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10 STATE LABOR COMMISSIONER

11 **ENDORSED**
12 **FILED**
13 **ALAMEDA COUNTY**

14 SEP 26 2011

15 CLERK OF THE SUPERIOR COURT
16 By — **Y. Singh** — Deputy

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 COUNTY OF ALAMEDA

19 STATE LABOR COMMISSIONER,
20 DIVISION OF LABOR STANDARDS
21 ENFORCEMENT, DEPARTMENT OF
22 INDUSTRIAL RELATIONS, STATE OF
23 CALIFORNIA,

24 Plaintiff,

25 v.

26 ZIPREALTY, INC. a Delaware
27 corporation; and DOES 1 through 10,
28 inclusive,

Defendants.

Case No.

RG

11596987

COMPLAINT

[No fee per Labor Code § 101 et seq.]

Assigned Judge:
Dept:
Location

29 Plaintiff, STATE LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS
30 ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA
31 complains of Defendants, and each of them, and alleges as follows:

32 PRELIMINARY ALLEGATIONS

33 1. Plaintiff, STATE LABOR COMMISSIONER (hereinafter, "LABOR
34 COMMISSIONER"), is the State agency with primary responsibility for enforcement of the wage

1 and hour provisions of the California Labor Code and the Wage Orders of the Industrial Welfare
2 Commission. The LABOR COMMISSIONER's mission has the twin objectives to ensure
3 compliance with minimum labor standards such as payment of the minimum wage and overtime to
4 protect workers from substandard conditions and to provide a level playing field for employers that
5 comply with the State's labor laws. The LABOR COMMISSIONER is authorized to bring this
6 action pursuant to Labor Code sections 95, 96.7, 97, 98.3, 217, and 1193.6 to determine and recover
7 any sums arising out of an employment relationship which are payable to the State or to any worker
8 in the State of California without assignment of such wages;

10 2. At all times herein mentioned, Defendant, ZIPREALTY, INC. (hereinafter,
11 "ZIPREALTY") has been a corporation doing business in the State of California, headquartered in
12 Emeryville, California. Since 1999 ZIPREALTY has operated as a real estate broker which obtains
13 clients and leads through its internet website. The public may obtain real estate information free of
14 charge through ZIPREALTY's internet website. Those obtaining real estate information from
15 ZIPREALTY's website are "leads" that are distributed to ZIPREALTY's agents.

17 3. Real estate agents in California may be engaged by a broker as either employees or
18 independent contractors, dependent upon the contractual agreement between the parties.

19 4. At all times prior to September of 2010 ZIPREALTY engaged its real estate agents in
20 California as employees pursuant to written agreements which expressly created employee/employer
21 relationships. The agreements between ZIPREALTY and its employee/real estate agents specifically
22 required that they work full-time for ZIPREALTY and that they work exclusively for ZIPREALTY
23 absent specific authorization to do otherwise by ZIPREALTY. On information and belief it is
24 alleged that few, if any, California employee/real estate agents for ZIPREALTY were ever
25 authorized to engage in other employment while employed by ZIPREALTY.

27 5. ZIPREALTY employee/real estate agents were required to attend a two week training
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1 program at the commencement of their employment. Notwithstanding the fact that the agents had no
2 opportunity to earn a commission or bonus during their training program, ZIPREALTY paid these
3 employees nothing for the time spent in its mandatory training program in violation of California
4 law. Even after ZIPREALTY settled a lawsuit in 2008 (*Crystal Alexander v. ZipRealty, Inc.*
5 (*Alexander*)), Case No. RG07326622) and paid minimum wage for training time to employees
6 through the end of 2007 as part of the settlement, it continued its unlawful practice of not paying for
7 mandatory training time thereafter.

