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FILED

APR 14 2006

COURT EXECUTIVE OFFICER
MARIN COUNTY SUPERIOR COURT
By: A. Garcia, Deputy

8 Class Counsel

9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF MARIN

11 JANINE PERRY, TOM VITRANO, LISA)
12 HERNANDEZ, individually and on behalf of)
13 other members of the general public similarly)
14 situated,)

15 Plaintiffs,

16 vs.

17 VITAMIN SHOPPE INDUSTRIES INC., dba.)
18 THE VITAMIN SHOPPE, and DOES 1)
19 though 50, inclusive,)

20 Defendant.

NO. CV 053770

THIRD AMENDED COMPLAINT

[CLASS ACTION]

- 1. Violations of Labor Code
- 2. Labor Code Penalties
- 3. Violation of B&P § 17200

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22
23 COME NOW, Plaintiffs, individuals over the age of eighteen (18), and bring this
24 challenge to Defendant's lucrative, repressive and unlawful business practices on behalf of
25 themselves and a class of all others similarly situated and for a Cause of Action against
26 Defendants, VITAMIN SHOPPE INDUSTRIES INC., and DOES 1-50, inclusive, (hereinafter
27 Defendants) and each of them, alleges as follows:
28

1 **THE PARTIES, JURISDICTION AND VENUE**

2 **1.**

3 This class action is brought pursuant to Section 382 of the California Code of Civil
4 Procedure. The monetary damage sought by Plaintiffs exceeds the minimal jurisdiction limits
5 of the Superior Court and will be established according to proof at trial. The amount in
6 controversy for the class representative, including her claims for compensatory damages and
7 pro rata share of attorney fees, is less than \$75,000.
8

9 **2.**

10 Plaintiff Janine Perry, a resident of Marin County, California, was at all times relevant
11 to the Complaint employed as a store manager by Defendants at retail locations located both in
12 the County of Marin and County of Sonoma. Plaintiff Tom Vitrano, a resident of Fresno
13 County, was at all times relevant to the Complaint, employed as a Store Manager at defendant's
14 retail locations. Venue is proper in the County of Marin as at least some of the acts
15 complained of herein occurred in Marin County as Defendant owns and operates retail stores in
16 Marin County. The representative Plaintiffs who worked in salaried retail position at one of
17 Defendant's retail locations within the State of California and/or who missed meal periods, rest
18 periods, premium rate pay or other Labor Code Violations are Janine Perry and Tom Vitrano.
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22 **3.**

23 Plaintiffs Janine Perry and Tom Vitrano bring this action on their own behalf, and on
24 behalf of all other Management Associates with the titles of store manager, assistant store
25 manager, keyholder, or their functional equivalent, employed by Defendants in the State of
26 California at any time during the four (4) years prior to the filing of this action, and on behalf of
27 the general public. Plaintiffs are "employees" as that term is used in the California Labor Code
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1 and the California Industrial Welfare Commission's Wage Orders (also hereinafter "Wage
2 Order") regulating wages, hours, and working conditions within California

3
4 **4.**

5 Defendant is and, at all times mentioned in this Complaint, was a corporation duly
6 organized in New York and doing business under the laws of California, with places of
7 business throughout California, including in Marin County. In addition, Defendant is a
8 "person" as defined in California Labor Code, Section 18 and an "employer" as that term is
9 used in the California Labor Code and the California Industrial Welfare Commission's Wage
10 Orders regulating wages hours, and working conditions.
11

12 **5.**

13 Upon information and belief, Defendant, VITAMIN SHOPPE INDUSTRIES, INC., has
14 at all times relevant to the complaint, and continues to, conduct business in California under the
15 name "The Vitamin Shoppe."
16

17 **6.**

18 Plaintiffs are informed and believe and thereon allege that all times herein mentioned
19 Defendant and Does 1 through 50, are and were corporations, business entities, individuals and
20 partnerships, licensed to do business and actually doing business in the State of California,
21 County of Marin. Defendant owns and operates an industry, business and establishment in
22 approximately 39 separate geographic locations within the State of California, including within
23 Marin County, for the purpose of selling vitamins and health and nutritional supplements. As
24 such, and based upon all the facts and circumstances incident to Defendants' business in
25 California, Defendants are subject to California Labor Code Section 1194, et seq., California
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1 Business and Professions Code Section 17200, et seq., (Unfair Practices Act) and the applicable
2 IWC Wage Orders.

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4 7.

