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1 WILLIAM R. HILL, #114954
 rock@donahue.com
 2 ANDREW S. MACKAY, #197074
 andrew@donahue.com
 3 JOSHUA M. CAPLAN, #245469
 joshua@donahue.com
 4 DONAHUE GALLAGHER WOODS LLP
 Attorneys at Law
 5 1999 Harrison Street, 25th Floor
 Oakland, California 94612-3520
 6 P.O. Box 12979
 Oakland, California 94604-2979
 7 Telephone: (510) 451-0544
 Facsimile: (510) 832-1486
 8
 Attorneys for Defendant
 9 ALCO IRON & METAL CO., a California
 corporation

FILED
ALAMEDA COUNTY

APR 07 2011
CLERK OF THE SUPERIOR COURT

Asm

11 SUPERIOR COURT OF CALIFORNIA
 12 COUNTY OF ALAMEDA
 13 HAYWARD HALL OF JUSTICE - UNLIMITED JURISDICTION

15 FELIPE DIAZ, INDIVIDUALLY AND
 ON BEHALF OF ALL OTHERS
 16 SIMILARLY SITUATED,
 17 Plaintiff,
 18 v.
 19 ALCO IRON & METAL CO., and DOES
 1 TO 30,
 20 Defendants.
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CASE NO. HG10517616
CLASS ACTION
**ANSWER TO PLAINTIFF'S UNVERIFIED
 FIRST AMENDED COMPLAINT**

BY FAX

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GENERAL DENIAL

Under the provisions of section 431.30(d) of the California Code of Civil Procedure, defendant Alco Iron & Metal Co. ("Alco"), a California corporation, for itself and itself alone, hereby denies, generally and specifically, each and every allegation contained in the First Amended Complaint filed herein by Plaintiff Felipe Diaz ("Plaintiff").

Alco further denies, generally and specifically, that Plaintiff or any putative class member, the existence of such class being expressly denied, is entitled to the relief requested, or that Plaintiff or any putative class member has been damaged in any sum, or at all, by reason of any act or omission on the part of Alco, or any of its past or present agents, representatives, or employees.

WHEREFORE, Alco prays for judgment as hereinafter set forth.

AFFIRMATIVE DEFENSES

Alco alleges, as to each and all the allegations of the First Amended Complaint, the following affirmative defenses. Alco reserves the right to assert additional affirmative defenses in the event that facts emerge hereinafter that warrant the assertion of such additional defenses.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

1. Alco alleges as an affirmative defense that each and all of the claims set forth in the First Amended Complaint fail to state facts sufficient to constitute a cause of action for which relief may be granted against Alco.

SECOND AFFIRMATIVE DEFENSE

(Estoppel)

2. Alco alleges as an affirmative defense that Plaintiff and each putative class member are by virtue of their own inequitable conduct estopped from recovery on the First Amended Complaint, and each cause of action contained therein.

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1 **THIRD AFFIRMATIVE DEFENSE**

2 **(Unclean Hands)**

3 3. Alco alleges as an affirmative defense that Plaintiff and each putative class
4 member come to this Court with unclean hands and are therefore barred from recovery on the
5 First Amended Complaint, and each cause of action contained therein.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 **(Waiver)**

8 4. Alco alleges as an affirmative defense that the First Amended Complaint and each
9 cause of action contained therein are barred by Plaintiff's and each putative class member's prior
10 waiver of the claims alleged therein.

11 **FIFTH AFFIRMATIVE DEFENSE**

12 **(Laches)**

13 5. Alco alleges as an affirmative defense that each and every cause of action of the
14 First Amended Complaint is barred by laches.

15 **SIXTH AFFIRMATIVE DEFENSE**

16 **(Statute of Limitations)**

17 6. Alco alleges as an affirmative defense that each cause of action of the First
18 Amended Complaint is barred by the applicable statute of limitations, including, but not limited
19 to, California Code of Civil Procedure sections 312, 337-340, California Business and
20 Professions Code section 17208, and California Labor Code sections 203 and 226.

21 **SEVENTH AFFIRMATIVE DEFENSE**

22 **(Offset)**

23 7. Alco alleges as an affirmative defense that Plaintiff's and each putative class
24 member's claims for damages must be offset by monies received from any other source, if any, or
25 must be offset by monies still owed by Plaintiff or each putative class member, or subject to
26 setoff based on the acts and wrongdoing of Plaintiff or each putative class member.

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EIGHTH AFFIRMATIVE DEFENSE

(Attorneys' Fees Barred)

8. Alco alleges as an affirmative defense that Plaintiff and each putative class member are precluded from recovering attorneys' fees from Alco under the applicable provisions of law, including, but not limited to, California Code of Civil Procedure section 1021.

NINTH AFFIRMATIVE DEFENSE

(Business Justification/Privilege)

9. Alco alleges as an affirmative defense that the conduct complained of in the First Amended Complaint was a just and proper exercise of management discretion undertaken for a fair and honest reason regulated by good faith under the circumstances then existing, and undertaken by Alco in a manner in which it believed in good faith that it was justified and/or privileged to act.

