

1 Edward J. Wynne (SBN 165819)
ewynne@wynnelawfirm.com
2 WYNNE LAW FIRM
3 80 E. Sir Francis Drake Blvd., Ste. 3G
Larkspur, CA 94939
4 Telephone: (415) 461-6400
Facsimile: (415) 461-3900
5

6 Gregg I. Shavitz (*pro hac vice*)
gshavitz@shavitzlaw.com
7 Alan L. Quiles (*pro hac vice*)
aquiles@shavitzlaw.com
8 SHAVITZ LAW GROUP, P.A.
1515 South Federal Highway, Ste. 404
9 Boca Raton, FL 33432
10 Telephone: (561) 447-8888
Facsimile: (561) 447-8831
11

12 Plaintiffs' Counsel
13
14

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 LAWRENCE C. BRANCO, KATHY
ELLIOTT, individually on behalf of other
18 members of the general public similarly
situated and as representatives and proxies for
19 the State of California,

20 Plaintiffs,

21 vs.

22 ORCHARD SUPPLY COMPANY, LLC,

23 Defendant.
24
25
26

Case No.: 5:18-cv-00531-EJD

FIRST AMENDED COMPLAINT

[CLASS ACTION]

1. 29 U.S.C. § 216(b)
2. Labor Code §§ 510, 1194
3. B&P § 17200 – Overtime
4. B&P § 17200 – Meal and Rest Breaks
5. Labor Code § 203
6. Labor Code § 226
7. Labor Code § 2802
8. Labor Code § 2698

JURY TRIAL DEMANDED

1 Lawrence C. Branco and Kathy Elliott, individually, on behalf of other members of the
2 general public similarly situated and as representatives and proxies for the State of California,
3 allege as follows:

4 **INTRODUCTION**

5 1. Plaintiffs Lawrence C. Branco and Kathy Elliott bring this action as a Nationwide
6 Representative Action on behalf of all current and former employees of Orchard Supply
7 Company, LLC (“Defendant”) employed as Assistant Store Managers within the last three years
8 who elect to opt-in to this action. Plaintiffs alleges that they and other Assistant Store Managers
9 were misclassified as exempt employees and therefore denied overtime compensation in
10 violation of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*
11 (“FLSA”).

12 2. Plaintiffs also bring this action as a California-only Class on behalf of all of
13 Defendant’s current and former Assistant Store Managers employed within the State of
14 California during the last four years from the time this case was originally filed through the time
15 this case is certified as a class alleging that they have been misclassified as exempt employees
16 and denied overtime compensation in violation of California labor law.

17 3. Plaintiffs also bring this action as a California-only Class on behalf of all of
18 Defendant’s current and former Assistant Store Managers employed within the State of
19 California during the last four years from the time this case was originally filed through the time
20 it is certified as a class alleging that they have not be reimbursed for all of their reasonable and
21 necessary business expenses in violation of California Labor Code § 2802.

22 4. Plaintiffs also bring this action as a California-only Waiting Time Penalties Sub-
23 Class on behalf of all former California-based Assistant Store Managers during the last three
24 years from the time this case was originally filed through the time this case is certified as a class
25 who were not timely and properly paid their final wages at time of termination in violation of
26 California Labor Code §§ 201-203.

27 5. Plaintiffs also bring this action as representatives and proxies for the State of
28 California to recover civil penalties under the California Labor Code Private Attorneys General

1 Act of 2004 (“PAGA”), California Labor Code section 2698 *et seq.* PAGA permits aggrieved
2 employees to bring a lawsuit on behalf of the State of California and other current and former
3 aggrieved employees to address an employer’s violations of the California Labor Code.

4 6. Plaintiffs are unaware of the names and capacities of all defendants who may
5 have caused or contributed to the harms complained of herein, but will seek leave to amend this
6 Complaint once their identities become known. Upon information and belief, Plaintiffs allege
7 that at all relevant times each defendant was the officer, director, employee, agent,
8 representative, alter ego, joint employer, co-employer, or co-conspirator of each of the other
9 defendants, and has engaged in the conduct alleged herein was in the course and scope of and in
10 furtherance of such relationship.

11 7. The Nationwide Representative Action, the California Sub-Class, and the
12 California Waiting Time Penalties Sub-Class are hereafter collectively referred to as the “Class”
13 or “Classes.”

14 8. The individual members of the Class are hereafter collectively referred to as the
15 “Class Members.”

16 **JURISDICTION AND VENUE**

17 9. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 29
18 U.S.C. § 216(b) on account of the federal question at issue in this litigation.

