

1 TIMOTHY J. LONG (STATE BAR NO. 137591)
tjlong@orrick.com
2 TINA M. TRAN (STATE BAR NO. 186529)
ttran@orrick.com
3 ORRICK, HERRINGTON & SUTCLIFFE LLP
777 South Figueroa Street, Suite 3200
4 Los Angeles, CA 90017
Telephone: 213-629-2020
5 Facsimile: 213-612-2499

6 Attorneys for Defendant
HALLMARK MARKETING CORPORATION
7 a Delaware Corporation

8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11

12 NIKKI FUZELL, an individual, on behalf
13 of herself, all others similarly situated,

14 Plaintiffs,

15 v.

16 HALLMARK MARKETING
CORPORATION, a Delaware
17 Corporation with its principal place of
business in the State of Missouri,

18 Defendant.

19

20

21

22

23

24

25

26

27

28

Case No.: CV08-05330 VBF (FFMx)

CLASS ACTION

ANSWER TO COMPLAINT FOR
DAMAGES, RESTITUTION AND
INJUNCTIVE RELIEF

1 Defendant Hallmark Marketing Corporation provides the following Answer to
2 Plaintiff's Complaint for Damages and Relief ("Complaint"):

3 **PRELIMINARY STATEMENT**

4 Admitted Plaintiff purports to bring this action as indicated. Denied as to
5 Plaintiff's entitlement to do so. Denied as to any and all remaining allegations.

6 **JURISDICTION AND VENUE**

7 1. Admitted (1) Defendant is a corporation incorporated in the State of
8 Delaware with its principal place of business in Missouri; (2) Defendant employs
9 Plaintiff in Los Angeles County, California; (3) Plaintiff purports to bring this action
10 as indicated and that, based on the allegations, this Court can exercise diversity
11 jurisdiction over this action; and (4) venue is proper in this Court, if any. Denied as
12 to any and all remaining allegations.

13 2. Defendant is without sufficient information either to admit or to deny
14 what Plaintiff "is informed and believes" and therefore denies the same. Further
15 answering, Defendant admits it employed "hundreds of" Retail Merchandisers in
16 California during the period referenced in Plaintiff's Complaint as the "CLASS"
17 period. Defendant is without knowledge or information sufficient to admit or deny
18 the remaining allegations and therefore denies them.

19 **CLASS DEFINITION**

20 3. Admitted Plaintiff purports to represent the class alleged, but denied as
21 to the propriety of any such representation or class. Denied as to any and all
22 remaining allegations.

23 4. Admitted Plaintiff purports to represent the class alleged, but denied as
24 to the propriety of any such representation or class. Denied as to any and all
25 remaining allegations.

26 5. Admitted Plaintiff purports to represent the class alleged, but denied as
27 to the propriety of any such representation or class. Denied as to any and all
28 remaining allegations.

1 6. Admitted Plaintiff purports to represent the class alleged, but denied as
2 to the propriety of any such representation or class. Denied as to any and all
3 remaining allegations.

4 **CLASS ALLEGATIONS**

5 7. Admitted as to subparts (a) and (b), subject to Defendants understanding
6 of “at all material times herein.” Denied as to any and all remaining allegations.

7 8. Denied.

8 9. Denied.

9 **DEFENDANTS**

10 10. Defendant is without sufficient information either to admit or to deny
11 what Plaintiff “is informed and believes” and therefore denies the same. Further
12 answering, Defendant admits subpart (a) and that it employs Plaintiff Fuzell and
13 other Retail Merchandisers. Denied as to any and all remaining allegations.

14 **THE CONDUCT**

15 11. Admitted as to the first six sentences. As to sentence seven,
16 Defendant’s policies provide for such payment, if the employee in question submits
17 the time for payment. Denied as to any and all remaining allegations.

18 12. Denied.

19 13. Denied.

20 14. Denied.

21 15. Denied.

22 **FIRST COUNT**

23 **FOR FAILURE TO PAY OVERTIME COMPENSATION**

24 [Cal. Lab. Code §§510, 1194 and 1198]

25 (By CLASS and against Defendant HALLMARK)

26 16. Defendant hereby realleges and incorporates its responses to ¶¶ 1-15,
27 *supra*, as if fully set forth herein.