9 6. With the collapse of the sub prime mortgage market in 2006 a substantial decline
10 occurred in the number of ZIPREALTY "leads" that could obtain financing and complete the
11 purchase of a home. Notwithstanding the fact that a large portion of individuals seeking information
12 through the ZIPREALTY website could not possibly be qualified for a mortgage and therefore
13 complete the purchase of a home, ZIPREALTY required its employee/real estate agents to
14 aggressively and repeatedly contact those "leads" over a two month period.

16 7. Employee/real estate agents for ZIPREALTY typically worked six or seven days per
17 week, far in excess of forty hours in a week, and frequently in excess of eight hours in a day.
18 Employees were required to obtain coverage from other agents and notify the company if they were
19 to take a day off.

21 8. ZIPREALTY employee/agents were directed to work from their residences and were
22 provided reimbursement for the costs associated with the operation of a home office including the
23 cost of a high speed internet connection.

25 9. ZIPREALTY employee/real estate agents spent far in excess of fifty percent of their
26 work time working in their home offices responding to emails, phone calls, preparing real estate
27 documents, researching property, and documenting their work through ZIPREALTY's web portal.
28 ZIPREALTY knew, or should have known, that its real estate agents were spending a small

1 percentage of their time away from their offices as it at all times had access to its employee logs
2 which recorded their activities inside and outside of their offices.

3 10. ZIPREALTY's compensation for its employee/real estate agents was in the form of
4 commissions, small "customer satisfaction" bonuses, and benefits. For pay periods in which a real
5 estate agent did not get paid a commission that agent did not get paid. ZIPREALTY operated on a
6 one week pay period system. Agents typically received no pay for a large majority of the pay periods
7 they worked after 2005.

9 11. Defendants DOES 1 through 10, inclusive, are persons acting on behalf of
10 ZIPREALTY who violated, or caused to be violated, the minimum wage and overtime pay
11 provisions of Labor Code section 510 and/or sections 3 and/or 4 of Industrial Welfare Comm'n
12 ("IWC") Wage Order 4-2001. Plaintiff is ignorant of the true names and capacities of DOES 1
13 through 10, inclusive, and for that reason sues said Defendants by such fictitious names. Leave of
14 court will be requested to amend this Complaint to show their true names and capacities when they
15 have been ascertained.

17 12. At all relevant times mentioned herein each of the Defendants was an agent, servant,
18 employee, partner and/or joint venturer of each of the remaining Defendants, and was at all times
19 acting within the course and scope of such agency, service, employment, partnership and/or joint
20 venture.

23 EQUITABLE TOLLING ALLEGATIONS

25 13. On May 18, 2007, a class action lawsuit was filed against ZIPREALTY in the
26 Superior Court of California, County of Alameda with the caption *Crystal Alexander v. ZipRealty,*
27 *Inc. ("Alexander")*, Case No. RG07326622. The *Alexander* lawsuit contained claims alleging that
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1 ZIPREALTY had failed to pay its employee real estate agents minimum wage and overtime
2 premium pay as required by California law and had failed to comply with the provisions of Labor
3 Code sections 201, 202, and 226. That lawsuit was dismissed by Plaintiff *Alexander* on September
4 16, 2008, upon approval of a class action settlement which included payments to class members for a
5 class period of May 18, 2003 through December 31, 2007 for the minimum wage payments during
6 the two week training program at the beginning of the employees' employment.
7

8 14. On May 17, 2008, a class action lawsuit was filed against ZIPREALTY in the
9 Superior Court of California, County of Los Angeles with the caption *Marla Simon v. ZipRealty,*
10 *Inc.*, Case No. BC387122. That lawsuit contained claims alleging that ZIPREALTY had failed to
11 pay its employee/real estate agents minimum wage, overtime premium pay, and had failed to comply
12 with the provisions of Labor Code sections 201, 202, and 226. That lawsuit was removed to the
13 United States District Court, Central District of California (Case No. CV 08-03373 SJO (JC)) on
14 May 21, 2008, and thereafter dismissed by Plaintiff *Simon* on June 17, 2008.
15

