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6 ECOLAB INC.

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 JUAN CAMPOS, an individual,  
12 Plaintiff,

13 v.

14 ECOLAB INC., a Delaware corporation;  
and DOES 1 through 100, inclusive,  
15 Defendants.  
16

Case No. 4:16-cv-04829-DMR

**ANSWER TO FIRST AMENDED  
COMPLAINT AND AFFIRMATIVE  
DEFENSES**

Complaint filed: August 22, 2016

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18 Defendant Ecolab Inc. (“Defendant” or “Ecolab”) hereby answers the First Amended  
19 Complaint (“Complaint”) of Plaintiffs Juan Campos (“Campos”) and Eddie Gomez (“Gomez”)  
20 (jointly “Plaintiffs”) as follows:

21 **INTRODUCTION**

22 1. Answering Paragraph 1 of the Complaint, this Paragraph does not contain any factual  
23 allegations, and therefore no response is required.

24 2. Answering Paragraph 2 of the Complaint, this Paragraph contains a description of the  
25 alleged class Plaintiffs seeks to represent, as defined by Plaintiffs and does not contain factual  
26 allegations that require a response. To the extent Paragraph 2 contains factual allegations, Defendant  
27 denies each and every allegation contained therein and alleges that this matter is not suitable for  
28 class action treatment.

1           3.       Answering Paragraph 3 of the Complaint, this Paragraph contains a description of the  
2 alleged aggrieved employees Plaintiffs seeks to recover for, as defined by Plaintiffs and does not  
3 contain factual allegations that require a response. To the extent Paragraph 3 contains factual  
4 allegations, Defendant denies each and every allegation contained therein and alleges that they may  
5 not seek penalties for other alleged aggrieved employees.

6           4.       Answering Paragraph 4 of the Complaint, this Paragraph contains a description of the  
7 alleged FLSA collective action that Plaintiffs seeks to pursue, as defined by Plaintiffs, and does not  
8 contain factual allegations that require a response. To the extent Paragraph 4 contains factual  
9 allegations, Defendant denies each and every allegation contained therein and alleges that this matter  
10 is not suitable for class action treatment.

11           5.       Answering Paragraph 5 of the Complaints, Defendant denies that it failed to pay  
12 required overtime to any trainees. Defendant admits that it did not pay overtime to RSMs and  
13 alleges that no overtime is owed to RSMs as they were exempt. Except as expressly admitted  
14 herein, Defendant denies each and every allegation in paragraph 5.

15           6.       Answering Paragraph 6 of the Complaint, Defendant admits that a class was certified  
16 in the mentioned Ross case and that the court in Ross granted summary adjudication as to some of  
17 the defenses raised in that case. Defendant further alleges that it filed a motion for permission to  
18 pursue an interlocutory appeal with respect to that decision, but the appeal was withdrawn when the  
19 matter settled. Although Defendant still believes that RSMs are properly classified as exempt,  
20 Defendant is in the process of changing its compensation system for California RSMs so that they  
21 are paid overtime in the manner required by California law. Except as so expressly admitted herein,  
22 Defendant denies each and every allegation contained therein.

23           7.       Answering Paragraph 7 of the Complaint, this Paragraph contains a description of the  
24 additional alleged aggrieved employees Plaintiffs seeks to recover for, as defined by Plaintiffs and  
25 does not contain factual allegations that require a response. To the extent Paragraph 7 contains  
26 factual allegations, Defendant denies each and every allegation contained therein.

27           8.       Answering Paragraph 8 of the Complaint, this Paragraph contains a description of the  
28 relief that Plaintiffs seeks in this matter, as defined by Plaintiffs and does not contain factual

1 allegations that require a response. To the extent Paragraph 8 contains factual allegations, Defendant  
2 denies each and every allegation contained therein.

3 9. Answering Paragraph 8 of the Complaint, this Paragraph contains a description of the  
4 alleged aggrieved employees Plaintiffs seeks to recover for, as defined by Plaintiffs and does not  
5 contain factual allegations that require a response. To the extent Paragraph 9 contains factual  
6 allegations, Defendant denies each and every allegation contained therein.

7 10. Answering Paragraph 10 of the Complaint, this Paragraph contains a description of  
8 the alleged aggrieved employees Plaintiffs seeks to recover for, as defined by Plaintiffs and does not  
9 contain factual allegations that require a response. To the extent Paragraph 10 contains factual  
10 allegations, Defendant denies each and every allegation contained therein.