5 Plaintiffs do not know the true names or capacities, whether individual, partner or
6 corporate, of the Defendants sued herein as DOES 1 through 50, inclusive, and for that reason,
7 said Defendants are sued under such fictitious names, and Plaintiffs pray leave to amend this
8 complaint when the true names and capacities are known. Plaintiffs are informed and believe
9 and thereon allege that each of said fictitious Defendants was responsible in some way for the
10 matters alleged herein and proximately caused Plaintiffs and members of the general public and
11 the class to be subject to the illegal employment practices, wrongs and injuries complained of
12 herein.
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15 8.

16 At all times herein mentioned, each of said Defendants participated in the doing of the
17 acts hereinafter alleged to have been done by the named Defendant; and furthermore, the
18 Defendants, and each of them, were the agents, servants and employees of each of the other
19 Defendants, as well as the agents of all Defendants, and at all times herein mentioned, were
20 acting within the course and scope of said agency and employment.
21

22 9.

23 At all times herein mentioned, Defendants, and each of them, were members of, and
24 engaged in, a joint venture, partnership and common enterprise, and acting within the course
25 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.
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At all times herein mentioned, the acts and omissions of various Defendants, and each of them, concurred and contributed to the various acts and omissions of each and all of the other Defendants in proximately causing the injuries and damages as herein alleged.

11.

At all times herein mentioned, Defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, the Defendants, and each of them, aided and abetted the acts and omissions of each and all of the other Defendants in proximately causing the damages as herein alleged. Further, at all times mentioned herein, the wage and hour related compensation policies of Defendant's retail locations in California are and were dictated by, controlled by, and ratified by the Defendants herein and each of them.

FACTUAL AND CLASS ALLEGATIONS

12.

Pursuant to California Labor Code §§ 218, 218.5, 218.6 and 1194, Plaintiffs may bring a civil action for overtime wages directly against the employer without first filing a claim with the California Division of Labor Standards Enforcement and may recover such wages, together with interest thereon, penalties, attorney fees and costs.

13.

Plaintiffs bring this action as a class action on behalf of all persons, in the State of California, who are or since August 16, 2001, have been, employed by Defendants as Management Associates with the titles of store manager, assistant store manager, keyholder, or their functional equivalent,. Plaintiffs bring this class action on behalf of themselves and other similarly situated members of the class who have been similarly treated by Defendants in the manner described below. The class is specifically defined as follows:

1 All individuals who worked for Defendant The Vitamin Shoppe in California from four
2 years prior to the time of filing of this Complaint to the time of certification (the Class Period)
3 as Management Associates with the titles of store manager, assistant store manager, keyholder,
4 or their functional equivalent;

5
6 Subclass One: Those management associates who were not provided their meal periods
7 as required by California law.

8 Subclass Two: Those management associates who were not authorized or permitted to
9 take rest breaks as required by California law.

10
11 Subclass Three: Those management associates who were not properly paid hourly rates
12 and hourly premium rates for overtime work in accordance with the applicable IWC Wage
13 Orders and California law for split-shifts, reporting time pay, overtime pay and/or other wage
14 payments.

15
16 Subclass Four: Those management associates who were improperly classified as exempt
17 from the payment of overtime, who worked overtime for Defendants, yet were not paid
18 overtime.

19 **14.**

20 Plaintiffs are informed and believe, and on that basis allege that during the Class Period
21 less than 100 persons have worked for Defendants as management associates.

22 **15.**

23
24 This action may be properly maintained as a class action under California Code
25 of Civil Procedure § 382 in that:

26 a. The members of the class are so numerous that their individual joinder in a
27 single action is impossible and/or impracticable. Although the number of class members cannot
28

1 be properly determined without further discovery, Plaintiffs are informed and believe, and on
2 that basis allege, that the class members' identities can be ascertained from Defendant's
3 records;

4
5 b. The central questions of law and fact involved in this action are of a common or
6 general interest. Common legal and factual issues predominate over any questions affecting
7 only individual members of the class, including but not limited to common questions of:

8 i. Does defendants' policy and practice regarding rest periods and meal
9 periods comply with California law;

10
11 ii. Can Plaintiffs and the class waive the wage and hour "off duty" rest
12 period and meal period laws designed for their benefit under California law and whether such
13 waivers were voluntary, knowing and valid given the nature of their work;

14
15 iv. Whether defendants' conduct constituted an illegal, or unfair, business
16 practice in violation of California law;

17
18 v. Whether Plaintiffs and the class are entitled to statutory damages
19 pursuant to the California Labor Code;

20
21 vi. Whether Plaintiffs and the class are entitled to injunctive relief, including
22 restitution and/or disgorgement of profits pursuant to California law;