28

1 17. Admitted Plaintiff has generally recited accurately the provisions of the
2 California Labor Code.

3 18. Admitted Plaintiff has generally recited accurately the provisions of the
4 California Labor Code.

5 19. Denied.

6 20. Admitted Plaintiff and/or other California Retail Merchandisers may
7 have, from time to time during the period specified in Plaintiff's Complaint, worked
8 more than eight hours in a day and/or more than forty hours in a week. Denied as to
9 any and all remaining allegations.

10 21. Denied. Defendant's policy is to pay overtime compensation for all
11 overtime hours submitted for payment.

12 22. Denied.

13 23. Defendant is without sufficient information either to admit or to deny
14 what Plaintiff "[is] informed and believe" and therefore denies the same. Denied as
15 to any and all remaining allegations.

16 24. Denied.

17 25. Admitted Plaintiff so requests, but denied Plaintiff is so entitled.
18 Denied as to any and all remaining allegations.

19 26. Admitted the statute cited authorizes recovery of attorneys' fees in
20 appropriate circumstances, but denied that this is any such circumstance. Denied as
21 to any and all remaining allegations.

22 **SECOND COUNT**

23 **FOR FAILURE TO PAY WAGES OWED**

24 **[Cal. Lab. Code §§ 204, 218, 218.5, 218.6]**

25 **(By the CLASS and Against all Defendant)**

26 27. Defendant hereby realleges and incorporates its responses to ¶¶ 1-26,
27 *supra*, as if fully set forth herein.

1 28. The allegations in this paragraph amount to legal conclusions that do not
2 require a response from Defendant. To the extent a response is required, Defendant
3 objects to Plaintiffs' characterization of the California Labor Code and so denies the
4 allegation as stated.

5 29. The allegations in this paragraph amount to legal conclusions that do not
6 require a response from Defendant. To the extent a response is required, Defendant
7 objects to Plaintiffs' general reference to "IWC Wage order(s)" and so denies the
8 allegation as stated.

9 30. Denied.

10 31. Denied.

11 32. Denied.

12 33. Admitted Plaintiff so seeks, but denied Plaintiff is so entitled. Denied as
13 to any and all remaining allegations.

14 34. Admitted Plaintiff so requests, but denied Plaintiff is so entitled.
15 Denied as to any and all remaining allegations.

16 **THIRD COUNT**

17 **FOR FAILURE TO PROVIDE MEAL PERIODS AND REST PERIODS**

18 **[Cal. Lab. Code §§2 26.7 and 512]**

19 **(By the CLASS and Against All Defendants)**

20 35. Defendant hereby realleges and incorporates its responses to ¶¶ 1-34,
21 *supra*, as if fully set forth herein.

22 36. Admitted the California Labor Code so provides.

23 37. Admitted the California Labor Code so provides.

24 38. Denied.

25 39. Admitted Plaintiff and other California Retail Merchandisers may have,
26 from time to time during the period specified in Plaintiff's Complaint, worked more
27 than five hours in a given day. Denied as to any and all remaining allegations.

28 40. Admitted the California Labor Code so provides.

1 41. Admitted the California Labor Code so provides.

2 42. Denied.

3 43. Admitted Plaintiff and other California Retail Merchandisers may have,
4 from time to time during the period specified in Plaintiff's Complaint, worked more
5 than four hours in a given day. Denied as to any and all remaining allegations.

6 44. Denied.

7 45. Defendant is without sufficient information either to admit or to deny
8 what Plaintiff "is informed and believes" and therefore denies the same. Denied as
9 to any and all remaining allegations.

10 46. Admitted the California Labor Code entitles an employee to seek the
11 recovery alleged, but denied Plaintiff is entitled to any such recovery. Denied as to
12 any and all remaining allegations.

