

I, Dean S. Barron do hereby declare and state:

1 The within statements are based upon my own personal knowledge except where stated to be based upon information and belief, and if called to testify about the matters stated here, I can competently do so.

2 I have 35 years experience in computer programming, including 25 years of performing statistical analysis and 20 years using the SAS language. I hold a degree in Mathematics and Chemistry, jointly, from State University of New York at Buffalo, magna cum laude and Phi Beta Kappa. I also there attended the School of Medicine and completed half of the requirements for an M.A. from the Department of Statistics.

3 In academia, I have provided consultation to graduate students to assist them in preparing the statistical section of their doctoral dissertations and master's theses. I have also performed statistical consulting for UCLA.

4 Clients for which I have performed statistical and programming consulting include many Fortune 500 corporations such as Wells Fargo Bank, Warner Brother's Home Video, Fireman's Fund Insurance, and the U.S. Navy. My experience includes consulting in Belgium for AXA. This work ranged from basic statistical analysis to more elegant methods, such as non-linear regression analysis and triangulation. My consulting for Foot Locker and Intel Corporation was related to their commissions, payroll, finance, and accounting applications.

5 I have been retained by both plaintiff and defendant as a statistician. I have substantial experience as a consultant, expert, and expert witness in complex class action litigation. See, e.g. Erichs v. Venator Group, Inc. 128 F.Supp. 2d 1255 (N. Dist. Ca. 2001). A true and correct copy of my resume is attached hereto as Exhibit "A." I have consulted in legal cases concerning commissions, overtime wages, minimum wages, random sampling calculations, random sampling techniques, and population definition.

6 I have had both direct and indirect access to 31 boxes of documents produced by defendants and labeled as Bates D000001-D073985. These included timecards over the date range 07NOV1997 through 01MAR2002.

7 All of the 749 timecards that were found within for the five named plaintiffs were selected, the data from which is heretofore referred to as TIMECARD. Additionally, from the date range a random sample was drawn of 47 weeks and the corresponding commission reports, the data from which is heretofore referred to as COMMRPT. The TIMECARD data in which the dates matched with COMMRPT data were merged to form a new dataset, heretofore referred to as TIMECARDCOMM. In total, 141 timecards were matched. Subsequently, all the commission reports that could be identified from the entire box population was drawn to form a complete set of commission reports, heretofore referred to as COMMCOMP. Similarly, the matched set of TIMECARD to COMMCOMP is heretofore referred to as TIMECARDCOMMCOMP.

8 The following paragraphs report the analysis of the data.

9 TIMECARDCOMM data revealed for the 137 timecards with hours worked, the average hourly rate of pay was \$22.82, ranging from a minimum of \$5.75 to a maximum of \$61.81 per hour, with a standard deviation of \$13.63.

9a TIMECARDCOMMCOMP data revealed for the 495 timecards with hours worked, the average hourly rate of pay was \$26.01, ranging from a minimum of \$5.75 to a maximum of \$83.69 per hour, with a standard deviation of \$14.55.

10 During this time frame, the applicable minimum wages were \$5.15 until 01MAR98, \$5.75 until 01JAN01, \$6.25 until 01JAN02, and \$6.75 thereafter. It appears that the calculation used to pay employees might have been endeavoring to represent 1.5x minimum wage, however, overtime hours were not properly figured.

11 TIMECARD data revealed that for the 702 timecards with hours worked, on average there were 36.66 hours worked each week. Figuring overtime as those hours worked beyond a 40 hour week, this included 2.09 hours overtime. In fact, 261 of these timecards reported overtime, over one-third of the timecards! For these 702 workweeks, there were a total of 25,732 hours worked including 1,472 hours overtime!

12 Alternatively, figuring overtime also as those hours worked 8-12 hours in a day and doubletime as those hours beyond 12 hours in a day, this included 4.57 hours overtime and 0.23 hour doubletime. In this fashion, for these 702 workweeks, the hours worked includes 3,203 hours overtime and 164.59 hours doubletime. As a weighted sum, this is equivalent to over 5,000 hours regular time!

13 Breakdown of overtime for timecards with hours greater than zero by individual plaintiff reveals similar patterns.

Plaintiff	FLSE ot % timecards	FSLE ot ave hours	CA ot % timecards	CA ot ave hours	CA dt ave hours
Bey	53%	2.06	97%	4.66	0.01
Harris	33%	1.51	94%	4.33	0.22

Lane	44%	4.40	89%	6.68	0.82
O'Connor	17%	0.73	68%	2.31	0.02
Sandercock	41%	2.41	94%	5.38	0.26
ALL FIVE	37%	2.10	88%	4.57	0.23

14 TIMECARDCOMM revealed that there are repeated occurrences when an employee failed to be paid the minimum wage. If one only counts as flagrant violations weeks in which the compensation was more than \$1.00 under what was indicated by the prevailing minimum wage, then this occurred 4.07% of all pay periods.