11 **VENUE AND JURISDICTION**

12 11. Defendant admits that it is covered by the Fair Labor Standards Act (“FLSA”).  
13 Except as expressly admitted herein, Defendant denies each and every allegation contained in  
14 Paragraph 11.

15 12. Defendant admits that it conducts business in Northern California and that it employs  
16 RSMs and trainees in Northern California. Except as expressly admitted herein, Defendant denies  
17 each and every allegation contained in Paragraph 12.

18 13. Answering Paragraph 13 of the Complaint, this Paragraph consists entirely of legal  
19 conclusion and argument, and does not contain factual allegations that require a response. To the  
20 extent any response is required, Defendant denies the allegations in Paragraph 13.

21 **THE PARTIES**

22 14. Answering Paragraph 14 of the Complaint, Defendant admits that Campos worked for  
23 it as a Route Sales Manager (“RSM”) in California from August of 2013 through February 12, 2016.  
24 Except as expressly admitted herein, Defendant denies each and every allegation contained in  
25 Paragraph 14.

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1           15.     Answering Paragraph 15 of the Complaint, Defendant admits that Lopez worked for  
2 it in the state of California as an RSM and prior to becoming an RSM he worked as a trainee.  
3 Except as expressly admitted herein, Defendant denies each and every allegation contained in  
4 paragraph 15.

5           16.     Answering Paragraph 16 of the Complaint, Defendant admits that Campos lived in  
6 the state of California. Except as expressly admitted herein, Defendant denies each and every  
7 allegation contained in Paragraph 16.

8           17.     Answering Paragraph 17 of the Complaint, Defendant admits that Gomez lived in the  
9 state of California. Except as expressly admitted herein, Defendant denies each and every allegation  
10 contained in Paragraph 17.

11          18.     Answering Paragraph 18 of the Complaint, Defendant admits that it is a Delaware  
12 corporation that does business in the Northern District of California.

13          19.     Answering Paragraph 19 of the Complaint, Defendant admits that it is covered by the  
14 FLSA. Except as expressly admitted herein, Defendant denies each and every allegation contained  
15 in Paragraph 19.

16          20.     Answering Paragraph 20 of the Complaint, Defendant admits that it is covered by the  
17 FLSA. Except as expressly admitted herein, Defendant denies each and every allegation contained  
18 in Paragraph 20.

19          21.     Answering Paragraph 21 of the Complaint, this Paragraph contains legal conclusions  
20 and argument and does not contain factual allegations to which a response is required. To the extent  
21 a response is required, Defendant denies each and every allegation contained therein.

22          22.     Answering Paragraph 22 of the Complaint, this Paragraph contains legal conclusions  
23 and argument and does not contain factual allegations to which a response is required. To the extent  
24 a response is required, Defendant denies each and every allegation contained therein.

25                                   **CALIFORNIA CLASS ACTION ALLEGATIONS**

26          23.     Answering Paragraph 23 of the Complaint, this Paragraph contains a description of  
27 the alleged class Plaintiffs seek to represent, as defined by Plaintiffs, and does not contain factual  
28 allegations that require a response. To the extent Paragraph 23 contains factual allegations,

1 Defendant denies each and every allegation contained therein and alleges that this matter is not  
2 suitable for class action treatment.

3 24. Answering Paragraph 24 of the Complaint, this Paragraph contains legal conclusions  
4 and argument and does not contain factual allegations to which a response is required. To the extent  
5 a response is required, Defendant denies each and every allegation contained therein.

6 25. Answering Paragraph 21 of the Complaint, this Paragraph contains legal conclusions  
7 and argument and does not contain factual allegations to which a response is required. To the extent  
8 a response is required, Defendant denies each and every allegation contained therein.

9 26. Answering Paragraph 26 of the Complaint, this Paragraph contains legal conclusions  
10 and argument and does not contain factual allegations to which a response is required. To the extent  
11 a response is required, Defendant denies each and every allegation contained therein.

12 27. Answering Paragraph 26 of the Complaint, Defendant admits that a class was  
13 certified in the Ross matter and that Plaintiffs were not part of that action. The remaining allegations  
14 in Paragraph 27 contain legal conclusions and argument and do not contain factual allegations to  
15 which a response is required. To the extent a response is required, Defendant denies each and every  
16 other allegation contained therein.