13 **FOURTH COUNT OF ACTION**

14 **FOR FAILURE TO REIMBURSE EMPLOYEES FOR BUSINESS**

15 **EXPENSES**

16 **[Cal. Lab. Code §2802]**

17 **(By Class and Against Defendant HALLMARK)**

18 47. Defendant hereby realleges and incorporates its responses to ¶¶ 1-46,
19 *supra*, as if fully set forth herein.

20 48. Admitted the California Labor Code so provides.

21 49. Admitted Plaintiff can and does travel for her work with Defendant.
22 Denied as to any and all remaining allegations.

23 50. Denied Plaintiff would or could incur all of the expenses alleged "[i]n
24 the process of this travel." Further answering, admitted Plaintiff can and does incur
25 expenses in her work for Defendant, which expenses she could and should submit for
26 reimbursement. Denied as to any and all remaining allegations.

27 51. Denied.

1 52. Admitted Plaintiff so seeks, but denied Plaintiff is so entitled. Denied as
2 to any and all remaining allegations.

3 **FIFTH CAUSE OF ACTION**
4 **FOR UNLAWFUL BUSINESS PRACTICES**
5 **[Cal. Bus. And Prof. Code §§ 17200 et seq.]**
6 **[By the CLASS and against All Defendants)**

7 53. Defendant hereby realleges and incorporates its responses to ¶¶ 1-52,
8 *supra*, as if fully set forth herein.

9 54. Admitted.

10 55. Admitted.

11 56. Denied.

12 57. Denied.

13 58. Denied.

14 59. Admitted Plaintiff so seeks, but denied Plaintiff is so entitled. Denied as
15 to any and all remaining allegations.

16 60. Admitted Plaintiff so seeks, but denied Plaintiff is so entitled. Denied as
17 to any and all remaining allegations.

18 61. Denied.

19 **PRAYER**

20 1. ON THE FIRST COUNT: Denied Plaintiff is entitled to any of the
21 relief requested in her Prayer.

22 2. ON THE SECOND COUNT: Denied Plaintiff is entitled to any of the
23 relief requested in her Prayer.

24 3. ON THE THIRD COUNT: Denied Plaintiff is entitled to any of the
25 relief requested in her Prayer.

26 4. ON THE FOURTH COUNT: Denied Plaintiff is entitled to any of the
27 relief requested in her Prayer.

28

1 5. ON THE FIFTH COUNT: Denied Plaintiff is entitled to any of the
2 relief requested in her Prayer.

3 6. ON ALL CAUSES OF ACTION: Denied Plaintiff is entitled to any of
4 the relief requested in her Prayer.

5
6 **ANSWER TO ALL ALLEGATIONS**

7 Defendant denies any and all allegations it did not specifically admit in
8 response to ¶¶ 1-61, *supra*, as if fully set forth herein.

9 **DEFENSES**

10 **FIRST AFFIRMATIVE DEFENSE**

11 Plaintiff's claims are covered by Hallmark Marketing Corporation's Dispute
12 Resolution Program ("DRP"). Defendant reserves all of its rights under the DRP and
13 does not waive any of its rights by responding herein.

14 **SECOND AFFIRMATIVE DEFENSE**

15 The Complaint, as well as each purported cause of action therein, fails to state
16 facts sufficient to constitute a cause or causes of action against Defendant and/or fails
17 to state a claim upon which relief can be granted against Defendant.

18 **THIRD AFFIRMATIVE DEFENSE**

19 Without accepting the burden of proof on the matter, Defendant alleges
20 Plaintiff has failed to set forth a prima facie case Defendant violated any of the
21 statutes and/or wage orders upon which Plaintiff relies and/or purports to rely.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 As a further and separate affirmative defense, Defendant alleges the
24 Complaint, as well as each purported cause of action therein, is barred by the
25 applicable statutes of limitation.

26 **FIFTH AFFIRMATIVE DEFENSE**

27 As a further and separate affirmative defense, Defendant alleges the
28 Complaint, as well as each purported cause of action therein, is barred, and that

1 Plaintiff unreasonably delayed in bringing this action without good cause, and
2 thereby prejudiced Defendant, and accordingly is guilty of laches.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 As a further and separate affirmative defense, Defendant alleges the
5 Complaint, as well as each purported cause of action alleged therein, is barred by the
6 doctrine of unclean hands, and that Plaintiff engaged in misconduct and wrongful
7 acts against or toward Defendant, in connection with the subject matter of this
8 litigation.