14a TIMECARDCOMMCOMP revealed that there are repeated occurrences when an employee failed to be paid the minimum wage. If one only counts as flagrant violations weeks in which the compensation was more than \$1.00 under what was indicated by the prevailing minimum wage, then this occurred 2.22% of all pay periods.

15 For TIMECARDCOMM, of these 9 instances, 6 occurred where the minimum wage in COMMRT data was miscalculated, and all 9 weeks featured overtime owed to the employee. Even were the calculations to have been based on flat minimum wage, only three instances would have then been within a dollar of the correct calculation.

15a For TIMECARDCOMMCOMP, of these 11 instances, 8 occurred where the minimum wage in COMMRT data was miscalculated, and 10 weeks featured overtime owed to the employee. Even were the calculations to have been based on flat minimum wage, only three instances would have then been within a dollar of the correct calculation.

16 For TIMECARDCOMM, broken down by plaintiff, 60% of the plaintiffs (3/5) had at least one such incident of minimum wage violation. The 10 occurrences were as follows Bey 3 (9.68% of 31 timecards, periods 21NOV1998, 06MAR1999, 20MAR1999), Lane 5 (23.81% of 21 timecards, periods 21NOV1998, 28NOV1998, 06MAR1999, 20MAR1999, 17APR1999), and O'Connor 1 (3.45% of 29 timecards, period 21NOV1998).

16a For TIMECARDCOMMCOMP, broken down by plaintiff, 60% of the plaintiffs (3/5) had at least one such incident of minimum wage violation. The 11 occurrences were as follows Bey 3 (2.61% of 115 timecards, periods 21NOV1998, 06MAR1999, 20MAR1999), Lane 6 (7.23% of 83 timecards, periods 21NOV1998, 28NOV1998, 06MAR1999, 20MAR1999, 17APR1999), and O'Connor 2 (1.69% of 118 timecards, period 21NOV1998 and 11NOV2000).

17 For TIMECARDCOMM, considered alone, approximately one-quarter of all pay periods paid beneath the base pay requirement of 1.5x minimum wage. Of the 137 timecards, 23.36% represented such violations using the BASE definition, and 18.25% using BASEALT. Broken down by plaintiff, 80% of the plaintiffs (4/5) had at least one such violation. The occurrences were as follows: Bey (7 assuming BASE or 7 assuming BASEALT, payperiods 21Nov1998 06Mar1999 20Mar1999 17Apr1999 18Aug2001 01Sep2001 01Dec2001), Harris (2 or 0, payperiods 28Nov1998 05May2001), Lane (5 or 5, payperiods 21Nov1998 28Nov1998 06Mar1999 20Mar1999 17Apr1999), O'Connor (17 or 12, payperiods 21Nov1998 05Dec1998 23Jan1999 06Mar1999 20Mar1999 17Apr1999 11Sep1999 05Feb2000 08Apr2000 30Sep2000 05May2001 14Jul2001 18Aug2001 01Sep2001 13Oct2001 20Oct2001 01Dec2001 OR 21Nov1998 06Mar1999 20Mar1999 17Apr1999 11Sep1999 05Feb2000 05May2001 14Jul2001 18Aug2001 01Sep2001 13Oct2001 01Dec2001).