23
24 vii. Who has the burden of proof on the denial of rest period and meal period
25 issue?;

26
27 viii. Whether Plaintiffs and the class were improperly and illegally mis-
28 classified by Defendant as "exempt" employees when, in fact, they were "non-exempt"
employees according to California law and would therefore have the right to be compensated
by Defendant at the appropriate compensatory wage rate for said work heretofore performed,

1 consisting of the straight time rate plus the appropriate overtime premium as mandated by
2 California law including interest, attorney fees and costs, and civil penalties thereon pursuant to
3 Labor Code §§ 558 and 1197.1.
4

5 c. The claims of the named representative Plaintiffs Janine Perry and Tom Vitrano
6 are typical of the claims of other members of the class. The named Plaintiffs share the same
7 interests as other members of the class in this action because they now suffer, and have
8 suffered, from the same violations of the law as the class. The named Plaintiffs, Janine Perry
9 and Tom Vitrano have retained competent and experienced counsel who specialize in
10 employment litigation to represent themselves and the proposed class;
11

12 d. A class action is the only realistic method available for the fair and efficient
13 adjudication of this controversy. Because the damages suffered by individual class members,
14 while not inconsequential, may be relatively small, the expense and burden of individual
15 litigation makes it impracticable for members of the class to seek redress individually for the
16 wrongful conduct herein alleged. Were each individual member required to bring a separate
17 lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for
18 the litigants and the Court. The prosecution of separate actions would also create the risk of
19 inconsistent rulings, which may be dispositive of the interest of class members who are not
20 parties to the adjudication and/or may substantially impede class members' ability to protect
21 their interests, and therefore would be contrary to the interest of justice and equity.
22
23

24 **16.**

25 The California Labor Code and Wage Order provisions upon which Plaintiffs assert
26 these claims are broadly remedial in nature. These laws and labor standards serve an important
27 public interest in establishing minimum working conditions and standards in California. These
28

1 laws and labor standards protect the average working employee from exploitation by employers
2 who may seek to take advantage of superior economic and bargaining power in setting onerous
3 terms and conditions of employment. The nature of this action and the format of laws available
4 to Plaintiffs and members of the class identified herein make the class action format a
5 particularly efficient and appropriate procedure to redress the wrongs alleged herein. If each
6 employee were required to file an individual lawsuit, the corporate Defendants would
7 necessarily gain an unconscionable advantage since they would be able to exploit and
8 overwhelm the limited resources of each individual class member with their vastly superior
9 financial and legal resources. Requiring each class member to pursue an individual remedy
10 would also discourage the assertion of lawful claims by employees who would be disinclined to
11 file an action against their current or former employer for real and justifiable fear of retaliation
12 and permanent damage to their careers at subsequent employment.
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16 **17.**

17 Such a pattern, practice and uniform administration of corporate policy regarding illegal
18 employee compensation, as described herein, is unlawful and creates an entitlement to recovery
19 by Plaintiffs and the class identified herein, in a civil action, for the unpaid balance of the full
20 amount of the straight time compensation and overtime premiums owing, including interest
21 thereon, penalties, reasonable attorneys fees, and costs of suit according to the mandate of
22 California Labor Code § 1194, et seq.
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24 **18.**

25 Proof of a common business practice or factual pattern, of which the named Plaintiffs'
26 experience is representative, will establish the right of each member of the plaintiff class to
27 recovery on the causes of action alleged herein.
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19.

The plaintiff class is entitled in common to a specific fund with respect to the overtime compensation monies illegally and unfairly retained by Defendants. This action is brought for the benefit of the entire class and will result in the creation of a common fund.

20.

During the term of Plaintiffs' employment, Defendants did not provide Plaintiffs and the class with 30-minute meal breaks; nor provide Plaintiffs and the class with 10-minute rest breaks for the majority of their employment period. Plaintiffs and the class were not compensated for any of the time they were not provided meal or rest periods either before or after their employment with Defendants was terminated. Based on the hours worked per day pursuant to the IWC Wage Orders and California labor laws, Plaintiffs and the members of the class were entitled to "off duty" rest periods and "off duty" meal breaks. "Off duty" as defined by the IWC means "relieved of all duty." Defendants employed Plaintiffs and members of the class for periods of more than five hours without a meal period of not less than thirty minutes. Further, the work involved was not of the nature that would prevent an employee from being relieved of all duty as required under the Wage Orders. In other words, the type of work performed by Plaintiffs and the class members was of the nature that she/he could and should have been relieved of all duties and thus were entitled to "off duty" rest and meal periods. Therefore, to the extent Plaintiffs and/or any class member signed an agreement waiving his/her right to "off duty" meal periods, said waiver agreement would be invalid under the Wage Orders. In fact, it is not the nature of the work that prevents the employees from being relieved of all duty; rather, it is the defendant's unrealistically low labor budget – and consequent understaffing – that "prevents" the employees from being relieved of all duty. The