9 **SEVENTH AFFIRMATIVE DEFENSE**

10 As a further and separate affirmative defense, Defendant alleges Plaintiff's
11 damages, the existence of which is specifically denied, were proximately caused or
12 contributed to by the acts, omissions, or wrongful conduct of persons or entities over
13 whom/which Defendants had no control and for whom/which Defendant has no
14 responsibility or liability.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 As a further and separate affirmative defense, Defendant alleges no conduct by
17 or attributable to Defendant was the cause in fact or proximate cause of the damages,
18 the existence of which is specifically denied, allegedly suffered by Plaintiff, nor a
19 substantial factor in bringing about said alleged damages.

20 **NINTH AFFIRMATIVE DEFENSE**

21 As a further and separate affirmative defense, Defendant alleges Plaintiff was
22 negligent with respect to each of the matters described in the Complaint, and that
23 Plaintiff's negligence was the cause in fact and proximate cause of the damages, the
24 existence of which is specifically denied, allegedly suffered by Plaintiff; Plaintiff's
25 negligence bars recovery in this action, either in whole or in part.

26 **TENTH AFFIRMATIVE DEFENSE**

27 As a further and separate affirmative defense, Defendant alleges in good faith
28 the Complaint, as well as each purported cause of action herein, is barred by

1 Plaintiff's failure to take reasonable steps to avoid or otherwise mitigate the alleged
2 damages, the existence of which is specifically denied.

3 **ELEVENTH AFFIRMATIVE DEFENSE**

4 As a further and separate affirmative defense, Defendant alleges it at all
5 relevant times properly paid Plaintiff (and all other Retail Merchandisers) for all time
6 submitted as compensable time.

7 **TWELFTH AFFIRMATIVE DEFENSE**

8 As a further and separate affirmative defense, Defendant alleges it at all
9 relevant times properly paid Plaintiff (and all other Retail Merchandisers) at least
10 minimum wage for all hours actually worked.

11 **THIRTEENTH AFFIRMATIVE DEFENSE**

12 Without accepting the burden of proof on the matter, Defendant alleges
13 Plaintiff's action may not proceed as a collective and/or class action because Plaintiff
14 and those she purports to represent were not/are not "similarly situated," as required.

15 **FOURTEENTH AFFIRMATIVE DEFENSE**

16 Without accepting the burden of proof on the matter, Defendant alleges
17 Plaintiff's action may not proceed as a collective action and/or class action because
18 Plaintiff and the purportedly "similarly situated" employees were not subject to a
19 common unlawful policy, practice, or scheme.

20 **FIFTEENTH AFFIRMATIVE DEFENSE**

21 As a further and separate affirmative defense, Defendant alleges Plaintiff
22 acknowledged, ratified, consented to, and acquiesced in the alleged acts or
23 omissions, if any, of Defendant, thus barring Plaintiff from any relief as prayed for in
24 her Complaint.

25 **SIXTEENTH AFFIRMATIVE DEFENSE**

26 As a further and separate affirmative defense, Defendant alleges its conduct
27 toward Plaintiff was at all times justified under the circumstance based on the
28 information in its possession, including the statements and conduct of Plaintiff.

1 **SEVENTEENTH AFFIRMATIVE DEFENSE**

2 As a further and separate affirmative defense, Defendant alleges Plaintiff lacks
3 standing to assert some or all of the causes of action against Defendant.

4 **EIGHTEENTH AFFIRMATIVE DEFENSE**

5 As a further and separate affirmative defense, neither Plaintiff nor the other
6 members of the purported class are entitled to the relief sought because the hours
7 claimed, in whole or in part, were/are not “hours worked.”

8 **NINETEENTH AFFIRMATIVE DEFENSE**

9 As a further and separate affirmative defense, Defendant alleges Plaintiff is not
10 a proper representative member of the alleged class.