19 10. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiffs’
20 state law claims because those claims derive from a common nucleus of operative facts.

21 11. Venue is proper pursuant to 28 U.S.C. § 1391 as Defendant is subject to personal
22 jurisdiction in this district because its principal place of business is in this judicial district and it
23 conducts business within this judicial district.

24 **PARTIES**

25 12. Plaintiff Lawrence C. Branco is a resident of the State of California and has been
26 employed by Defendant during the statutory time period covered by this complaint. Plaintiff
27 Branco was employed as an Assistant Store Manager by Defendant.

28 13. Plaintiff Kathy Elliott is a resident of the State of California and has been

1 employed by Defendant during the statutory period covered by this Complaint. Plaintiff Elliott is
2 currently employed as an Assistant Store Manager by Defendant.

3 14. At all relevant times during the applicable class period, Defendant Orchard
4 Supply Company, LLC is a home improvement retailer doing business under the name “Orchard
5 Supply Hardware” and is a wholly owned subsidiary of Lowe’s Home Centers, LLC. Orchard
6 Supply Hardware’s principal place of business and corporate office is located within this judicial
7 district at 6450 Via Del Oro, San Jose, California.

8 **GENERAL ALLEGATIONS**

9 15. At all times herein mentioned Defendant is a business entity licensed to do
10 business and doing business in the Northern District of California. Defendant owns and operates
11 an industry, business and establishment in multiple separate geographic locations within the
12 State of California, including within the Northern District of California, selling home
13 improvement goods and services. As such, and based on the facts and circumstances incident to
14 Defendant’s business in California, Defendant is subject to California Labor Code § 1194,
15 California Business and Professions Code § 17200 *et seq.*, (Unfair Practices Act), the applicable
16 Industrial Welfare Commission Wage Orders, and the FLSA.

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

21 **FACTUAL ALLEGATIONS**

22 17. As a matter of Defendant’s uniform company policy, Plaintiffs and all members
23 of the identified classes worked and were regularly scheduled to work as salaried Assistant
24 Store Managers in excess of eight hours per workday and/or in excess of forty hours per
25 workweek without receiving straight time or overtime compensation for such overtime hours
26 worked in violation of California Labor Code §§ 510, 1194, California Industrial Welfare
27 Commission Wage Order 4-2001, and the FLSA.

28 18. Pursuant to Defendant’s realistic expectations, Plaintiffs and other Assistant

1 Store Managers were primarily engaged in working on the sales floor engaged in such activities
2 as receiving inventory, running forklifts, stocking shelves, resets, price changes, merchandising,
3 returns, setting displays, cleaning, cashiering and customer service.

4 19. Defendant has failed to meet the requirements for establishing an exemption
5 from the overtime requirements of California and federal law because all class members: (a)
6 regularly spent more than 50% of their time performing nonexempt work and did not perform
7 exempt work as a primary duty, (b) did not customarily and regularly exercise discretion and
8 independent judgment on matters of significance, (c) did not have the authority to hire or fire or
9 make meaningful recommendations regarding same, (d) did not customarily and regularly
10 supervise at least two employees or the equivalent, (e) did not perform work directly related to
11 the management policies or the general business operations of Defendant or Defendant's
12 customers, (f) did perform nonexempt production and/or sales work a majority of their time
13 (i.e., in excess of 50%) consistent with Defendant's realistic expectations, (g) did not
14 customarily and regularly spend more than 50% of their time away from the Defendant's places
15 of business selling or obtaining orders or contracts, and (h) did not earn more than 50% of their
16 compensation in a bona fide commission plan.

17 20. Plaintiffs routinely incurred reasonable and necessary business expenses without
18 reimbursement by Defendant. For instance, Defendant has a policy and practice of requiring
19 Assistant Store Managers to use their personal cell phones for work related purposes such as
20 communicating with other employees before and after normal work hours and taking
21 photographs of displays and uploading the images for Defendant's use. Defendant does not
22 reimburse its Assistant Store Managers for their reasonable expenses incurred as a result of
23 using their personal cell phones for Defendant's ordinary business needs.

24 **CLASS ALLEGATIONS**

25 21. Plaintiffs bring this action as a Nationwide Representative Action on behalf of a
26 proposed collective of individuals pursuant to the FLSA, 29 U.S.C. 216(b) and two California
27 Sub-Classes pursuant to Federal Rule of Civil Procedure 23.

28 22. The members of the Class and Sub-Classes are so numerous that joinder of all

1 members is impracticable. The exact number of the members of the Classes can be determined
2 by reviewing Defendant's records.

