

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

JOSEFINA A. TOLEDO MONTERO, individually  
and on behalf of all others similarly situated,

Plaintiff,

- against -

MC MILLAN'S HOME CARE AGENCY INC.,  
and YVONNE MC MILLAN,

Defendants.

Index No.

10104779

CLASS ACTION COMPLAINT

Jury Trial Demanded  
NEW YORK  
COUNTY CLERKS OFFICE

APR 13 2010

NOT COMPARED  
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Plaintiff, Josefina A. Toledo Montero, by her undersigned attorneys, for her class action complaint against Defendants, alleges upon information and belief, except as to the allegations that pertain to Plaintiff which are alleged upon personal knowledge, as follows:

1. Plaintiff brings this class action, individually and on behalf of a class of similarly situated employees, to seek redress for systematic and class wide underpayment of minimum wages and overtime pay, and for unjust enrichment against Defendant Mc Millan's Home Care Agency Inc. ("Mc Millan"), a provider of home health care for the elderly and infirm in and around New York City, and against Yvonne Mc Millan ("Y. Mc Millan"), President and CEO of defendant Mc Millan.

2. Defendants' unlawful practices, in violation of the provisions of the New York Labor Law, applicable regulations and common law principles of unjust enrichment, include but are not limited to, their failure to pay Plaintiff and the Class she seeks to represent for all wages due for work performed and overtime at not less than one and one-half (1-1/2) times the basic minimum hourly rate for all hours worked in excess of forty (40) hours in a workweek as well as

failure to pay the “spread of hours” premium required by the New York Labor Law and applicable regulations.

3. Defendants have been unjustly enriched by virtue of their systematic failure to compensate Plaintiff and the Class of similarly situated persons in accordance with New York law.

4. On behalf of the Class, Plaintiff seeks unpaid wages, actual, incidental, consequential and compensatory damages, pre-and post-judgment interest, and attorneys’ fees and costs. To prevent recurrence of this conduct, Plaintiff also seeks injunctive relief on behalf of herself and the Class.

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action because Defendants operate their business in the State of New York, County of New York.

6. Venue in this Court is proper under CPLR Section 503. Defendants regularly conduct business in the State of New York and within New York County. Defendants have an office located at 165 West 46<sup>th</sup> Street, New York, New York, and represent that they provide services in New York County and elsewhere in the City of New York. Some of the work that is the subject of Plaintiff’s claims was performed in New York County. Accordingly, Plaintiff’s causes of action arise in this venue.

7. Plaintiff brings causes of action based solely on and arising under New York law. The claims of Plaintiff and the Class are claims for violations of New York law. These claims arise from Defendants’ systematic wage abuse against its home health care workers in New York. Plaintiff makes no claims arising under federal law in this action.

## PARTIES

8. Plaintiff Josefina A. Toledo Montero (“Toledo Montero”), an individual residing at 322 E. 115th Street in New York County, is a home health care worker employed by Defendants to work in and around the city of New York to provide personal care and assistance to disabled and elderly clients of Defendants.

9. At all times relevant to this action, Defendant Mc Millan was and is a closely held, for profit domestic corporation formed in accordance with the laws of the State of New York conducting business in the State of New York, including New York County. Mc Millan maintains a regular place of business at 165 West 46th Street, New York, New York. Mc Millan describes itself as a provider of “Personal Care Aides, Home Health Aides, Nursing and Physical Therapy services” in the city of New York and Nassau County. Mc Millan further describes itself as “licensed and insured by the State of New York” for the past decade.

10. At all times relevant to this action, Defendant Y. Mc Millan was the President and Chief Executive Officer of Defendant Mc Millan. Y. Mc Millan is a substantial shareholder in this closely held for profit corporation. Her office or usual place of business is at 165 West 46th Street, New York, New York. At all times relevant to this action, Defendant Y. Mc Millan possessed and exercised operational control and policy making authority over employment policies, compensation policies, budgets, employee wages, hours and schedules and client services.

