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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BENNET MARCUS, STEVE KENNEDY, and
ISAAC KEIL, individually and on behalf of other
persons similarly situated who were employed by
AXA ADVISORS, LLC, AXA FINANCIAL
SERVICES, LLC, and AXA NETWORK, LLC
and/or any other entities affiliated with or controlled
by AXA ADVISORS, LLC and AXA NETWORK,
LLC,

Plaintiffs,

- against -

AXA ADVISORS, LLC, AXA FINANCIAL
SERVICES, LLC, and AXA NETWORK, LLC
and/or any other entities affiliated with or controlled
by AXA ADVISORS, LLC, AXA FINANCIAL
SERVICES, LLC, and AXA NETWORK, LLC,

Defendants.

Case No. 11-CV-2339 (SJ)(SMG)

**AMENDED CLASS ACTION
COMPLAINT**

Plaintiffs, by their attorneys, Virginia & Ambinder, LLP and Leeds, Morelli, & Brown,
P.C, allege upon knowledge to themselves and upon information and belief as to all other matters
as follows:

PRELIMINARY STATEMENT

1. This action is brought pursuant to the Fair Labor Standards Act (hereinafter

referred to as “FLSA”), 29 U.S.C. §§ 207 and 216(b), New York Labor Law Article 19 § 663, New York Labor Law Article 6 §§ 190 *et seq.*, 12 New York Codes, Rules, and Regulations (hereinafter referred to as “NYCRR”) § 142-2.2, to recover unpaid wages and overtime wages owed to Plaintiffs and all similarly situated persons who are presently or were formerly employed by AXA ADVISORS, LLC, AXA FINANCIAL SERVICES, LLC, and AXA NETWORK, LLC and/or any other entities affiliated with or controlled by AXA ADVISORS, LLC, AXA FINANCIAL SERVICES, LLC, and AXA NETWORK, LLC, (hereinafter collectively referred to as “AXA Financial” or “Defendants”).

2. Beginning in approximately May of 2005 and, upon information and belief, continuing through the present, Defendants have wrongfully withheld wages from Plaintiff and other similarly situated individuals who worked for Defendants in the business of selling securities or training to be in the business of selling securities.

3. Beginning in approximately May of 2005 and, upon information and belief, continuing through the present, Defendants have wrongfully classified Plaintiff and others similarly situated as exempt from overtime wages.

4. Beginning in approximately May of 2005 and, upon information and belief, continuing through the present, Defendants have failed to provide minimum wage and overtime compensation to its employees for all hours worked in excess of 40 hours in any given week.

5. Plaintiffs have initiated this action seeking for themselves, and on behalf of all similarly situated employees, all compensation, including minimum wage and overtime compensation, which they were deprived of, plus interest, damages, attorneys’ fees, and costs.

JURISDICTION

6. Jurisdiction of this Court is invoked pursuant to FLSA, 29 U.S.C. §216(b), and 28 U.S.C. §1331 and 1337. This court also has supplemental jurisdiction under 28 U.S.C. § 1367 of

the claims brought under the New York Labor Law.

VENUE

7. Venue for this action in the Eastern District of New York under 28 U.S.C. § 1391 (b) is appropriate because a substantial part of the events or omissions giving rise to the claims occurred in the Southern District of New York.

THE PARTIES

8. Plaintiff BENNET MARCUS is an individual who is currently a resident of New York and was employed by Defendants as a trainee and cold caller from approximately October 2010 through February of 2011.

9. Plaintiff STEVE KENNEDY is an individual who is currently a resident of New York and was employed by Defendants as a Financial Consultant, Financial Planner, trainee, and cold caller from approximately September of 2007 through June of 2010.

10. Plaintiff ISAAC KEIL is an individual is currently a resident of Pennsylvania and was employed by Defendants as a Financial Consultant, Financial Planner, trainee, and cold caller from approximately May 2007 through June 2011.

11. Upon information and belief, Defendant AXA ADVISORS, LLC is a foreign limited liability company organized and existing under the laws of Delaware, with its principal place of business at 1633 Broadway, New York, New York 10019 and is engaged in the financial business.

12. Upon information and belief, Defendant AXA FINANCIAL SERVICES, LLC is a foreign limited liability company organized and existing under the laws of Delaware, with its principal place of business at 1633 Broadway, New York, New York 10019 and is engaged in the financial business.