3 23. Plaintiffs will fairly and adequately protect the interests of the Classes and have
4 retained counsel that are experienced and competent in class action and employment litigation.
5 Plaintiffs have no interests that are contrary to, or in conflict with, members of the Class.

6 24. A class action suit, such as the instant one, is superior to other available means
7 for fair and efficient adjudication of this lawsuit. The damages suffered by individual members
8 of the Classes may be relatively small when compared to the expense and burden of litigation,
9 making it virtually impossible for members of the Classes to individually seek redress for the
10 wrongs done to them.

11 25. A class action is, therefore, superior to other available methods for the fair and
12 efficient adjudication of the controversy. Absent these actions, the members of the Classes
13 likely will not obtain redress of their injuries and Defendant will retain the proceeds of its
14 violations of California and United States law.

15 26. Even if any member of the Classes could afford individual litigation against
16 Defendant, it would be unduly burdensome to the judicial system. Concentrating this litigation
17 in one forum will promote judicial economy and parity among the claims of individual members
18 of the Classes and provide for judicial consistency.

19 27. There is a well-defined community of interest in the questions of law and fact
20 affecting the Classes as a whole. Questions of law and fact common to each of the Classes
21 predominate over any questions affecting solely individual members of the action. Among the
22 common questions of law and fact are:

- 23 a. Whether the Classes have been properly classified as exempt by
24 Defendant from overtime compensation;
- 25 b. Whether the Classes are expected to regularly work hours in excess of
26 forty per week and/or in excess of eight hours per day;
- 27 c. How the Classes are compensated;
- 28 d. Whether the California Class has incurred unreimbursed business

1 expenses that are reasonable and necessary; and,

2 e. Whether the Classes have sustained damages and, if so, what the proper
3 measure of damages is.

4 28. The answers to these predominant common questions are equally applicable to all
5 Class Members and are answers that will drive resolution of this litigation.

6 29. Pursuant to 29 U.S.C. § 207, Plaintiffs seek to prosecute the FLSA claims as a
7 Nationwide Representative Action on behalf of the following similarly situated persons:

8 All current and former employees of Orchard Supply Company,
9 LLC in the United States of America with the title “Assistant Store
10 Manager” who worked at any time from three years prior to the
11 filing of this Complaint up to the time of certification (the “FLSA
12 class.”)

13 30. Pursuant to Federal Rule of Civil Procedure 23(a) and (b), Plaintiffs also allege a
14 California-only Class on behalf of:

15 All current and former employees of Orchard Supply Company,
16 LLC, in California with the title “Assistant Store Manager” who
17 worked at any time from four years prior to the filing of this
18 Complaint up to the time of certification (the “California Class.”)

19 31. Pursuant to Federal Rule of Civil Procedure 23(a) and (b), Plaintiffs also allege a
20 California-only Waiting Time Penalties Sub-Class on behalf of:

21 All former employees of Orchard Supply Company, LLC, in
22 California with the title “Assistant Store Manager” who worked at
23 any time from three years prior to the filing of this Complaint up to
24 the time of certification (the “California Sub-Class.”)

25 32. Notice of the pendency and any resolution of this action can be provided to
26 Classes by mail, print, and/or internet publication.

27 **FIRST CAUSE OF ACTION**

28 **(29 U.S.C. § 201 *et seq.* – on behalf of the FLSA Class)**

33. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
34. Complaint as if fully set forth herein.

35. At all relevant times, Defendant has been and continues to be, an employer
36. engaged in interstate commerce and/or the production of goods for commerce, within the

1 meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

2 35. At all relevant times, Defendant employed, and/or continues to employ, Plaintiffs
3 and each member of the FLSA Class within the meaning of the FLSA.

4 36. As alleged above, Defendant had a policy and practice of failing to properly pay
5 overtime compensation to its Assistant Store Managers for the hours worked in excess of forty
6 hours per week.

7 37. Defendant's failure to pay Plaintiffs and all other members of the FLSA Class
8 for overtime compensation at a rate not less than one and one-half times their regular rate for
9 work performed beyond the 40-hour workweek is in violation of 29 U.S.C. §§ 206, 207.

10 38. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA
11 within the meaning 29 U.S.C. § 255(a).

12 39. Due to the Defendant's FLSA violations, Plaintiffs, on behalf of the members of
13 the FLSA Class, are entitled to recover from Defendant unpaid overtime compensation, an
14 additional amount equal as liquidated damages, reasonable attorneys' fees, and costs pursuant to
15 29 U.S.C. § 216(b).

16 **SECOND CAUSE OF ACTION**

17 **(Labor Code §§ 510, 1194 – on behalf of the California Class)**

18 40. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
19 Complaint as if fully set forth herein.

