CORP.’s** asset purchase of **EINSTEIN/NOAH BAGEL CORP.**  
2 and **EINSTEIN/NOAH BAGEL PARTNERS, L.P.**, out of bankruptcy proceedings.

3  
4 4. Defendant **ROBERT M. HARTNETT**, an individual, is, and at all times relevant,  
5 has been the employer of Plaintiffs and the Class, and in his capacity as employer, has  
6 exercised control over the wages, hours or working conditions of Plaintiff and the Class.

7 5. Defendant **PAUL J. B. MURPHY III**, an individual, is, and at all times relevant, has  
8 been the employer of Plaintiffs and the Class, and in his capacity as employer, has exercised  
9 control over the wages, hours or working conditions of Plaintiff and the Class.

10  
11 6. Defendant **W. ERIC CARLBORG**, an individual, is, and at all times relevant, has  
12 been the employer of Plaintiffs and the Class, and in his capacity as employer, has exercised  
13 control over the wages, hours or working conditions of Plaintiff and the Class.

14 7. Defendant **PAULA MANLEY**, an individual, is, and at all times relevant, has been  
15 the employer of Plaintiffs and the Class, and in his capacity as employer, has exercised  
16 control over the wages, hours or working conditions of Plaintiff and the Class.

17  
18 8. Defendant **ROBERT C. ELLIS**, an individual, is, and at all times relevant, has been  
19 the employer of Plaintiffs and the Class, and in his capacity as employer, has exercised  
20 control over the wages, hours or working conditions of Plaintiff and the Class.

21  
22 9. Plaintiffs **TRISTAN GOLDSTEIN** and  and all others  
23 similarly situated are, and at all relevant times were, employed by Defendants, and each of  
24 them, as retail store managers and assistant managers who spent the majority of their  
25 working time doing the same work and performing the same function as non-exempt workers  
26 employed by Defendants, and each of them, in the same location.  
27  
28

1 10. In acknowledgment of its error in classifying the assistant managers as exempt,  
2 Defendants, and each of them, reclassified the assistant managers as non-exempt in  
3 approximately April 2002, but failed to make restitution of overtime wages earned prior to  
4 that time under California law and within four years of the filing of the original Complaint in  
5 this action.

7 11. In acknowledgment of its error in classifying the assistant managers as exempt,  
8 Defendants, and each of them, conspired with themselves and their attorneys, and others,  
9 and offered to pay approximately one third of the wages due under California law as  
10 overtime compensation, in violation of Labor Code Section 206, in exchange for a release in  
11 violation of Labor Code Section 206.5.

13 12. Unless otherwise alleged in this Complaint, Plaintiffs are informed and believe, and  
14 on the basis of that information and belief allege, that at all times mentioned in this  
15 Complaint, Defendants were the agents and employees of their codefendants, and in doing  
16 the things alleged in this Complaint were acting within the course and scope of that agency  
17 and employment, and also referred to hereinafter simply by the collective noun,  
18 "Defendants."

20 13. Upon information and belief, Defendants own and operate approximately seventy  
21 (70) retail bagel and delicatessen stores in the state of California. Defendants are and at all  
22 relevant times have been an employer under the applicable Industrial Welfare Commission  
23 Orders.

25 14. Upon information and belief, individual Defendants, **ROBERT M. HARTNETT,**  
26 **PAUL J. B. MURPHY III, W. ERIC CARLBORG, PAULA MANLEY, ROBERT C.**  
27 **ELLIS,** and, Does 1 through 50, inclusive, are and all relevant times have been employers of  
28

1 Plaintiffs and the Plaintiff class under the applicable Industrial Welfare Commission Orders  
2 and have exercised control over the wages, hours and working conditions of the Plaintiffs  
3 and the Plaintiff class.

4  
5 15. Upon information and belief, the corporate and individual Defendants and Does 1  
6 through 50, inclusive, and each of them, caused to be created, implemented, disseminated,  
7 utilized, and processed, a document entitled “ACKNOWLEDGEMENT OF RECEIPT AND  
8 RELEASE” on or about September 2002 to the Plaintiff class, a copy of which is attached  
9 hereto as exhibit A.