1 understaffing also results in a failure to authorize or permit denying Plaintiffs and the class
2 members “off duty” rest. In short, Plaintiffs and the other members of the class were
3 improperly and illegally denied “off duty” meal periods by defendants when, in fact, they were
4 entitled to them. Plaintiffs and the class are owed additional wages pursuant to Labor Code §
5 226.7 and the applicable IWC Wage Orders. Plaintiffs and the class were also not properly
6 compensated for all overtime hours worked at the proper premium rates under the applicable
7 IWC Wage Orders and California law. Plaintiffs and the class are owed additional wages
8 pursuant to the applicable IWC Wage Orders.
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11 **21.**

12 As a pattern and practice, in violation of the aforementioned labor laws and wage
13 orders, Defendants knowingly and intentionally did not maintain any records or furnish any
14 records to the class pertaining to when Representative Plaintiffs and the members of the class
15 began and ended each work period, meal period, the total daily hours worked, and the total
16 hours worked per pay period and applicable rates of pay in violation of California Labor Code
17 §§ 226 and 1174 thereby causing injury to the class. Accordingly, Defendants and each of
18 them are liable for civil penalties to Plaintiff and the class pursuant to Labor Code §§ 226,
19 226.3, 558 and 1174.5.
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22 **22.**

23 Because the Plaintiffs and class were not fully paid all wages due them within the time
24 required, the Plaintiffs and each class member who are former employees are entitled to
25 penalties as provided by California Labor Code § 203.
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1 without receiving straight time or overtime compensation for such overtime hours worked in
2 violation of California Labor Code § 1194 and the applicable Wage Orders. Plaintiff and the
3 other members of the class were improperly and illegally mis-classified by Defendant as
4 "exempt" employees when, in fact, they were "non-exempt" employees according to California
5 law. Plaintiff and the class have the right to be compensated by Defendant at the appropriate
6 compensatory wage rate for said work heretofore performed, consisting of the straight time rate
7 plus the appropriate overtime premium as mandated by California law including interest,
8 attorney fees and costs, and civil penalties thereon pursuant to Labor Code §§ 558 and 1197.1.
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11 **29.**

12 Pursuant to Labor Code § 2699, the Labor Code Private Attorneys General Act of 2004
13 (SB 796 operative January 1, 2004), Plaintiffs brings this action on behalf of themselves and
14 other current and former employees and seek recovery of applicable civil penalties as follows:

15 a. where civil penalties are specifically provided in the Labor Code for each of the
16 violations alleged herein, Plaintiff seeks recovery of such penalties;

17 b. where civil penalties are not established in the Labor Code for each of the
18 violations alleged herein, Plaintiff seeks recovery of the penalties established in § 2699(e) of
19 the Labor Code Private Attorneys General Act of 2004. The Labor Workforce Development
20 Agency has been apprized of this action and declined investigation thereof.
21

22 WHEREFORE, Plaintiffs on their own behalf and on behalf of the members of the
23 class, pray for judgment as hereinafter set forth.
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THIRD CAUSE OF ACTION
UNFAIR COMPETITION ACT

32.

Plaintiffs herein repeat and re-allege as though fully set forth at length each and every paragraph of this Complaint, excepting those paragraphs which are inconsistent with this cause of action for relief regarding Defendants' violations of California Business and Professions Code § 17200 et seq. (Unfair Practices Act).

33.

The failure of Defendant to compensate Plaintiffs and each class member as alleged above, and the deprivation by Defendant of the Plaintiffs and each class members' meal and rest periods, and the failure to properly pay hourly overtime premium rates are unlawful business practices within the meaning of Business and Professions Code § 17200, et. seq. including but not limited to a violation of the applicable State of California Industrial Welfare Commission Wage Orders, California Labor Code, regulations and statutes. Further, whether or not in violation of the aforementioned Wage Orders, regulations and statutes, Defendant has engaged in a practice that is otherwise unlawful.

34.

This cause of action is brought under Business and Professions Code §§ 17203 and 17204, commonly called the Unfair Competition Act. Under this cause of action and pursuant to Business and Professions Code § 17208, Plaintiffs and all class members seek restitution of wages owed, and where applicable, request the penalties which are provided under Labor Code § 203, where the wages and penalties were due Plaintiffs, and each class member during the Class Period, through the date of trial.