20 41. California Wage Order 4-2001, 8 C.C.R. § 11040, and Labor Code § 510 state
21 that an employee must be paid overtime, equal to 1.5 times the employee's regular rate of pay,
22 for all hours worked in excess of 40 per week and/or 8 per day.

23 42. Class members regularly work more than 40 hours per week and/or 8 hours per
24 day but are not paid overtime.

25 43. Class members do not meet any of the tests for exempt status under the
26 California Wage Orders and/or the California Labor Code.

27 44. Plaintiffs and the California Class seek their unpaid overtime wages including
28 interest thereon and reasonable attorneys' fees and costs pursuant to Labor Code § 1194.

1 **THIRD CAUSE OF ACTION**

2 **(Bus. & Prof. Code § 17203 – Overtime – on behalf of the California Class)**

3 45. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
4 Complaint as if fully set forth herein.

5 46. Defendant has committed an act of unfair competition under California Business
6 & Professions Code § 17200 *et seq.* by not paying the required state law overtime pay to the
7 members of the California Class.

8 47. Pursuant to Bus. & Prof. Code § 17203, Plaintiffs request an order requiring
9 Defendant to make restitution of all overtime wages due to the California Class.

10 **FOURTH CAUSE OF ACTION**

11 **(Bus. & Prof. Code § 17203 – Meal and Rest Breaks - on behalf of the California Class)**

12 48. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
13 Complaint as if fully set forth herein.

14 49. In violation of Labor Code § 512 and IWC Wage Order 4-2001, Defendant failed
15 to provide and document meal and rest period breaks for the California Class in the number,
16 length and manner as required. At no time have Plaintiffs or the California Class entered into
17 any written agreement with Defendant expressly or impliedly waiving their right to their meal
18 and rest breaks. Plaintiffs and the California Class have been injured by Defendant’s failure to
19 comply with Labor Code § 512 and IWC Wage Order 4-2001 and are thus entitled to the wages
20 set forth in Labor Code § 226.7 and IWC Wage Order 4-2001 §§ 11 and 12.

21 50. Pursuant to Bus. & Prof. Code § 17203, Plaintiffs request Defendant make
22 restitution of all wages due to the class under this Cause of Action.

23 **FIFTH CAUSE OF ACTION**

24 **(Labor Code § 203 – Waiting Time Penalties -- on behalf of the California Sub-Class)**

25 51. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
26 Complaint as if fully set forth herein.

27 52. Plaintiff Branco and the California Sub-Class were discharged by Defendant or
28 voluntarily quit, and did not have a written contract for employment. Defendant, in violation of

1 California Labor Code §§ 201 and 202 *et seq.* had a consistent and uniform policy, practice and
2 procedure of willfully failing to pay the earned and unpaid wages of all such former employees.
3 Defendant has willfully failed to pay the earned and unpaid wages of such individuals,
4 including, but not limited to, straight time, overtime, vacation time, meal and rest wages, and
5 other wages earned and remaining uncompensated according to amendment or proof. Plaintiff
6 and the California Sub-Class did not secret or absent themselves from Defendant nor refuse to
7 accept the earned and unpaid wages from Defendant. Accordingly, Defendant is liable for
8 waiting time penalties for the unpaid wages pursuant to California Labor Code § 203.

9 **SIXTH CAUSE OF ACTION**

10 **(Labor Code §§ 226 – Wage Statements – on behalf of the California Class)**

11 53. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
12 Complaint as if fully set forth herein.

13 54. Defendant, as a matter of corporate policy did not maintain or provide accurate
14 itemized statements in violation of Labor Code § 226.

15 55. For instance, Defendant did not state or did not accurately state, *inter alia*, the
16 total hours worked, hours worked daily, or the actual hourly rate of Plaintiffs and other
17 Assistant Store Managers in their pay statements. Defendant's failure to maintain accurate
18 itemized statements was willful, knowing, intentional, and the result of Defendant's custom,
19 habit, pattern and practice. Defendant's failure to maintain accurate itemized statements was not
20 the result of isolated, sporadic or unintentional behavior. Due to Defendant's failure to comply
21 with the requirements of Labor Code § 226, Plaintiffs and other Assistant Store Managers
22 suffered damages.

23 56. Such a pattern and practice as alleged herein is unlawful and creates an
24 entitlement to recovery by Plaintiffs and the identified Class for all damages pursuant to Labor
25 Code § 226, including interest, attorneys' fees and costs.