10  
11 16. The so-called “ACKNOWLEDGEMENT OF RECEIPT AND RELEASE” purports  
12 to be a release of all California wage claims in exchange for payment of the federal overtime  
13 claims. Federal overtime law prohibits any release of claims by an employee in exchange for  
14 wages sought by the United States Department of Labor, unless and only unless, the  
15 Secretary of Labor or the United States Department of Labor is signatory and consents to  
16 such a release. The Secretary of Labor and the United States Department of Labor did not  
17 consent to any release in this instance.

18  
19 17. Under the doctrine of *Skyline Homes, Inc. v. Department of Industrial Relations*  
20 (1985) 165 Cal. App. 3d 239, 247, Plaintiff class members are entitled to time and one half  
21 for overtime under California law, while the federal law requires only “half time” for  
22 overtime, assuming the straight time was already paid. Thus, under California law, Plaintiff  
23 class members were entitled to three times the amount they received under federal law. The  
24 so-called “ACKNOWLEDGEMENT OF RECEIPT AND RELEASE” purports to be a  
25 release of all California wage claims in exchange for payment one third the amount conceded  
26 to be due.  
27  
28

1 18. California Labor Code Section 218.6 provides that: “In any action brought for the  
2 nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate  
3 of interest specified in subdivision (b) of Section 3289 of the Civil Code, which shall accrue  
4 from the date that the wages were due and payable as provided in Part 1 (commencing with  
5 Section 200) of Division 2.” The rate of interest is simple interest at 10%. The amount  
6 contained offered in the so-called “ACKNOWLEDGEMENT OF RECEIPT AND  
7 RELEASE” does not include interest as required by law.  
8

9 19. The so-called “ACKNOWLEDGEMENT OF RECEIPT AND RELEASE” is  
10 therefore invalid as a matter of law.  
11

12 20. Distributing the so-called “ACKNOWLEDGEMENT OF RECEIPT AND  
13 RELEASE” which contains false and misleading statements and material omissions,  
14 constitutes an unlawful, deceptive, and unfair business practice within the meaning and in  
15 violation of California Business & Professions Code § 17200 et seq. and violates the  
16 provisions of California Labor Code Sections 206 and 206.5.  
17

18 21. Plaintiffs do not know the true names or capacities of Defendants sued herein under  
19 California Codes of Civil Procedure § 474 as Does 1 through 50, inclusive, and for that  
20 reason the Plaintiffs sue these Defendants by such fictitious names. Plaintiffs will seek to  
21 amend their Complaint and include these Doe Defendants’ true names and capacities as soon  
22 as they can be reasonably ascertained. Each of the fictitiously named Defendants is  
23 responsible in some manner for the conduct alleged herein and for the injuries suffered by  
24 the Plaintiffs, the members of the class and the general public. One or more of such  
25 Defendants is and was a resident of the State of California.  
26  
27  
28

1 22. Plaintiffs are informed and believe and thereon allege that at all times herein  
2 mentioned, Defendants and Does 1 through 50 are and were corporations, business entities,  
3 law firms, individuals, and partnerships, licensed to do business and actually doing business  
4 in the State of California. As such, and based upon all the facts and circumstances incident  
5 to Defendants' business in California, Defendants are subject to California Labor Code  
6 §1194, et seq., California Business and Professions Code § 17200, et seq., and the applicable  
7 wage orders issued by the Industrial Welfare Commission.  
8

9 23. As stated in paragraph 1(A)(1)(e) of the Wage Order 7 of the Industrial Wage  
10 Commission: "The activities constituting exempt work and non-exempt work shall be  
11 construed in the same manner as such items are construed in the following regulations under  
12 the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. § 541.102,  
13 541.104-111, and 541.115-116."  
14

15 24. Thus, the Order of the Industrial Wage Commission prohibits an employer from  
16 considering time spent as a "working foreman" or "straw boss" as executive or managerial  
17 exempt time by adopting by specific reference the provisions of 29 C.F.R. § 541.115(a)  
18 which states in part: "Clearly, the work of the same nature as that performed by the  
19 employees' subordinates must be counted as nonexempt work and if the amount of such work  
20 performed is substantial the exemption does not apply. ("Substantial," as used in this section,  
21 means more than 20 percent. ...)"  
22