11. At all times relevant to this action, Plaintiff and the Class were “employees” covered by the New York Labor Law, and Defendants were “employers” of Plaintiff and the Class of home health care workers she seeks to represent, as those terms are defined by New York Labor Law §§ 651 (5) and (6) and applicable regulations, 12 NYCRR § 142-2.14.

12. The acts of Defendant Mc Millan charged in this Complaint were authorized, directed or accomplished by Defendant Y. Mc Millan, individually or jointly, by herself or by her agents, officers, employees or representatives, while actively engaged in the management of Defendants' home care businesses in New York.

### CLASS ACTION ALLEGATIONS

13. Plaintiff brings this case pursuant to CPLR Article 9 on behalf of a class (the "Class") of all current and former hourly paid home health care workers employed by Defendants in New York for work performed during the period from April 12, 2004 through the present (the "Class Period").

14. The Class is so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, and the facts are presently within the sole knowledge of Defendants, there are hundreds of home health care workers employed by Defendants as of the date this Complaint was filed. Since the Class also includes former employees since April 12, 2004, the class is sufficiently numerous to warrant certification.

15. There are questions of law or fact common to the Class that predominate over any questions affecting individual members. Those questions include but are not limited to the following:

a. whether Defendants have and are engaged in a pattern or practice of not paying all wages due for work performed and overtime, that is, one and one half (1 and 1/2 ) times the basic minimum hourly rate for all hours worked in excess of 40 in a work week;

b. whether Defendants have kept true and accurate time records for all hours worked by Plaintiff and the Class, as required by the New York Labor Law §§ 195 and 661 and 12 NYCRR § 142-2.6;

c. whether Defendants violated the New York Labor Law by failing to pay Plaintiff and the Class overtime wages and an extra hour's pay for the "spread of hours" worked;

d. whether Defendants violated the New York Labor Law by failing to pay Plaintiff and the Class all wages, including overtime wages, in the proper pay period;

e. whether Defendants were unjustly enriched by their wage policies;

f. whether Defendants should be enjoined from continuing the alleged wrongful practices in violation of New York Labor Law and applicable regulations; and

g. what is the proper measure of damages for the type of injury and losses commonly suffered by Plaintiff and the Class.

16. Plaintiff's claims are typical of the claims of the Class, because they are all current or former hourly paid home health care employees of Defendants who sustained damages, including underpayment of wages, as a result of Defendants' common compensation policies and practices. The defenses that likely will be asserted by Defendants against Plaintiff are typical of the defenses that Defendants will assert against the Class members.

17. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel experienced in pursuing complex and class action litigation who will adequately and vigorously represent the interests of the class.

18. Class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy alleged herein. Treating this as a class action will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. As a practical matter, absent a class action, there

will be no lawsuits to recover the unpaid wages due to Plaintiff and the Class because the amounts due and owing to each class member are too small to warrant the filing of individual litigation. Moreover, class members would be reluctant to file individual claims for fear of retaliation. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. The Class is readily identifiable from records that Defendants are legally required to maintain.

19. No individual class member has any interest in individually controlling the prosecution of a separate individual action. No other suits or complaints have been filed by any class member. Pursuing these small claims on an individual basis is neither practical nor efficient. In order to pursue these claims in a class action, Plaintiff is waiving any claim on her own behalf or on behalf of the Class in this lawsuit for liquidated damages under the New York Labor Law.

20. Prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for Defendants.

21. Defendants have acted, or failed to act, on grounds generally applicable to the Class.

22. Without a class action, Defendants will likely retain the benefit of their wrongdoing and will continue a course of action which will result in further damages to Plaintiff and the members of the Class.

## STATEMENT OF FACTS

23. Plaintiff Toledo Montero, a resident of New York County, is and was at all times relevant a home health care worker employed by Defendants to work in and around the city of New York to provide personal home health care and assistance to disabled and elderly clients of Defendants. Plaintiff has worked for Defendants as a home health care worker for approximately four years, beginning in February 28, 2006. At the direction of Defendants, she provided personal care and assistance to homebound elderly clients based upon a schedule set and dictated by Defendants.