16 15. On January 22, 2010, a class action lawsuit was filed against ZIPREALTY in the
17 Superior Court of California, County of Alameda with the caption *Elizabeth Williams v. ZipRealty,*
18 *Inc.*, Case No. RG0495083. That lawsuit contained claims alleging that ZIPREALTY had failed to
19 pay its employee real estate agents minimum wage, overtime premium pay, and had failed to comply
20 with the provisions of Labor Code sections 201, 202, and 226. That lawsuit was dismissed by
21 Plaintiff *Williams* on March 24, 2010.
22

23 16. On or about August 31, 2010, a wage claim was filed by Steven Kinney against
24 ZIPREALTY with the Division of Labor Standards Enforcement ("DLSE" or "Labor
25 Commissioner") which claimed minimum wages and overtime pay. An Order, Decision or Award
26 ("ODA") in favor of Kinney was issued on November 9, 2010. On or about November 30, 2010, a
27 Notice of Appeal was filed by ZIPREALTY with the Superior Court of California, County of Kern,
28

1 with the caption *Kinney v. Ziprealty, Inc.*, case no. S-1500-CV-272237. On September 1, 2011, after
2 a bench trial which concluded on June 15, 2011, a decision was rendered in favor of Kinney
3 awarding him minimum wages/liquidated damages, overtime pay, wage statement damages, waiting
4 time penalties, and prejudgment interest in the amount of \$112,916.09.

5
6 17. On or about August 31, 2010, a wage claim was filed by Marilee Tomczak against
7 ZIPREALTY with the DLSE which claimed minimum wages and overtime pay. An ODA in favor of
8 Tomczak was issued on November 9, 2010. On or about November 30, 2010, a Notice of Appeal
9 was filed by ZIPREALTY with the Superior Court of California, County of Kern, with the caption
10 *Marilee Tomczak v. Ziprealty, Inc.*, case no. S-1500-CV-272238. On September 1, 2011, after a
11 bench trial which concluded on June 15, 2011, a decision was rendered in favor of Tomczak,
12 awarding her minimum wages/liquidated damages, overtime pay, wage statement damages, waiting
13 time penalties, and prejudgment interest in the amount of \$84,044.70.

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15 18. On or about September 2, 2010, a wage claim was filed by Nadine Radovicz against
16 ZIPREALTY with the DLSE which claimed minimum wages and overtime pay. An ODA in favor of
17 Radovicz was issued on November 9, 2010. On or about November 30, 2010, a Notice of Appeal
18 was filed by ZIPREALTY with the Superior Court of California, County of Kern, with the caption
19 *Nadine Radovicz v. Ziprealty, Inc.*, case no. S-1500-CV-272238. On September 1, 2011, after a
20 bench trial which concluded on June 15, 2011, a decision was rendered in favor of Radovicz,
21 awarding her minimum wages/liquidated damages, overtime pay, wage statement damages, waiting
22 time penalties, and prejudgment interest in the amount of \$109,965.43.

23
24 19. On or about September 7, 2010, a wage claim was filed by Patrice Parson-Adams
25 against ZIPREALTY with the DLSE which claimed minimum wages and overtime pay. An ODA in
26 favor of Parson-Adams was issued on November 10, 2010. On or about November 30, 2010, a
27 Notice of Appeal was filed by ZIPREALTY with the Superior Court of California, County of Kern,
28

1 with the caption *Parson-Adams v. Ziprealty, Inc.*, case no. S-1500-CV-272235. On September 1,
2 2011, after a bench trial which concluded on June 15, 2011, a decision was rendered in favor of
3 Parson-Adams, awarding her minimum wages/liquidated damages, overtime pay, wage statement
4 damages, waiting time penalties, and prejudgment interest in the amount of \$23,275.80.