TENTH AFFIRMATIVE DEFENSE

(Employer's Reasonable Care)

10. Alco alleges as an affirmative defense that each and all of the claims of Plaintiff or any putative class member are barred because: (a) Alco exercised reasonable care to prevent and correct promptly any employment law issues, including, but not limited to, those related to maintenance of payroll records, payment of final wages, meal periods, and rest breaks; and (b) Plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by Alco or to avoid harm otherwise.

ELEVENTH AFFIRMATIVE DEFENSE

(Consent)

11. Alco alleges as an affirmative defense that Plaintiff and each putative class member acknowledged, ratified, consented to, and acquiesced in the alleged acts or omissions, if any, of Alco, thus barring Plaintiff and each putative class member from any relief as prayed for in the First Amended Complaint.

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TWELFTH AFFIRMATIVE DEFENSE

(Section 203 Claims Barred After Filing Original Complaint)

12. Alco alleges as an affirmative defense that Plaintiff's claims for penalties pursuant to California Labor Code section 203 are barred as of the filing of the original complaint.

THIRTEENTH AFFIRMATIVE DEFENSE

(Contribution by Own Acts)

13. Alco alleges as an affirmative defense that if the damages alleged in the First Amended Complaint, and each cause of action alleged therein, occurred, such damages were proximately caused by and/or were contributed to by Plaintiff's and each putative class member's own acts or omissions.

FOURTEENTH AFFIRMATIVE DEFENSE

(Failure to State Facts Warranting Class Certification)

14. Alco alleges as an affirmative defense that Plaintiff fails to allege facts sufficient to warrant class certification.

FIFTEENTH AFFIRMATIVE DEFENSE

(Inadequate Representation)

15. Alco alleges as an affirmative defense that the First Amended Complaint, and each cause of action contained therein, are not proper for treatment as a class action because Plaintiff is an inadequate representative of the putative class.

SIXTEENTH AFFIRMATIVE DEFENSE

(No Commonality of Claims)

16. Alco alleges as an affirmative defense that the First Amended Complaint, and each cause of action contained therein, are not proper for treatment as a class action because Plaintiff cannot establish that common issues predominate.

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TWENTY-FIRST AFFIRMATIVE DEFENSE

(Individualized Nature of Claims)

21. Alco alleges as an affirmative defense that the First Amended Complaint, and each cause of action contained therein, are not proper for treatment as a class action because the individualized nature of the class members' claims makes class treatment inappropriate.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Damages Not Recoverable)

22. Alco alleges as an affirmative defense that section 17206 of the Business & Professions Code prevents Plaintiff and the putative class members from recovering civil penalties for Alco's alleged unfair business practices.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Unjust Enrichment)

23. Alco alleges as an affirmative defense that the First Amended Complaint, and each and every cause of action contained therein, are barred because any recovery from Alco would result in Plaintiff's unjust enrichment, and the unjust enrichment of the putative class he seeks to represent, the existence of such class being expressly denied.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

24. Alco alleges as an affirmative defense that Plaintiff's and each putative class member's alleged injuries, if any there be, were aggravated by the failure of Plaintiff and each putative class member to use reasonable diligence to mitigate them.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Good Faith and Reasonableness)

25. Alco alleges as an affirmative defense that Alco believed in good faith and upon reasonable grounds that Plaintiff and/or the putative class members were subject to an exemption and that Alco was not in violation of any provision of the Labor Code relating to the issues raised in the First Amended Complaint.

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1 **THIRTIETH AFFIRMATIVE DEFENSE**

2 **(Avoidable Consequences)**

3 30. Alco alleges as an affirmative defense that Plaintiff and each putative class
4 member's alleged damages, if any there be, could have been avoided by reasonable effort, and
5 Plaintiff and each putative class member failed in their duty to exercise reasonable care and
6 diligence to protect Plaintiff and each putative class member and minimize the losses, if any there
7 be.

8 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

9 **(No Standing to Pursue Penalties)**

10 31. Alco alleges as an affirmative defense that Plaintiff and each putative class
11 member, as private litigants, lack standing to seek penalties for the conduct alleged in the First
12 Amended Complaint.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Alco prays as follows:

- 15 1. That Plaintiff and the putative class take nothing by reason of the First Amended
16 Complaint;
- 17 2. That the First Amended Complaint be dismissed in its entirety with prejudice, and
18 that judgment be entered for Alco and against Plaintiff;
- 19 3. That Alco be awarded its reasonable costs;
- 20 4. That Alco be awarded its reasonable attorneys' fees pursuant to statute; and
- 21 5. That Alco be awarded such other and further relief as the Court deems just and
22 proper.

23 Dated: April 6, 2011

DONAHUE GALLAGHER WOODS LLP

24 By: 

25 Andrew S. MacKay
26 Attorneys for Defendant
27 Alco Iron & Metal Co., a California corporation
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