26 **SEVENTH CAUSE OF ACTION**

27 **(Labor Code § 2802 - Business Expenses – on behalf of the California class)**

28

1 57. Plaintiffs incorporate the allegations contained in the previous paragraphs of this
2 Complaint as if fully set forth herein.

3 58. Labor Code § 2802 provides that “[a]n employer shall indemnify his or her
4 employee for all necessary expenditures or losses incurred by the employee in direct
5 consequence of the discharge of his or her duties.”

6 59. While discharging their duties for Defendant, Plaintiffs and similarly situated
7 members of the California Class have incurred work-related expenses. Such expenses include
8 but are not limited to mobile telephone charges.

9 60. Defendant has failed to indemnify or in any manner reimburse Plaintiffs and
10 similarly situated members of the California Class for these expenditures and losses. By
11 requiring those employees to pay expenses and cover losses that they incurred in direct
12 consequence of the discharge of their duties for Defendant and/or in obedience of Defendant’s
13 direction or expectations, Defendant has violated and continues to violate Labor Code § 2802.

14 61. By unlawfully failing to indemnify Plaintiffs and similarly situated members of
15 the California Class, Defendant is liable for reasonable attorneys’ fees and costs under Labor
16 Code § 2802(c).

17 62. As a direct and proximate result of Defendant’s conduct, Plaintiffs and similarly
18 situated members of the California Class have suffered substantial losses according to proof, as
19 well as pre-judgment interest, costs, and attorneys’ fees for the prosecution of this action.

20 **EIGHTH CAUSE OF ACTION**

21 **(Labor Code § 2698 et seq. – Civil Penalties – on behalf of aggrieved employees and**
22 **the State of California)**

23 63. Plaintiff Kathy Elliott incorporates the allegations contained in the foregoing
24 paragraphs as though repeated here.

25 64. As alleged above, Defendant failed to comply with the California Labor Code.
26 As such, Plaintiff Elliott is an “aggrieved employee” as defined in Labor Code § 2699(a).
27 Pursuant to Labor Code § 2698 *et seq.*, the Labor Code Private Attorneys General Act of 2004,
28 Plaintiff Elliott brings this action on behalf of herself and other current and former California

1 Assistant Store Managers against Orchard Supply Company, LLC and seek recovery of
2 applicable civil penalties as follows:

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

5 b. where civil penalties are not established in the Labor Code for each of the
6 violations alleged herein, Plaintiff Elliott seeks recovery of the penalties
7 established in § 2699(e) of the Labor Code Private Attorneys General Act of
8 2004, and in accordance with § 200.5 of the Labor Code.

9 65. On February 8, 2018 and February 9, 2018, Plaintiff Elliott caused to be served
10 written notice and amended notice, via certified mail to the Labor and Workforce Development
11 Agency and to Defendant Orchard Supply Company, LLC of Plaintiff Elliott's intent to amend
12 the complaint to add a cause of action pursuant to Labor Code § 2698 *et seq.* The notice put
13 Defendant Orchard Supply Company, LLC on notice of the claims alleged herein and the factual
14 basis thereof. Plaintiff Elliott did not receive a response from the LWDA to Plaintiff's certified
15 letter.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs, on their own behalf and on behalf of the members of all
18 classes, prays for judgment as follows:

19 1. For an order conditionally certifying the Nationwide Representative Action and
20 for an order directing that notice be sent to all members of the FLSA Class;

21 2. For an order certifying the claims brought under California law and for an order
22 directing notice be send to all members of the California Class and California Sub-Class;

23 3. For damages, restitution, penalties, attorney fees and costs; and,

24 4. For prejudgment interest.
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: May 3, 2018

WYNNE LAW FIRM

By: /s/Edward J. Wynne
Edward J. Wynne
80 E. Sir Francis Drake Blvd., Suite 3G
Larkspur, CA 94939
Telephone (415) 461-6400
Facsimile (415) 461-3900

SHAVITZ LAW GROUP, P.A.
Gregg I. Shavitz (pro hac vice)
Alan L. Quiles (pro hac vice)
1515 South Federal Highway, Suite 404
Boca Raton, FL 33432
Telephone (561) 447-8888
Facsimile (561) 447-8831
Counsel for Plaintiffs and the Putative Classes

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JURY DEMAND

Plaintiffs hereby request a jury trial on all issues so triable.

Dated: May 3, 2018

WYNNE LAW FIRM

By: /s/Edward J. Wynne
Edward J. Wynne
80 E. Sir Francis Drake Blvd., Suite 3G
Larkspur, CA 94939
Telephone (415) 461-6400
Facsimile (415) 461-3900
Counsel for Plaintiffs and the Putative Classes