13. Upon information and belief, Defendant AXA NETWORK, LLC is a foreign

limited liability company organized and existing under the laws of Delaware, with its principal place of business at 1633 Broadway, New York, New York 10019 and is engaged in the financial business.

14. Defendants engage in interstate commerce, produce goods for interstate commerce, and/or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce.

15. Upon information and belief, Defendants annual gross volume of sales made or business done is not less than \$500,000.

CLASS ALLEGATIONS

16. Plaintiffs repeat and re-allege the allegations set forth in paragraphs 1 through 14 hereof.

17. This action is properly maintainable as a collective action pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b), and as a Class Action under Rule 23 of the Federal Rules of Civil Procedure.

18. This action is brought on behalf of Plaintiffs and a class consisting of similarly situated employees who worked for Defendants as financial product marketers, financial product marketer trainees, and cold callers.

19. Plaintiffs and potential plaintiffs who elect to opt-in as part of the collective action are all victims of the Defendants' common policy and / or plan to violate the FLSA by (1) failing to pay all earned wages; (2) misclassifying Plaintiffs and members of the putative collective action as exempt from minimum wage and overtime compensation; (3) failing to provide minimum wages for work performed by Plaintiffs and other members of the putative collective action; and (4) failing to provide overtime wages, at the rate of one and one half times the regular rate of pay, for all time worked in excess of 40 hours in any given week pursuant to

29 U.S.C. § 207.

20. The putative class is so numerous that joinder of all members is impracticable. The size of the putative class is believed to be in excess of 1000 employees. In addition, the names of all potential members of the putative class are not known.

21. The questions of law and fact common to the putative class predominate over any questions affecting only individual members. These questions of law and fact include, but are not limited to, (1) whether Defendants failed to pay Plaintiffs and members of the putative class all earned wages; (2) whether the Defendants misclassified Plaintiffs and members of the putative class as exempt from overtime; (3) whether the Defendants required Plaintiffs and members of the putative class to perform work on its behalf and for its benefit for which they were not compensated; and (4) whether the Defendants failed to pay overtime wages, at the rate of one and one half times the regular rate of pay, for all hours worked in excess of 40 hours in any given week in violation of federal and state law.

22. The claims of the named Plaintiff are typical of the claims of the putative class. The Plaintiff and putative class members were all subject to Defendants' policies and willful practices of failing to pay all earned wages, misclassifying their employees as exempt, and of refusing to pay employees overtime wages. The Plaintiffs and the putative class members thus have sustained similar injuries as a result of the Defendants' actions.

23. Plaintiffs and their counsel will fairly and adequately protect the interests of the putative class. Plaintiffs have retained counsel experienced in complex wage and hour collective and class action litigation.

24. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The individual Plaintiffs and putative class action members

lack the financial resources to adequately prosecute separate lawsuits against Defendants. A class action will also prevent unduly duplicative litigation resulting from inconsistent judgments pertaining to the Defendants' policies.

FACTS

25. Upon information and belief, beginning in or around 2005, the Defendants employed numerous individuals at offices across the United States to sell financial products.

26. Upon information and belief, under 29 U.S.C § 201, *et seq.*, and the cases interpreting the same, AXA Financial constitutes an "enterprise engaged in commerce."

27. Upon information and belief, Defendants' typical plan and procedure for recruiting new financial product marketers involved employing individuals who had not yet been licensed by the National Association of Securities Dealers / FINRA as general securities representatives.

28. Plaintiffs and, upon information and belief, others similarly situated, were required to pay for training materials and registration fees while studying to become licensed by FINRA, and were not compensated by Defendants. Upon further information and belief, during this time period, Plaintiff and others similarly situated were required to perform work for and on behalf of Defendants without compensation.

29. Plaintiffs and, upon information and belief, others similarly situated, upon becoming licensed performed services including (but not limited to) making "cold calls" to sell securities, assuring that client trades are successfully processed, and developing a book of business.

30. Plaintiffs and, upon information and belief, others similarly situated, were compensated by means of a flat "salary" plus a commission on sales made.

31. Plaintiffs and, upon information and belief, others similarly situated, routinely worked more than forty hours in a week, and often as many sixty hours in a week. Plaintiff and, upon information and belief, others similarly situated, were not compensated for any time spent working past forty hours in a week.