23 25. At all times mentioned in the causes of action alleged herein, each and every  
24 Defendant was an agent of each and every other Defendant. At all relevant times, each and  
25 every Defendant was acting within the course and scope of this agency or employment and  
26 was acting with the consent, confirmation and authorization of each of the remaining  
27  
28

1 Defendants, with respect to the allegations set forth herein. All actions of each Defendant as  
2 alleged and the cause of action stated herein were ratified and/or approved by every other  
3 Defendant or their officers or managing agents.

4  
5 26. At all times herein mentioned, Defendants, and each of them, were members of, and  
6 engaged in, a joint venture, partnership and common enterprise, and acting within the course  
7 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

8 27. At all times herein mentioned, the acts and omissions of various Defendants, and  
9 each of them, concurred and contributed to the various acts and omissions of each and all of  
10 the other Defendants in proximately causing the injuries and damages herein alleged.

11  
12 28. At all times herein mentioned, Defendants, and each of them, ratified each and every  
13 act or omission complained of herein. At all times herein mentioned, the Defendants, and  
14 each of them, aided and abetted the acts and omissions of each and all of the other  
15 Defendants in proximately causing the damages as herein alleged.

16  
17 **CLASS ACTION ALLEGATIONS**

18 29. Plaintiffs bring this action on their own behalf, and on behalf of the class of all  
19 persons similarly situated pursuant to California Code of Civil Procedure § 382, and,  
20 pursuant to California Business and Professions Code § 17200 et seq., on behalf of the  
21 general public. The class consists of two sub-classes: one class of all current and former  
22 managers and another class of all current and former assistant managers, employed by  
23 Defendants in the State of California who worked overtime within four years of the filing of  
24 the original Complaint in this action up to and including the time the action is certified as a  
25 class, yet who were not paid overtime compensation.  
26  
27  
28

1 30. During all times relevant herein, Defendants incorrectly classified the positions and jobs  
2 performed by the members of each class as exempt employees, not entitling the members of the  
3 classes to overtime compensation under California law.  
4

5 31. Each subclass consists of at least seventy, and likely more, employees and former  
6 employees, which is so numerous that the joinder of each member of each sub-class is  
7 impracticable.

8 32. There is a well-defined community of interest in the questions of law and fact  
9 affecting each of the subclasses Plaintiffs represent. The class members' claims against  
10 Defendants involve questions of common or general interest, in that their claims are based on  
11 Defendants' implementation and utilization of policy pursuant to which all members of the  
12 class were denied payment of overtime compensation during the years in question while  
13 falsely being told that they were part of management and not entitled to overtime  
14 compensation.  
15

16 33. There is also a common question of law as to the application of the "working  
17 foreman" or "straw boss" regulations referenced above to the prescribed duties and  
18 reasonably expected activities of each sub-class member.  
19

20 34. In addition, there is a predominate question of fact and law as to the legality, force  
21 and effect, and propriety of the so-called "ACKNOWLEDGEMENT OF RECEIPT AND  
22 RELEASE" document disseminated to the assistant manager subclass by Defendants, and  
23 each of them. Resolution of these questions are such that proof of a state of facts common to  
24 the members of the subclass will entitle each member of the subclass to the relief requested  
25 in this Complaint.  
26  
27  
28

1 35. Plaintiffs will fairly and adequately represent the interests of the class, because each  
2 Plaintiff is a member of each subclass and the claim of each Plaintiff is typical of those in  
3 each subclass. Plaintiffs, as representative parties, will fairly and adequately protect the  
4 interests of the class by vigorously pursuing this suit through attorneys who are skilled and  
5 experienced in handling civil litigation of this type. Plaintiffs request permission to amend  
6 the Complaint to include other individuals as class representatives if Plaintiffs are deemed  
7 not to be an adequate representative of each subclass.  
8

9  
10 **FIRST CAUSE OF ACTION**  
(Failure To Pay Overtime Compensation)