17 28. Answering Paragraph 28 of the Complaint, this Paragraph contains legal conclusions  
18 and argument and does not contain factual allegations to which a response is required. To the extent  
19 a response is required, Defendant denies each and every allegation contained therein.

20 29. Answering Paragraph 29 of the Complaint, this Paragraph contains legal conclusions  
21 and argument and does not contain factual allegations to which a response is required. To the extent  
22 a response is required, Defendant denies each and every allegation contained therein.

23 30. Answering Paragraph 30 of the Complaint, this Paragraph contains legal conclusions  
24 and argument and does not contain factual allegations to which a response is required. To the extent  
25 a response is required, Defendant denies each and every allegation contained therein.

26 31. Answering Paragraph 31 of the Complaint, this Paragraph contains legal conclusions  
27 and argument and does not contain factual allegations to which a response is required. To the extent  
28 a response is required, Defendant denies each and every allegation contained therein.





**THIRD CAUSE OF ACTION**

**[Failure to Reimburse Necessary Work Expenses]**

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3 48. Answering Paragraph 48 of the Complaint, Defendant incorporates all of the  
4 preceding Paragraphs of this Answer as if set forth fully herein.

5 49. Answering Paragraph 49 of the Complaint, this Paragraph contains legal conclusions  
6 and argument and does not contain factual allegations to which a response is required. To the extent  
7 a response is required, Defendant denies each and every allegation contained therein.

8 50. Answering Paragraph 50 of the Complaint, this Paragraph contains legal conclusions  
9 and argument and does not contain factual allegations to which a response is required. To the extent  
10 a response is required, Defendant denies each and every allegation contained therein.

11 51. Answering Paragraph 51 of the Complaint, Defendant denies that it failed to pay for  
12 any necessary apparel or for required cell phone expenses to the extent employees used their  
13 personal cell phones to perform their job duties.

14 52. Answering Paragraph 52 of the Complaint, Defendant denies each and every  
15 allegation contained therein.

16 53. Answering Paragraph 53 of the Complaint, this Paragraph contains legal conclusions  
17 and argument and does not contain factual allegations to which a response is required. To the extent  
18 a response is required, Defendant denies each and every allegation contained therein.

19 54. Answering Paragraph 54 of the Complaint, this Paragraph contains legal conclusions  
20 and argument and does not contain factual allegations to which a response is required. To the extent  
21 a response is required, Defendant denies each and every allegation contained therein.

22 55. Answering Paragraph 55 of the Complaint, this Paragraph contains legal conclusions  
23 and argument and does not contain factual allegations to which a response is required. To the extent  
24 a response is required, Defendant denies each and every allegation contained therein.

**FOURTH CAUSE OF ACTION**

**[Unfair Competition]**

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27 56. Answering Paragraph 56 of the Complaint, Defendant incorporates all of the  
28 preceding Paragraphs of this Answer as if set forth fully herein.







1           74.     Answering Paragraph 74 of the Complaint, this Paragraph contains legal conclusions  
2 and argument and does not contain factual allegations to which a response is required. To the extent  
3 a response is required, Defendant denies each and every allegation contained therein.

4           75.     Answering Paragraph 75 of the Complaint, this Paragraph contains legal conclusions  
5 and argument and does not contain factual allegations to which a response is required. To the extent  
6 a response is required, Defendant denies each and every allegation contained therein.

7           76.     Answering Paragraph 76 of the Complaint, this Paragraph contains legal conclusions  
8 and argument and does not contain factual allegations to which a response is required. To the extent  
9 a response is required, Defendant denies each and every allegation contained therein.

10          77.     Answering Paragraph 77 of the Complaint, this Paragraph contains legal conclusions  
11 and argument and does not contain factual allegations to which a response is required. To the extent  
12 a response is required, Defendant denies each and every allegation contained therein.

13          78.     Answering Paragraph 78 of the Complaint, this Paragraph contains legal conclusions  
14 and argument and does not contain factual allegations to which a response is required. To the extent  
15 a response is required, Defendant denies each and every allegation contained therein.

16          79.     Answering Paragraph 79 of the Complaint, this Paragraph contains legal conclusions  
17 and argument and does not contain factual allegations to which a response is required. To the extent  
18 a response is required, Defendant denies each and every allegation contained therein.