24. Despite the notation on Plaintiff's pay stubs, Plaintiff does not "live in" the homes of Defendants' clients nor is she an "exempt companion" and thus she is not statutorily exempt from coverage under the New York Minimum Wage Law and applicable regulations, 12 NYCRR Sections 142-2.1(b) and 142-2.14(c).

25. From approximately January 1, 2007 until August 2008, Plaintiff was paid the New York State minimum wage of \$7.15 per hour. In August, 2008, Plaintiff's hourly wage increased to \$7.20 per hour. As of July 24, 2009, Plaintiff's hourly wage increased to \$7.25 per hour. Plaintiff frequently was assigned and worked more than forty (40) hours during the course of a work week providing direct care to clients of Defendants. Plaintiff has worked as many as approximately sixty (60) hours in a work week providing care to clients of Defendants. For those work hours in excess of forty (40) hours, Plaintiff was not paid any overtime premium by Defendants. Rather, she was paid for all work hours at her regular straight-time rate.

26. Plaintiff and the Class are required to attend "in-service" training sessions approximately three times a year. These training sessions each last approximately four hours.

Defendants do not pay Plaintiff and the Class for the time spent in these mandatory “in-service” trainings that take place at Defendants’ office location.

27. Plaintiff and the Class are required to wear uniforms in the course of their employment. However, Defendants do not launder the required uniforms nor do they pay Plaintiff and the Class the additional amount per week required by New York Labor Law and applicable regulations.

28. Plaintiff and the Class are also required to use latex gloves during the performance of certain of their job responsibilities. Plaintiff and the Class are obligated to purchase these supplies for the benefit of Defendants, their employer. By requiring Plaintiff and the Class to purchase and pay for their own supplies, Defendants are making impermissible deductions from the wages of Plaintiff and the Class. NYLL § 193; 12 NYCRR § 142-2.10.

29. At all times relevant, Defendants are and were required to establish, maintain and preserve for not less than six years, weekly payroll records that show for each employee, among other information, the number of hours worked daily and weekly including the time of arrival and departure of each employee working a split shift of spread of hours exceeding ten hours. NYLL §195 and 12 NYCRR §§ 142-2.6 (a)(4) and 142-2.18.

30. The records maintained by Defendants fail to reflect accurately Plaintiff’s time of arrival at and departure from the homes of Defendants’ clients.

31. At all relevant times, Plaintiff and the Class frequently work a “spread of hours” or a shift longer than ten hours per day but were not paid for an additional hour of work at the minimum wage as required by New York Labor Law and applicable regulations. 12 NYCRR §142-2.4(a).



32. As part of her duties as an employee of Defendants, Plaintiff was assigned to care for clients and performed services including changing bed linens, helping clients bathe, picking up clients' prescriptions at the pharmacy, grocery shopping, laundry, and house-cleaning.

33. Defendants provide home health care to elderly and infirm individuals residing in New York City and Nassau County. Defendants provide services essential to the care for eligible individuals at the homes of those individuals.

34. In order to conduct their home health care business, Defendants employ and assign home health care workers, such as Plaintiff, to provide personal care and assistance to medically needy clients who have selected Defendants as their provider. Pursuant to a written or verbal schedule, Defendants assign Plaintiff to provide this direct care at the respective homes of the clients.

35. Defendants have the right to control and in fact control the hours, hourly pay, assignments, and schedules of Plaintiff and the other class members. Defendants require Plaintiff and the other class members to fill out daily records of clients visited and the time spent with each, and to submit those records to Defendants regularly.

36. Plaintiff and the other members of the Class often are assigned to spend more than forty (40) hours in a given work week providing direct care to these home-bound clients. Defendants paid for direct-care work performed in excess of forty (40) hours per week at an employee's regular rate of pay. Defendants, as a matter of policy and practice, do not and did not pay Plaintiff and the Class one and one half (1 and 1/2) times the New York State minimum wage rate for direct care work in excess of forty (40) hours in a work week.

37. Defendants did not keep true, accurate and legible records of the time worked by Plaintiff and the members of the Class.