11 36. Defendants employed Plaintiffs and all members of the Plaintiff class under a  
12 contract of employment that was partly written, partly oral, and partly implied.  
13

14 37. At all relevant times, Plaintiffs and all members of the Plaintiff class were regularly  
15 required to work in excess of eight hours during the workday and in excess of 40 hours  
16 during the workweek.  
17

18 38. At all relevant times, the California Industrial Welfare Commission Order (IWC) No.  
19 7 applied to Plaintiffs and all members of the Plaintiff class. In all years except 1998 and  
20 1999, the IWC Order provides that "...nonexempt employees must be paid an overtime  
21 premium for all hours worked in excess of eight during the workday and in excess of 40  
22 during the workweek, as well as for work performed on the seventh workday in a work  
23 week...." In 1998 and 1999, the IWC order was essentially the same, but provided for  
24 overtime premium pay only after 40 hours in a workweek.  
25

26 39. Plaintiffs and each class member were engaged more than 50% percent of the time  
27 doing work that was of the same nature as that performed by the employees' subordinates,  
28 which working time must be counted as nonexempt work. Because the amount of such work

1 performed was substantial, the managerial exemption from overtime does not apply to  
2 members of each sub-class herein.

3 40. Plaintiffs and each class member were engaged more than 50% percent of the time  
4 doing work that was neither managerial nor executive and are therefore not exempt.  
5

6 41. Plaintiffs and each class member were engaged in production, and were thus not  
7 entitled to the exemption for administrative personnel.

8 42. California Labor Code § 552 further provides “No employer of labor shall cause his  
9 employees to work more than six days in seven.”  
10

11 43. Despite the fact that Plaintiffs and all members of the Plaintiff class routinely worked  
12 hours for which they should have received overtime premium under the above-described  
13 IWC Orders, Defendants routinely failed and refused to pay such overtime premiums. In  
14 addition, Defendants routinely required Plaintiffs to work more than six days in seven  
15 without overtime or other additional compensation.  
16

17 44. Defendants’ conduct described in this Complaint violates the provisions of Labor  
18 Code § 1198.

19 45. Throughout the above-described period, Defendants repeatedly misrepresented to the  
20 members of the Plaintiff class that they were exempt from coverage of the above-cited IWC  
21 Order and that they were not entitled to receive premium overtime compensation. This  
22 representation was false and fraudulent and designed to prevent Plaintiffs from pursuing their  
23 legal remedies. By reason of this fraudulent misrepresentation and in reasonable reliance  
24 thereon, Plaintiffs were prevented from pursuing their overtime claims.  
25

26 46. In the alternative, Defendants repeatedly misrepresented to the general public, the  
27 rate payers of the State of California and various regulatory agencies that the Plaintiffs and  
28

1 members of Plaintiff class were not engaged primarily in administrative tasks, but were  
2 engaged in the production of the product and/or service for which the Defendant is in  
3 business to produce and/or sell.

4  
5 47. Plaintiffs and members of the Plaintiff class identified herein were discharged by  
6 Defendants or voluntarily quit, and did not have a written contract for employment. The  
7 Defendants, and each of them, in violation of California Labor Code §§ 201 and 202, et seq.,  
8 respectively, had a consistent and uniform policy, practice and procedure of willfully failing  
9 to pay the earned and unpaid wages of all such former employees. The Defendants and each  
10 of them have willfully failed to pay the earned and unpaid wages of such individuals,  
11 including, but not limited to, regular time, overtime, vacation time, and other wages earned  
12 and remaining uncompensated according to amendment, or proof. Plaintiffs and other  
13 members of the class did not secret or absent themselves from Defendants nor refuse to  
14 accept the earned and unpaid wages from Defendants. Accordingly, Defendants are liable  
15 for waiting time penalties for the unpaid wages pursuant to California Labor Code § 203.  
16  
17

18 48. Defendants' conduct described in this Complaint constitutes an unlawful business  
19 practice in violation of the provisions of Business and Professions Code § 17200, et seq.  
20

21 **SECOND CAUSE OF ACTION**  
22 (Obtaining Unlawful Releases)

23 49. Plaintiffs hereby incorporate each and every allegation contained of this Complaint  
24 above and reallege said allegations as though fully set forth herein.