19          80.     Answering Paragraph 80 of the Complaint, this Paragraph contains legal conclusions  
20 and argument and does not contain factual allegations to which a response is required. To the extent  
21 a response is required, Defendant denies each and every allegation contained therein.

22          81.     Answering Paragraph 81 of the Complaint, this Paragraph contains legal conclusions  
23 and argument and does not contain factual allegations to which a response is required. To the extent  
24 a response is required, Defendant denies each and every allegation contained therein.

25          82.     Answering Paragraph 82 of the Complaint, this Paragraph contains legal conclusions  
26 and argument and does not contain factual allegations to which a response is required. To the extent  
27 a response is required, Defendant denies each and every allegation contained therein.  
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1 any additional defenses that become available or apparent during pretrial proceedings and discovery  
2 in this action and hereby reserves the right to amend this Answer to assert all such further defenses.

3 **FIRST AFFIRMATIVE DEFENSE**

4 (Failure to State a Claim)

5 1. As a separate and distinct affirmative defense, Ecolab alleges that the  
6 Complaint, and each and every alleged cause of action therein, fails to state facts sufficient to  
7 constitute a cause of action upon which relief can be granted.

8 **SECOND AFFIRMATIVE DEFENSE**

9 (Class Action – Certification Prerequisites)

10 2. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs  
11 cannot satisfy the prerequisites for class certification and therefore cannot represent the interest of  
12 others.

13 **THIRD AFFIRMATIVE DEFENSE**

14 (Class Action – Standing)

15 3. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs lack  
16 standing to assert the legal rights or interests of others.

17 **FOURTH AFFIRMATIVE DEFENSE**

18 (Class Action – Lack of Predominance)

19 4. As a separate and distinct affirmative defense, Ecolab alleges that the types of  
20 claims alleged by Plaintiffs on behalf of themselves and/or the alleged putative group they purports  
21 to represent are matters in which individual questions dominate and thus are not appropriate for class  
22 treatment.

23 **FIFTH AFFIRMATIVE DEFENSE**

24 (Class Action – Lack of Commonality)

25 5. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs are  
26 not similarly situated to other potential members of the alleged putative group he purports to  
27 represent and thus is an inadequate representative of the alleged putative group.  
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**SIXTH AFFIRMATIVE DEFENSE**  
(Class Action – Lack of Typicality)

6. As a separate and distinct affirmative defense, Ecolab alleges that certain interests of the alleged putative group are in conflict with the interests of all or certain subgroups of the members of the alleged putative group.

**SEVENTH AFFIRMATIVE DEFENSE**  
(Class Action – Lack of Superiority)

7. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs gave not shown and cannot show that class treatment of the purported causes of action in his Complaint is superior to other methods of adjudicating the controversy.

**EIGHTH AFFIRMATIVE DEFENSE**  
(Class Action – Lack of Manageability)

8. As a separate and distinct affirmative defense, Ecolab alleges that the Complaint and each purported cause of action alleged therein, cannot proceed as a purported class or collective action because of difficulties likely to be encountered that render the action unmanageable.

**NINTH AFFIRMATIVE DEFENSE**  
(Class Action – Violation of Due Process)

9. As a separate and distinct affirmative defense, Ecolab alleges that certification of a class, as applied to the facts and circumstances of this case, would constitute a denial of Ecolab’s due process rights, both substantive and procedural, in violation of the Fourteenth Amendment to the United States Constitution and the California Constitution. Ecolab reserves the right to amend its answer upon further investigation and discovery of facts supporting this defense.

**TENTH AFFIRMATIVE DEFENSE**  
(Labor Code §§ 515, 1171, IWC Orders – Exemption from Overtime)

10. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiff and the putative class members were RSMs that were properly classified as exempt employees under Labor Code sections 515 and 1171, and the applicable Wage Orders of the Industrial Welfare

1 Commission, which include, but are not limited to, the outside sales exemption and the  
2 commissioned sales exemption.

3 **ELEVENTH AFFIRMATIVE DEFENSE**

4 (Failure to Perform to Expectations – Exemption from Overtime)

5 11. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiff and  
6 putative class members were properly classified as exempt employees when they worked as RSMs,  
7 and any failure of Plaintiff not to spend more than fifty percent of his time engaged in exempt duties  
8 is a result of him not performing to Ecolab’s reasonable expectations of the position.