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35.

This cause of action is brought as a cumulative remedy as provided in Business and Professions Code § 17205, and is brought as a collective action by Plaintiffs on behalf of themselves and all persons similarly situated, irrespective of whether said persons are also certified as class members within the meaning of C.C.P. §382 as to any cause of action in this Complaint.

36.

Defendants, and each of them, have engaged in unfair business practices in California by practicing, employing and utilizing the employment practices as outlined herein, to wit, by requiring their store managers to perform the labor services in violation of the Labor Code and applicable Wage Orders. Defendants' utilization of such unfair business practices constitutes unfair competition and provides an unfair advantage over Defendants' competitors. Plaintiffs, and other similarly situated members of the general public, seek full restitution and disgorgement of monies, as necessary and according to proof, to restore any and all monies withheld, acquired and/or converted by the Defendants by means of the unfair practices complained of herein. Plaintiffs seek, on their own behalf and on behalf of the general public, the appointment of a receiver, as necessary.

37.

Further, Plaintiffs request that the violations of the Defendant alleged herein be enjoined, and other equitable relief as this court deems proper, including an order for the payment by Defendant of tax contributions on the accrued wages in the form of FICA, Social Security, Medicare, Unemployment Insurance, or other appropriate payments.

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38.

Plaintiffs are informed and believe and on that basis allege that at all times herein mentioned Defendants have engaged in unlawful, deceptive and unfair business practices, as proscribed by California Business and Professions Code § 17200 et seq., including those alleged herein thereby depriving Plaintiffs and other members of the general public the minimum working standards and conditions due to them under the California labor law and Industrial Welfare Commission Wage Orders as specifically described herein.

39.

Plaintiffs, and all persons similarly situated, are further entitled to and do seek a both a declaration that the above-described business practices are unfair, unlawful and/or fraudulent and injunctive relief restraining Defendants from engaging in any of such business practices in the future. Such misconduct by Defendants, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to all members of the class in that the Defendants will continue to violate California law, represented by labor statutes and IWC Wage Orders, unless specifically ordered to comply with same. This expectation of future violations will require current and future employees to repeatedly and continuously seek legal redress in order to gain compensation to which they are entitled under California law. Plaintiffs have no other adequate remedy at law to insure future compliance with the California labor laws and Wage Orders alleged to have been violated herein.

Wherefore, Plaintiffs and each class member request relief as hereinafter prayed for.

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PRAYER FOR RELIEF

Wherefore, Plaintiffs, on their behalf and on behalf of the class members, prays for this Court to grant the following relief:

1. For an order by the Court certifying this action as a class action;

2. That judgment be entered for wages for Plaintiffs and each class member, according to proof;

3. That the Defendant be ordered to pay and judgment be entered for Labor Code § 203 according to proof and for civil penalties pursuant to California Labor Code §§ 226, 558, 1174.5, 1197.1 and 2699;

4. That the Defendant be found to have engaged in unfair competition in violation of the Business and Professions Code § 17200;

5. That the Defendant be ordered and enjoined to pay restitution to the Plaintiffs and each class member due to the Defendant's unlawful and unfair competition, and for an order that the Defendant pay appropriate taxes on Plaintiffs' and each class members' wages, including but not limited to FICA, Social Security, Medicare and Unemployment Insurance, according to proof;

6. That Defendant be enjoined from further acts of unfair competition and specifically from refusing to provide meal and rest periods, refusing to keep accurate information and records of meal periods, refusing to keep records at the place of employment or at a central location in California and failing to pay wages to class members;

7. For a declaratory judgment;

8. For preliminary and injunctive relief;

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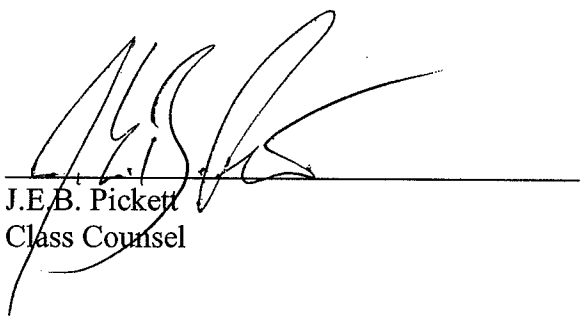
9. For an award of Plaintiffs' costs, disbursements, and reasonable attorneys fees on the appropriate causes of action;

10. Prejudgment interest; and

11. Any other relief as the court deems proper.

DATED: April 14, 2006

RIGHETTI ♦ WYNNE



J.E.B. Pickett
Class Counsel