25 50. California Labor Code Section 206(a) states: In case of a dispute over wages, the  
26 employer shall pay, without condition and within the time set by this article, all wages, or  
27 parts thereof, conceded by him to be due, leaving to the employee all remedies he might  
28 otherwise be entitled to as to any balance claimed.

1 51. California Labor Code Section 206.5 states: No employer shall require the execution  
2 of any release of any claim or right on account of wages due, or to become due, or made as  
3 an advance on wages to be earned, unless payment of such wages has been made. Any  
4 release required or executed in violation of the provisions of this section shall be null and  
5 void as between the employer and the employee and the violation of the provisions of this  
6 section shall be a misdemeanor.  
7

8 52. By the conduct of sending and obtaining releases for overtime wage claims against  
9 the Defendant, Defendants and each of them, have violated Business & Professions Code  
10 Section 17200 and Labor Code Sections 206 and 206.5.  
11

12 WHEREFORE, Plaintiffs demand judgment against Defendants as hereinafter set forth,  
13 including, inter alia:

14 (a) Restitution, as appropriate, to Plaintiffs and to each member of each subclass, who  
15 have not been paid for working overtime and/or whose records of hours worked have not  
16 been maintained or furnished, and/or have been inaccurately maintained or have been  
17 destroyed;  
18

19 (b) An Order requiring disgorgement from Defendants of all monies wrongfully withheld  
20 as a result of the practices alleged herein, and/or imposing on Defendant an equitable trust  
21 the “res” of which consisting of all monies due in overtime compensation, for the benefit of  
22 employees for whom overtime compensation was owed and unpaid, to be paid to each such  
23 individual that the Defendant can locate, and the remainder of which shall be deposited with  
24 the Labor Commissioner as Trustee for the Industrial Relations Unpaid Wage Fund of the  
25 State of California pursuant to Labor Code §§ 96.6 and 96.7, or, if the Labor Commissioner  
26 will not accept these funds, then to the National Employment Lawyers Association (a not for  
27  
28

1 profit organization located in San Francisco dedicated to promoting the employment rights  
2 of workers), in the manner provided by California Code of Civil Procedure § 384;

3 (c) Implementation of other equitable and injunctive relief, including, inter alia, an  
4 injunction prohibiting Defendant from (1) failing to pay overtime to managers and assistant  
5 managers as required under California Labor Code § 1194 and Industrial Welfare  
6 Commission Order No. 7-2001; (2) failing to maintain records of the hours worked by store  
7 managers and assistant managers as required under California Labor Code § 1174; (3)  
8 failing to furnish records of hours worked in violation of California Labor Code § 226 and  
9 Industrial Welfare Commission Order No. 7-2001; (4) failing to pay compensation due  
10 former employees in violation of California Labor Code § 203; (5) converting the wages of  
11 the managers and assistant managers for its own use and benefit; and, (6) attempting to  
12 improperly enforce the so-called “ACKNOWLEDGEMENT OF RECEIPT AND  
13 RELEASE.”  
14  
15

16 (d) An order to each and every person who signed the so-called  
17 “ACKNOWLEDGEMENT OF RECEIPT AND RELEASE” that it is void and without legal  
18 effect in California and that all limitations periods are tolled from the time Defendants sent  
19 such so-called “ACKNOWLEDGEMENT OF RECEIPT AND RELEASE” until the time  
20 that the releases are void is received.  
21  
22

23 (e) A declaration that the so-called “ACKNOWLEDGEMENT OF RECEIPT AND  
24 RELEASE” violates California Labor Code Sections 206 and 206.5 and is thus void and  
25 without legal effect.  
26

27 (f) Waiting time penalties pursuant to California Labor Code § 203;

28 (g) Interest;

- 1 (h) Attorney fees and costs as provided by statute and/or applicable case law; and  
2 (i) Such other relief as the Court deems just and proper.

3 Dated: October 22, 2002  
4  
5

6 **THIERMAN LAW FIRM**

7  
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