9 **TWELFTH AFFIRMATIVE DEFENSE**

10 (Labor Code §§ 201, 202, 203 – Payment of All Wages)

11 12. As a separate and distinct affirmative defense, Ecolab alleges that it paid all  
12 wages due and owing at the time of Plaintiff’s and putative class members’ separation from Ecolab.

13 **THIRTEENTH AFFIRMATIVE DEFENSE**

14 (Labor Code §§ 201, 202, 203 – Good Faith)

15 13. As a separate and distinct affirmative defense, Ecolab alleges that to the extent  
16 that Plaintiff and putative class members were not paid all wages at the time of their separation from  
17 Ecolab, there is a good faith dispute as to any amount Plaintiff claimed was owed to him at the time  
18 of his separation from Ecolab.

19 **FOURTEENTH AFFIRMATIVE DEFENSE**

20 (Labor Code §§ 1171, 226(e) – Outside Salesperson Exemption)

21 14. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiff and  
22 putative class members were properly classified as exempt employees, and, therefore, Ecolab was  
23 not obligated to provide Plaintiff and putative class members with “wage statements.”

24 **FIFTEENTH AFFIRMATIVE DEFENSE**

25 (Labor Code § 226(e) – No Violation)

26 15. As a separate and distinct affirmative defense, Ecolab alleges that, even  
27 assuming *arguendo* Plaintiff and putative class members were entitled to receive wage statements,  
28 Ecolab’s wage statements complied with Labor Code section 226(a).



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**SIXTEENTH AFFIRMATIVE DEFENSE**

(Labor Code § 226(e) – No Injury)

16. As a separate and distinct affirmative defense, Ecolab alleges that, even assuming *arguendo* Plaintiff and putative class members were entitled to receive wage statements, Plaintiff is not entitled to recover any damages or penalties because, pursuant to California Labor Code section 226(e), they did not suffer any injuries as a result.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

(Labor Code § 226(e) – No Willfulness)

17. As a separate and distinct affirmative defense, Ecolab alleges that, even assuming *arguendo* Plaintiff and putative class members were entitled to receive wage statements, Plaintiffs are not entitled to recover any damages or penalties because, pursuant to California Labor Code section 226(e), the non-compliance was not willful and inadvertent.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

(Labor Code § 226(e) – Substantial Compliance)

18. As a separate and distinct affirmative defense, Ecolab alleges that, even assuming *arguendo* Plaintiff and putative class members were entitled to receive wage statements, Plaintiffs are not entitled to recover any damages or penalties because Ecolab substantially complied with Labor Code section 226(a).

**NINETEENTH AFFIRMATIVE DEFENSE**

(Bus. & Prof. Code § 17200 *et seq.* – No Violation)

19. As a separate and affirmative defense, Ecolab alleges that its business practices were not “unfair,” “unlawful,” or “deceptive” within the meaning of California Business and Professions Code section 17200, *et seq.*

**TWENTIETH AFFIRMATIVE DEFENSE**

(Bus. & Prof. Code § 17200 *et seq.* – Violates Due Process)

20. As a separate and distinct affirmative defense, Ecolab alleges that the prosecution of a representative action on behalf of the general public under California Business and Professions Code section 17200, *et seq.*, as applied to the facts and circumstances of this case, would

1 constitute a denial of Ecolab’s due process rights, both substantive and procedural, in violation of the  
2 California Constitution and the Fourteenth Amendment to the United States Constitution.

3 **TWENTY-FIRST AFFIRMATIVE DEFENSE**  
4 (Bus. & Pro. Code §§ 17200 *et seq.* – No Injury)

5 21. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiff and  
6 the putative class members were properly classified as exempt employees and, for that reason, they  
7 never suffered any injury such as to have standing to bring a cause of action pursuant to the Unfair  
8 Competition Law, Business & Professions Code sections 17200, *et seq.*

9 **TWENTY-SECOND AFFIRMATIVE DEFENSE**  
10 (No Basis for Attorneys’ Fees and Costs)

11 22. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiff  
12 failed to state facts sufficient to constitute a claim for which attorneys’ fees and costs may be  
13 awarded.