11 **TWENTIETH AFFIRMATIVE DEFENSE**

12 Without accepting the burden of proof on the matter, Defendant alleges this
13 action cannot proceed as a collective and/or class action because of the inadequacy of
14 representation and/or because of the incompatibility of the proposed classes.

15 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

16 Without accepting the burden of proof on the matter, Defendant alleges this
17 action cannot proceed as a collective and/or class action because the parties are not
18 numerous within the meaning of applicable class action requirements.

19 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

20 Without accepting the burden of proof on the matter, Defendant alleges there
21 is not a common or general interest in the alleged class.

22 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

23 Without accepting the burden of proof on the matter, Defendant alleges there
24 is not a community of interest among the alleged class members.

25 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

26 Without accepting the burden of proof on the matter, Defendant alleges certain
27 of the interests of the proposed class members are in conflict with interests of all or
28

1 certain sub-groups of the members of the alleged class of persons but Plaintiff
2 purports to represent, the existence of which is expressly denied.

3 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

4 Without accepting the burden of proof on the matter, Defendant alleges there
5 is not a risk of substantial prejudice from separate actions.

6 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

7 As a further and separate affirmative defense, to the extent Plaintiff agreed to
8 arbitrate all causes of action asserted in the Complaint, this Complaint was filed in
9 the wrong forum.

10 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

11 As a further and separate affirmative defense, Plaintiff is not entitled to
12 recover damages, the existence of which is specifically denied, as Defendant acted in
13 good faith and had reasonable grounds to believe it was not violating applicable state
14 law.

15 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

16 As a further and separate affirmative defense, Plaintiff's claim for injunctive
17 relief is barred because Plaintiff has an adequate and complete remedy at law.

18 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

19 As a further and separate affirmative defense, Plaintiff received proper
20 payment for all time worked and/or all compensable time.

21 **THIRTIETH AFFIRMATIVE DEFENSE**

22 Plaintiff was paid any and all wages to which she was entitled.

23 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

24 Without accepting the burden of proof on the matter, Defendant denies
25 Plaintiff may maintain this action as a collective or representative action because she
26 cannot satisfy the requirements of 29 U.S.C. § 216, Fed. R. Civ. P. 23, or any other
27 applicable statute.

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

THIRTY-SECOND AFFIRMATIVE DEFENSE

To the extent Plaintiff seeks civil money penalties and/or disgorgement of amounts earned, such claims are unconstitutional under federal and/or state constitutional provisions of due process, equal protection, and/or excessive fines clauses.

THIRTY-THIRD AFFIRMATIVE DEFENSE

Without accepting the burden of proof on the matter, Defendant alleges it paid Plaintiff (and all Retail Merchandisers) for all hours worked of which it was or should have been aware.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

Without accepting the burden of proof on the matter, Defendant alleges Plaintiff and all Retail Merchandisers were able to take rest and meal breaks as desired.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

Without accepting the burden of proof on the matter, Defendant alleges Plaintiff and all Retail Merchandisers were reimbursed for all reasonable expenses incurred.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

Defendant in good faith attempted to comply with all applicable laws, including but not limited to laws applicable to pay for hours worked, which attempt limits the applicability under §203 of any penalties

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

Any unpaid time that Plaintiff may have worked was *de minimis*.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

Discovery in this matter may reveal additional bases for an avoidance or affirmative defense; Defendant therefore reserves the right to amend this Answer to plead such affirmative defenses should they be discovered.

1 WHEREFORE, having fully answered, Defendant prays as follows:
2 That Plaintiff take nothing by way of her Complaint;
3 That Defendant be awarded costs of suit;
4 That Plaintiff's Complaint be dismissed herein; and
5 That the Court award such other and further relief as it deems appropriate.
6

7 Dated: September 22, 2008

TIMOTHY J. LONG
TINA M. TRAN
Orrick, Herrington & Sutcliffe LLP

9
10 
11 TINA M. TRAN
12 Attorneys for Defendant
13 Hallmark Marketing Corporation
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28