17a For TIMECARDCOMMCOMP, considered alone, approximately one-quarter of all pay periods paid beneath the base pay requirement of 1.5x minimum wage. Of the 495 timecards, 13.94% represented such violations using the BASE definition, and 9.70% using BASEALT. Broken down by plaintiff, 100% of the plaintiffs (5/5) had at least one such violation. The occurrences were as follows: Bey (9 assuming BASE or 8 assuming BASEALT, pay periods 21Nov1998 06Mar1999 20Mar1999 17Apr1999 03Jul1999 18Aug2001 01Sep2001 01Dec2001 02Feb2002 OR 21Nov1998 06Mar1999 20Mar1999 17Apr1999 03Jul1999 18Aug2001 01Sep2001 01Dec2001), Harris (14 or 4, payperiods 28Nov1998 27Mar1999 19Jun1999 26Jun1999 05Aug2000 11Sep1999 11Sep1999 03Feb2001 03Mar2001 05May2001 12May2001 19May2001 26May2001 02Jun2001 OR 19Jun1999 26Jun1999 05Aug2000 02Jun2001), Lane (10 or 10, payperiods 21Nov1998 28Nov1998 06Mar1999 20Mar1999 17Apr1999 15May1999 15Apr2000 28Oct2000 03Mar2001 16Jun2001), O'Connor (34 or 25, payperiods 21Nov1998 05Dec1998 23Jan1999 06Mar1999 20Mar1999 17Apr1999 22May1999 24Jul1999 07Aug1999 11Sep1999 11Sep1999 05Feb2000 08Apr2000 30Sep2000 11Nov2000 11Nov2000 05May2001 19May2001 02Jun2001 07Jul2001 14Jul2001 28Jul2001 18Aug2001 01Sep2001 15Sep2001 13Oct2001 20Oct2001 27Oct2001 03Nov2001 17Nov2001 01Dec2001 05Jan2002 12Jan2002 02Feb2002 OR 21Nov1998 06Mar1999 20Mar1999 17Apr1999 22May1999 24Jul2001 07Aug1999 11Sep1999 11Sep1999 05Feb2000 11Nov2000 11Nov2000 05May2001 07Jul2001 14Jul2001 28Jul2001 18Aug2001 01Sep2001 15Sep2001 13Oct2001 03Nov2001 17Nov2001 01Dec2001 05Jan2002 02Feb2002), and Sandercock (2 or 1, payperiods 25Sep1999 11Nov2000 OR 25Sep1999).

18 There were two instances in which the employee was paid nothing, although at least 40 hours were, in fact, logged in those weeks. This impacted 40% of plaintiffs (2/5). The two occurrences were Bey (period 20MAR1999) and Lane (also period 20MAR1999).

19 Additionally, there was one instance (0.68%) in which an employee payment to the employer is indicated! In this particular week, a total weekly pay of -\$20.00 is recorded for Lane pay period 05FEB2000 in which zero hours were worked.

20 For TIMECARDCOMM, it is of importance to note that commissions failed to represent half of total compensation repeatedly (13/137 or 9.49% with hours worked in TIMECARDCOMM). Therefore,

this disparity occurred in almost 10% of pay periods! It should be noted that in each instance, the alternative minimum wage calculation was used in the presence of zero commission, even if incorrect.

20a For TIMECARDCOMMCOMP, commissions failed to represent half of total compensation repeatedly (20/495 or 4.04% with hours worked in TIMECARDCOMM).

21 For TIMECARDCOMM, broken down by plaintiff, 60% of the plaintiffs (3/5) had at least one such incident of commission percentage wage violation. The 13 occurrences were as follows Bey 4 (12.90% of 31 timecards, periods 21NOV1998, 06MAR1999, 20MAR1999, 17APR1999), Lane 5 (23.81% of 21 timecards, periods 21NOV1998, 28NOV1998, 06MAR1999, 20MAR1999, 17APR1999), and O'Connor 4 (13.79% of 27 timecards, periods 21NOV1998, 06MAR1999, 20MAR1999, and 17APR1999).

21a For TIMECARDCOMMCOMP, broken down by plaintiff, 100% of the plaintiffs (5/5) had at least one such incident of commission percentage wage violation. The 20 occurrences were as follows Bey 5 (4.35% of 115 timecards, periods 21NOV1998, 06MAR1999, 20MAR1999, 17APR1999, 03JUL1999), Harris 2 (2.11% of 95 timecards, periods 06NOV1999, 05AUG2000), Lane 7 (8.43% of 83 timecards, periods 21NOV1998, 28NOV1998, 06MAR1999, 20MAR1999, 17APR1999, 28OCT2000, 03MAR2001), O'Connor 5 (4.24% of 118 timecards, periods 21NOV1998, 06MAR1999, 20MAR1999, 17APR1999, 04SEP1999), and Sandercock 1 (1.19% of 84 timecards, period 25SEP1999).

22 In addition to the above, there is the one occurrence (Lane, period 05FEB2000) where the commission was a negative value and therefore also could not possibly satisfy the 50% requirement.

23 One may wish to determine if a pay plan potentially qualifies as commission plan. If so, two of the conditions which must met are as follows: first, the plan must always pay at least 1.50 times the prevailing minimum wage; second, the commission must comprise at least 50% of the total compensation.

24 In the absence of a stated base pay, it is useful to identify an effective base pay. One such possible base pay is the guarantee of (1.50) x (40hours per week) x (prevailing minimum wage). Heretofore, this will be referred to as BASE. Logically, this is valid because a bona fide commission plan that exempts employees from overtime pay must make such a guarantee. Thus, since it is assumed that this guarantee is in place, the employee knows that it is the minimum that will always be paid. This is precisely what a base pay is.