14 **TWENTY-THIRD AFFIRMATIVE DEFENSE**  
15 (Statute of Limitations)

16 23. As a separate and distinct affirmative defense, Ecolab alleges that each  
17 purported cause of action set forth in the Complaint is barred in whole or in part by the applicable  
18 statute(s) of limitation, including without limitation, the three-year limitations period contained in  
19 California Code of Civil Procedure section 338(a); the one-year limitations period governing  
20 recovery of statutory penalties contained in California Code of Civil Procedure section 340(a);  
21 and/or the four year limitations period found in Business and Professions Code section 17208; as to  
22 the FLSA claim, Defendant alleges that to the extent that the time period in the Complaint, or some  
23 period of time later alleged in this action, predates the limitations period set forth in Section 6(a) of  
24 the Portal-to-Portal Act, and by principles of laches, such claims are time barred. Furthermore, only  
25 a two year statute of limitations shall apply because there was no willful violation of the FLSA.

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**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

(Prejudgment Interest)

24. As a separate and distinct affirmative defense, Ecolab alleges that the Complaint fails to properly state a claim upon which prejudgment interest may be awarded, as the damages claimed are not sufficiently certain to allow an award of prejudgment interest.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

(Equitable Defenses)

25. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiff's claims are barred in whole or in part to the extent that he did not mitigate his damages, waived his claims, are estopped, barred by laches, or barred by unclean hands.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

(Arbitration)

26. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs are covered by an Arbitration Agreement that requires them to submit all claims alleged in the Complaint to individual binding arbitration. However, in light of the 9<sup>th</sup> Circuit decision of *Morris v. Ernst & Young, LLP* Ecolab is not filing a motion to compel arbitration at this time and is instead reserving its right to file a motion to compel arbitration if the decision is changed in the future. At the current time a petition for review is pending before the United States Supreme Court (petition for certiorari filed on 9/8/16).

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

(Unconstitutional Wage Order)

27. As a separate and distinct affirmative defense, Defendant alleges that the Complaint and each cause of action therein, or some of them, are barred because the applicable wage order(s) of the Industrial Welfare Commission is unconstitutionally vague and ambiguous and violates Defendant's rights under the United States Constitution and the California Constitution as to, among other things, due process of law.

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1 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

2 (Exemption From Overtime under the FLSA)

3 28. As a separate and distinct affirmative defense, Defendant alleges that  
4 Plaintiff's claim under the FLSA, to the extent based upon the time period that Plaintiff is claiming a  
5 violation of the FLSA for the period worked as a RSM, is barred in whole or in part to the extent that  
6 the work he performed falls within exemptions, exceptions, or exclusions provided under the FLSA,  
7 29 U.S.C. § 201, *et seq.*, including and specifically the exemption described at 29 U.S.C. § 207(i).

8 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

9 (Portal-to-Portal Act, 29 U.S.C. § 254)

10 29. As a separate and distinct affirmative defense, Defendant alleges that  
11 Plaintiff's claims are barred in whole or in part by the provisions of Section 4 of the Portal-to-Portal  
12 Act, 29 U.S.C. § 254, as to all hours during which Plaintiff was engaged in activities which were  
13 preliminary or postliminary to his principal activities.

14 **THIRTIETH AFFIRMATIVE DEFENSE**

15 (Good Faith, 29 U.S.C. § 259)

16 30. As a separate and distinct affirmative defense, Defendant alleges that  
17 Plaintiff's claims are barred in whole or in part by the provisions of Section 10 of the Portal-to-  
18 Portal Act, 29 U.S.C. § 259, because actions taken in connection with Plaintiff's compensation were  
19 done in good faith in conformity with and reliance upon written administrative regulations, orders,  
20 rulings, approvals, interpretations, or written and unwritten administrative practices or enforcement  
21 policies of the Administrator of the Wage and Hour Division of the United States Department of  
22 Labor.

23 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

24 (Avoidable Consequences)

25 31. As a separate and distinct affirmative defense, Defendant alleges that each  
26 purported cause of action contained in the Complaint, or some of the causes of action, are barred, or  
27 any recovery should be reduced, pursuant to the avoidable consequences doctrine because Defendant  
28 took reasonable steps to prevent and correct improper wage payments. Plaintiff unreasonably failed

1 to use the preventative and corrective opportunities provided to him by Defendant, and reasonable  
2 use of Defendant’s procedures would have prevented at least some, if not all, of the harm that  
3 Plaintiff allegedly suffered.