38. Defendants' actions, as alleged herein, were intentional and not made in good faith.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **New York Labor Law, Article 19: Unpaid Wages and Overtime Wages**

39. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

40. During the Class Period, Plaintiff and members of the Class were "employees" within the meaning of NYLL §190(2), and 12 NYCRR § 142-2.14.

41. During the Class Period, Defendants were employers within the meaning of NYLL § 650(6).

42. Throughout the Class Period, Defendants failed to pay Plaintiff and the Class overtime wages of not less than one and one-half times the New York State minimum wage rate for each hour worked in excess of 40 hours in a workweek in violation of the NYLL, Article 19, §650, *et seq.*, and 12 NYCRR §142-2.2.

43. Defendants also failed to pay Plaintiff and the Class their hourly wage for the time spent in mandatory "in-service" training sessions. To the extent, the time spent at these "in-service" training sessions caused Plaintiff and the Class to work more than 40 hours in one week, Plaintiffs and the Class are required to be compensated at one and one-half times the New York State minimum wage rate.

44. Defendants mandate that Plaintiff and the Class purchase their own supplies, including, but not limited to, required latex gloves. Such expenses constitute an impermissible deduction from Plaintiff's and the Class's wages.

45. Due to Defendants' violations of the NYLL, Plaintiff and members of the Class are entitled to recover from Defendants all of the wages due them for hours worked at their regular rate of pay and unpaid overtime wages of not less than one and one-half times the New York State minimum wage rate for each hour worked in excess of 40 hours in a workweek, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Plaintiff also seeks injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

## **COUNT II**

### **New York Labor Law, Articles 6 and 19 – Spread of Hours Pay**

46. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

47. During the Class Period, Defendants failed to pay Plaintiff and the members of the Class an additional hour's pay at the basic minimum hourly wage rate for every day that they worked a spread of hours that exceeded 10 hours or a shift in excess of 10 hours, in violation of N.Y. Labor Law §190, *et seq.*, and 650, *et seq.*, and 12 NYCRR § 142.

48. Due to Defendants' violations of the NYLL, Plaintiffs and the members of the Class are entitled to recover from Defendants their unpaid wages, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Plaintiff also seeks injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

**COUNT III**  
**New York Labor Law Section 195**  
**Defendants' Failure to Pay Wages When Due**

49. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

50. Defendants have failed to pay Plaintiff and the Class members all wages, including minimum wage and overtime wages, for the hours they each worked for Defendants. The NYLL requires that wages be paid on an employee's regular payday for all hours worked.

51. Due to Defendants' violations of the NYLL, Plaintiff and the members of the Class are entitled to recover from Defendants their unpaid wages, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Plaintiff also seeks injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

**COUNT IV**  
**New York Labor Law Article 19 and 12 NYCRR §142-2.5(c)**  
**Failure to Pay Additional Amounts for Laundering of Required Uniforms**

52. Plaintiff realleges and incorporates by reference all allegations in all preceding paragraphs.

53. New York Labor Law and the regulations promulgated thereunder, 12 NYCRR §142-2.5(c), provide that where an employer failed to launder or maintain required uniforms for any employee, he shall pay such employee in addition to the minimum wage the following amount per week for employees that work more than 30 hours: (1) \$6.40 per week on and after March 31, 2000; (2) \$7.45 per week on and after January 1, 2005; (3) \$8.40 per week on and after

January 1, 2006; (4) \$8.90 per week on and after January 1, 2007; and (5) \$9.00 per week on and after July 24, 2009 through January 17, 2010.

54. Defendants require Plaintiff and the Class to wear a uniform during the performance of their employment duties.

55. In failing to launder the required uniforms and in failing to pay Plaintiff and the Class the additional required laundry costs incurred by Plaintiff and the class,, Defendants have violated New York Labor Law and 12 NYCRR §142-2.5.