25 The use of this as a base pay is actually an underestimation, and therefore the number identified violations is also an underestimation. The company knows and expects that an employee will normally generate commissions over the minimum. The amount over this minimum can also be considered as expected and therefore functionally part of base pay. In over 90% of pay periods featuring greater than zero hours (124/137) commission exceeded 1.50x minimum wage, and therefore is an expected occurrence. Further, the commission reports seem to imply that the guarantee was only equal to minimum wage, not 1.50x minimum wage.

26 Alternatively, another possible base pay is to use the minimum of 40 hours and the actual number of hours worked. Heretofore, this will be referred to as BASEALT. There may be other alternatives, but the analysis presented here considers these two.

27 Equipped with an effective base pay, an effective commission may be calculated by calculating pay and subtracting from it the base pay. The argument that instances where the minimum guarantee is not triggered are 100% commission is false. Since this initial step merely duplicates the guarantee, is superimposable within the plan, and represent absolutely indistinguishable amounts. It is of no consequence with respect to dollars on a paycheck, whether the guarantee amount was paid because it was the guaranteed minimum accompanied by no commissions, or because it was cosmetically resultant from purported commissions. Only when an amount in excess of the guarantee is obtained does pay exceed the minimum. Thus, only the additional amount is in excess of the minimum, and is the effective commission.

28 For TIMECARDCOMM, analysis reveals that nearly half of all pay periods violated at least one requirement! Of the 137 timecards, 48.91% either were paid under the base pay using the BASE definition, and 41.61% using BASEALT. Broken down by plaintiff, 100% of the plaintiffs (5/5) had at least one such violation. The occurrences were as follows: Bey (11 assuming BASE or 9 assuming BASEALT), Harris (11 or 10), Lane (10 or 8), O'Connor (30 or 28), Sandercock (5 or 2). In fact, assuming BASE, O'Connor suffered a violation in every payperiod!

28a For TIMECARDCOMMCOMP, analysis reveals that nearly half of all pay periods violated at least one requirement! Of the 137 timecards, 48.69% either were paid under the base pay using the BASE definition, and 36.16% using BASEALT. Broken down by plaintiff, 100% of the plaintiffs (5/5) had at least one such violation. The occurrences were as follows: Bey (29 assuming BASE or 18 assuming BASEALT), Harris (57 or 47), Lane (29 or 15), O'Connor (106 or 91), Sandercock (20 or 8).

29 For TIMECARDCOMM, in approximately half of all pay periods, commission fell beneath 50% of total pay. Of the 137 timecards, 48.91% represented such violations using the BASE definition, and 41.61% using BASEALT. About half of these also violated the base pay requirements analyzed in previous paragraphs. Broken down by plaintiff, 100% of the plaintiffs (5/5) had at least one such violation. The occurrences were as follows: Bey (11 assuming BASE or 9 assuming BASEALT), Harris (11 or 10), Lane (10 or 8), O'Connor (30 or 28), Sandercock (5 or 2).

29a For TIMECARDCOMMCOMP, in approximately half of all pay periods, commission fell beneath 50% of total pay. Of the 137 timecards, 48.69% represented such violations using the BASE definition, and 36.16% using BASEALT. About half of these also violated the base pay requirements analyzed in previous paragraphs. Broken down by plaintiff, 100% of the plaintiffs (5/5) had at least one such violation. The occurrences were as follows: Bey (29 assuming BASE or 18 assuming BASEALT), Harris (57 or 47), Lane (29 or 15), O'Connor (106 or 91), Sandercock (20 or 8).

30 The commission violation numbers coincide with the overall violations because some payperiods violated both tenets. In fact, nearly 25% of all pay periods violated BOTH requirements!

31 Based upon dates of employment and descriptions of the boxes, these boxes were expected to contain a total of 914 pay periods. If one assumes that 94% of all payperiods have non-zero hours (702/749), then 859 timecards that matched commission reports were expected. Therefore, figures relating to TIMECARD can be multiplied by 1.2236 (859/702) to extrapolate to the full total contained within these boxes. Similarly, TIMECARDCOMM can be multiplied by a factor of 6.2701 (859/137) and TIMECARDCOMMCOMP by 1.7354 (859/495).

32 There are additional time periods in which some of the plaintiffs were employed beyond the time period covered by the boxes. Therefore, these figures and calculations could be modified based upon data pertaining to such other periods.

33 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of December, 2006, at Long Beach, California.


Dean S. Barron