4 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

5 (No Injunctive Relief)

6 32. As a separate and distinct affirmative defense, Defendant alleges that the  
7 Complaint fails to properly state a claim upon which injunctive relief may be awarded.

8 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

9 (PAGA – Not Aggrieved Employees)

10 33. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs lack  
11 standing to bring claims for any civil penalties on behalf of others because they are not employees  
12 and, therefore, not “aggrieved employee[s]” pursuant to the Labor Code Private Attorneys General  
13 Act of 2004 (“PAGA”), Labor Code section 2698 *et seq.*

14 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

15 (PAGA – Failure to Exhaust)

16 34. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs  
17 failed to provide the Labor Workforce Development Agency (“LWDA”) proper notification of the  
18 claims and/or the names of the “aggrieved employee[s]” on whose behalf they intend to seek  
19 penalties, pursuant to the PAGA.

20 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

21 (PAGA – Failure to Identify)

22 35. As a separate and distinct affirmative defense, Ecolab alleges that Plaintiffs  
23 have failed to identify any other allegedly “aggrieved employee[s],” as required by the PAGA.

24 **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

25 (PAGA – Determination of Penalties)

26 36. As a separate and distinct affirmative defense, Ecolab alleges that the civil  
27 penalties that Plaintiffs seek pursuant to the PAGA cannot be determined on a class-wide or  
28 representative basis.

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**THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

(PAGA – Unjust Penalties)

37. As a separate and distinct affirmative defense, Ecolab alleges that any penalties awarded against it pursuant to the PAGA would be unjust, arbitrary, oppressive or confiscatory.

**THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

(PAGA – Substantial Compliance)

38. As a separate and distinct affirmative defense, Ecolab alleges that to the extent that any non-compliance is found on the part of the Ecolab, it is not subject to PAGA civil penalties because Ecolab substantially complied with the law.

**THIRTY-NINTH AFFIRMATIVE DEFENSE**

(PAGA – Constitutionality)

39. As a separate and distinct affirmative defense, Ecolab alleges that the imposition of civil penalties pursuant to the PAGA is unconstitutional under the California and United States constitutions.

**FORTIETH AFFIRMATIVE DEFENSE**

(PAGA – Labor Code § 256 Penalties)

40. As a separate and distinct affirmative defense, should Ecolab be found liable for any violation of Labor Code section 203, Ecolab alleges that Labor Code section 256 is not the applicable civil penalty provision for a violation of this statute.

**FORTY-FIRST AFFIRMATIVE DEFENSE**

(PAGA – Labor Code § 204)

41. As a separate and distinct affirmative defense, Ecolab alleges that it paid Plaintiffs and the putative class member s their wages twice a month in compliance with Labor Code section 204.

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**FORTY-SECOND AFFIRMATIVE DEFENSE**  
(PAGA – Labor Code § 204)

42. As a separate and distinct affirmative defense, Ecolab alleges that, should Plaintiffs and the putative class members be owed wages, Labor Code section 204 does not provide a separate right to be paid the correct amount of wages.

**FORTY-THIRD AFFIRMATIVE DEFENSE**  
(PAGA – Labor Code § 219)

43. As a separate and distinct affirmative defense, Ecolab alleges that it has never entered into any private agreement with Plaintiffs or the putative class member to circumvent the payment of their wages.

**FORTY-FOURTH AFFIRMATIVE DEFENSE**  
(PAGA – Labor Code § 226.3)

44. As a separate and distinct affirmative defense, Ecolab alleges that, should it be found that its wage statements do not comply with Labor Code section 226(a), the civil penalty provision in Labor Code section 226.3 applies only to a complete failure to issue wage statements, not merely non-compliant ones.

**ADDITIONAL DEFENSES**

45. Defendant reserves its right to amend and/or supplement its Affirmative Defenses in the future.

**PRAYER FOR RELIEF**

WHEREFORE, Ecolab prays for relief as follows:

1. That Plaintiffs take nothing and that the Complaint be dismissed in its entirety with prejudice;
2. That judgment be entered in favor of Ecolab;
3. That Ecolab be awarded its attorney fees and costs of suit here in accordance with applicable law; and

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4. That Ecolab be awarded such other and further relief as the Court deems just and proper.

Dated: October 6, 2016

s/ Jody A. Landry  
JODY A. LANDRY  
LITTLER MENDELSON, P.C.  
Attorneys for Defendant  
ECOLAB INC.

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