5
6 20. The *Alexander, Simon, Williams, Kinney, Tomczak, Radovicz, and Parson-Adams*
7 lawsuits were timely filed and provided defendants, and each of them, with notice of the violations
8 of law alleged herein. The *Alexander* and *Williams* lawsuits and their class claims for minimum
9 wages and overtime pay were specifically referenced in the ZIPREALTY 2008/2009 Annual Reports
10 (SEC Form 10-K). At all times subsequent to May 18, 2007, Defendants, and each of them, have
11 been aware of the prospective claims (alleged herein) and had full opportunity to change their
12 employment practices and/or preserve evidence such that Defendants will not be prejudiced by the
13 equitable tolling of the statute of limitations on claims for minimum wage/liquidated damages,
14 overtime pay, wage statement damages, and waiting time penalties during the periods of May 18,
15 2007 through September 16, 2008, January 22, 2010 through March 24, 2010, and August 31, 2010
16 through the filing date of this complaint.
17

18 21. Plaintiff LABOR COMMISSIONER has acted reasonably and in good faith in
19 pursuing this action such that equitable tolling is appropriate. Pursuant to Labor Code section 98.4
20 the LABOR COMMISSIONER provided counsel to Kinney, Parson-Adams, Radovicz, and
21 Tomczak in their trials de novo in Superior Court and promptly, upon a judicial finding that the
22 employment practices of ZIPREALTY were unlawful, initiated this action to vindicate the rights of
23 all similarly situated employees of ZIPREALTY in the State of California. This course of conduct
24 preserved resources of the State, the courts, and ZIPREALTY, while not prejudicing Defendants
25 who were fully cognizant that their practices could be deemed unlawful by a court and who were
26 therefore on notice to preserve evidence and/or change their conduct.
27
28

1 **FIRST CAUSE OF ACTION**

2 (Violation of State and Local Minimum Wage Requirements: CA Labor Code §1197;
3 **Industrial Welfare Commission Wage Order 4-2001 Sections 4, 20; San Francisco Minimum**
4 **Wage Ordinance, Chpt. 12R of the San Francisco Administrative Code)**
5 **(Against All Defendants)**
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7
8 22. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1
9 through 21, inclusive, of this Complaint as though fully set forth herein.

10 23. Since on or before May 1, 2006, and continuing to approximately September 1, 2010,
11 Defendant ZIPREALTY and/or DOES 1-10, and each of them, failed to compensate real estate
12 agents engaged as employees working within San Francisco at the applicable San Francisco
13 minimum wage and real estate agents working in the other fifty seven counties of California at the
14 applicable State minimum wage, for all hours worked, or caused the non-payment of the minimum
15 wage.
16

17 24. As a direct result of their illegal conduct in violating State or Local minimum wage
18 laws, or causing the violation of the minimum wage requirement, Defendants, and each of them,
19 have caused economic loss to the employees of ZIPREALTY in an amount in excess of Seven
20 Million Five Hundred Thousand Dollars (\$7,500,000), the exact amount to be proven at trial.
21

22 **SECOND CAUSE OF ACTION**

23 (Violation of State Overtime Laws: Labor Code Sections 510, 558; Industrial Welfare
24 **Commission Wage Order 4-2001 Sections 3, 20)**
25 **(Against All Defendants)**

26 25. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1
27 through 24, inclusive, of this Complaint as though fully set forth herein.
28

1 26. At all times relevant herein the Defendants, and each of them, failed to pay the
2 employees of ZIPREALTY overtime premium pay for hours worked in excess of 8 hours in a
3 workday and/or in excess of 40 hours in a work week as required by Labor Code section 510 and
4 IWC Wage Order section 3 or caused the failure to compensate employees properly for overtime
5 work.

6
7 27. As a direct result of their illegal conduct in violating the State overtime pay laws, or
8 causing the violation of the overtime pay requirements, Defendants, and each of them, have caused
9 economic loss to the employees of ZIPREALTY in an amount in excess of One Million Two
10 Hundred and Fifty Thousand Dollars (\$1,250,000), the exact amount to be proven at trial.