56. Due to Defendants' violations of the NYLL, Plaintiff and members of the Class are entitled to recover from Defendants the additional sums due them for laundering of required uniforms, reasonable attorneys' fees, costs, and pre-judgment and post-judgment interest. In light of Defendants' longstanding and ongoing violations of New York Labor Law and applicable regulations, Plaintiff also seeks injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

#### **COUNT V**

#### **New York Labor Law §§195 and 661; 12 NYCRR §142-2.6 Failure to Comply With Notification Requirements And To Maintain Records**

57. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

58. NYLL § 195 sets out notice and record keeping requirements governing employers in the State of New York. Employers are required to keep true and accurate records reflecting the employment of plaintiff and the members of the Class. Prior to October 26, 2009, employers were required to notify their employees at the time of hiring of the rate of pay and regular pay day designated by the employer. Effective on October 26, 2009, employers are

required to notify employees in writing at the time of hiring of, among other things, the rate of pay and, for employees who are eligible for overtime, the overtime rate of pay. To the extent that the Class includes persons who were hired on or after October 26, 2009, Defendants are likely in violation of the requirements of NYLL Section 195.

59. Pursuant to 12 NYCRR §142-2.6, Defendants are also required to establish, maintain and preserve for not less than six years, weekly payroll records which, *inter alia*, shall show for each employee: name and address; social security number; wage rate; the number of hours worked daily and weekly, including the time of arrival and departure of each employee working a split shift or spread of hours exceeding 10; the amount of gross wages; deductions from gross wages; allowances, if any, claimed as part of the minimum wage; and net wages paid. By failing to maintain true, accurate and legible records for Plaintiff and each member of the Class of the time worked on a daily and weekly basis and of their times of arrival at and departure from the homes of Defendants' clients, Defendants violated 12 NYCRR §142-2.6.

60. In light of Defendants' longstanding and ongoing violations of New York Labor Laws and applicable regulations, Plaintiff also seeks injunctive relief precluding Defendants from continued violations of these laws and affirmatively mandating their compliance with the provisions of the New York Labor Law.

**COUNT VI**  
**Unjust Enrichment - Defendants' Failure to Pay All Wages Due Including**  
**Wages for Overtime And Spread of Hours**

61. Plaintiff incorporates by reference all preceding paragraphs of this Complaint.

62. At all times material to this Complaint, Defendants, by their policies and actions, benefited from, and increased their profits and personal compensation by failing to pay

Plaintiff and the Class: (1) all wages due for work performed including but not limited to overtime for hours worked in excess of 40 hours in a workweek at one and one-half times the New York State minimum wage rate; and (2) an extra hour at the minimum wage for working a “spread of hours” in excess of 10 hours or a shift longer than 10 hours.

63. Defendants accepted and received the benefits of the work performed by Plaintiff and the Class at the expense of Plaintiff and the Class. Defendant Y. Mc Millan was unjustly enriched as she is and was the major shareholder and/or the President and CEO of Defendant Mc Millan.

64. It is inequitable and unjust for Defendants to reap the benefits of Plaintiff’s and the Class’s labor, which includes underpaid overtime hours caring for the clients of Defendants and the pay due for spread of hours.

65. Plaintiff and the Class are entitled to relief for this unjust enrichment in an amount equal to the benefits unjustly retained by Defendants, plus interest on these amounts.

WHEREFORE, Plaintiff, on behalf of herself and the Class, respectfully requests that this Court grant the following relief:

A. Allow this action to proceed as a class action under CPLR Article 9 for all claims alleged, designate Plaintiff as the representative of the class and the undersigned counsel as counsel for the class;

B. Enter judgment against Defendants, jointly and severally, and in favor of Plaintiff and each member of the Class, in the amount of their individual unpaid wages, actual and compensatory damages, and pre-and post judgment interest as allowed by law and enjoin Defendants from future violations;

D. Award Plaintiff the attorneys’ fees and costs incurred in this litigation;

E. Enjoin Defendants to cease the practices found illegal or in violation of Plaintiff's rights, and

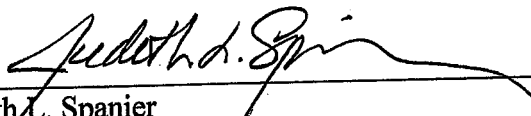
F. Grant Plaintiff such further relief as this Court deems just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: New York, New York  
April 13, 2010

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