11 **THIRD CAUSE OF ACTION**

12 **(Violation of Labor Code Section 226)**

13 **(Against Defendant ZIPREALTY)**

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15 28. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1
16 through 27, inclusive, of this Complaint, as though fully set forth herein.

17 29. At all times relevant herein ZIPREALTY has knowingly and intentionally failed to
18 provide its employees with itemized statements in writing which accurately itemized total hours
19 worked at each wage rate worked in the pay period and which provided accurate information about
20 wage rates as required by Labor Code section 226(a). The wage statements provided by
21 ZIPREALTY failed to state the number of hours works altogether and also failed to report the
22 required rates of pay.

23
24 30. ZIPREALTY's employees have been injured as a result of its knowing and
25 intentional failure to comply with the requirements of Labor Code section 226 by being required to
26 expend time and resources in determining if they have been paid properly and in calculating their
27 unpaid hours of work. ZIPREALTY's employees have been further vexed by its failure to provide
28

1 them with accurate wage statements that conformed with the requirements of Labor Code section
2 226(a) and have suffered general injury by the annoyance, frustration, anxiety, inconvenience,
3 embarrassment, and emotional distress associated with attempting to calculate the amount of
4 uncompensated work they have performed. Defendant's employees are entitled to damages in an
5 exact amount to be proven at trial. Alternatively, Defendant's employees are entitled to liquidated
6 damages in an amount up to \$4,000 per employee in a total amount in excess of One Million Dollars
7 (\$1,000,000).
8

9 **FOURTH CAUSE OF ACTION**

10 **(Violation of Labor Code Sections 201, 202)**

11 **(Against Defendant ZIPREALTY)**

12 31. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1
13 through 30, inclusive, of this Complaint as though fully set forth herein.
14

15 32. Since on or about May 1, 2006, Defendant ZIPREALTY employed workers in the
16 State of California, without paying those workers all wages earned and unpaid, at the time of
17 termination of employment, as required by Labor Code sections 201 and 202.

18 33. The failure by Defendant to pay employees all wages due at termination was willful
19 in that it knew, or should have known, that at the time each worker's employment was terminated,
20 all wages earned were not paid because Defendant was responsible for keeping each employee's
21 time and payroll records fully and accurately.
22

23 34. As a result of the actions of ZIPREALTY, its employees are entitled to have their
24 wages continue, up to thirty (30) days from termination, as and for waiting time statutory penalties,
25 pursuant to Labor Code section 203, in an amount in excess of Five Hundred Thousand Dollars
26 (\$500,000), the exact amount to be proven at trial.

27 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as
28

1 follows:

- 2 1. For minimum wages in an amount in excess of \$7,500,000, according to proof as to
- 3 all Defendants;
- 4 2. For overtime premium in an amount in excess of \$1,250,000, according to proof as to
- 5 all Defendants;
- 6 3. For liquidated damages pursuant to Labor Code section 1194.2 in an amount in
- 7 excess of \$7,500,000, according to proof as to all Defendants;
- 8 4. For damages, pursuant to Labor Code section 226(e), in an amount in excess of
- 9 \$1,000,000, according to proof as to Defendant ZIPREALTY;
- 10 5. For Labor Code section 203 penalties in an amount in excess of \$500,000.00,
- 11 according to proof as to Defendant ZIPREALTY;
- 12 6. For attorney's fees, pursuant to Labor Code sections 226(e) and 1193.6 ;
- 13 7. For prejudgment interest;
- 14 8. For costs of suit;
- 15 9. For such other relief deemed just and proper by the Court.

18 Dated: September 22, 2011

DIVISION OF LABOR STANDARDS ENFORCEMENT

19 By: 

20 David Balter

21 *Attorney for Plaintiff*

22 STATE LABOR COMMISSIONER

23 [*Nota bene:* When the State is plaintiff, the complaint need not be verified, but the answer thereto must be verified,
24 pursuant to C.C.P. § 446.]

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