32. Upon information and belief, while working for Defendants, Plaintiffs and the members of the putative class were regularly required to perform work for Defendants, without receiving overtime compensation as required by applicable federal and state law.

33. Plaintiffs and all members of the putative class constituted “employees” as that term is defined in Article 6 and Article 19 of the New York Labor Law and in 12 NYCRR 142-2.14, and under the Fair Labor Standards Act.

34. The payments made to Plaintiffs and other members of the putative class by Defendants constitute “wages” as that term is defined under Article 6 and Article 19 of the New York Labor Law.

35. Upon information and belief, while working for Defendants, Plaintiffs and the members of the putative class did not receive all earned wages at their regular hourly wage rate.

36. Upon information and belief, while working for Defendants, Plaintiffs and the members of the putative class did not receive all earned overtime wages, at the rate of one and one half times the regular rate of pay, for the time in which they worked after the first forty hours in any given week.

37. Upon information and belief, Defendants willfully disregarded and purposefully evaded recordkeeping requirements of the Fair Labor Standards Act and applicable State law by failing to maintain proper and complete timesheets or payroll records.

38. Named Plaintiff Bennet Marcus worked for Defendants as a financial product marketer / cold caller between October of 2010 and February of 2011. Plaintiff Marcus reported

to AXA Financials' office location at 1633 Broadway, New York, New York 5 days per week. Plaintiff Marcus was required to pay for training materials and registration fees while he studied to become a licensed securities broker.

39. While he was studying to become a licensed securities broker and afterwards, Plaintiff Marcus was required to work for Defendants from approximately 8:00 A.M. until at least 8:00 P.M. each day, five days per week. Although he was not compensated by Defendants during his "training" time, he was required to make "cold calls" for the purposes of soliciting sales of financial products. If recipients expressed interest, Plaintiff Marcus was required to hand the call along to a senior broker. If a call led to a sale of financial products, Plaintiff Marcus would receive a percentage commission.

40. Plaintiff Marcus routinely worked more than 40 hours each week, but did not receive overtime wages at time and one-half his regular hourly wage for all the hours over 40 that he worked each week.

41. While employed by Defendants, Plaintiff Marcus did not have any managerial duties. He was not responsible for decisions regarding the hiring, firing, demotion or promotion of employees.

42. Plaintiff Marcus did not exercise independent judgment and discretion on matters of significance while employed by Defendants.

43. Plaintiff Steve Kennedy was employed by Defendants from approximately September of 2007 through approximately June of 2010, working as a cold caller, financial consultant, financial planner, and trainee.

44. Plaintiff Kennedy was required to pay for training materials and registration fees while he studied to become a licensed securities broker.

45. Upon completing his examination in January of 2008, through April of 2008,

Plaintiff Kennedy was not paid by Defendants, because he had not “reached quota” of sales.

46. From April of 2008 through June of 2010, Plaintiff Kennedy was paid at a rate of \$24,000 per year, plus commissions.

47. Plaintiff Kennedy was required to work as many as seven days per week.

48. Typically, Plaintiff Kennedy would work from 6:00 a.m. until 9 p.m., Monday through Thursday; 6:00 a.m. to 6:00 p.m., on Fridays; and occasionally for up to seven hours on Saturdays and five hours on Sundays.

49. Plaintiff Kennedy routinely worked more than 40 hours each week, but did not receive overtime wages at time and one-half his regular hourly wage for all the hours over 40 that he worked each week

50. While employed by Defendants, Plaintiff Kennedy did not have any managerial duties. He was not responsible for decisions regarding the hiring, firing, demotion or promotion of employees.

51. Plaintiff Marcus did not exercise independent judgment and discretion on matters of significance while employed by Defendants.

**FIRST CAUSE OF ACTION AGAINST DEFENDANTS:
FLSA MINIMUM WAGE COMPENSATION**

52. Plaintiff repeats and re-alleges the allegations set forth in paragraph 1 through 51 hereof.

53. Pursuant to 29 U.S.C. § 206, "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) except as otherwise provided in this section, not less than -- (A) \$5.85 an hour, beginning on the 60th day after May 25, 2007; (B) \$6.55 an hour, beginning 12

months after that 60th day; and (C) \$7.25 an hour, beginning 24 months after that 60th day [July 24, 2009]."

54. AXA Financial, is an employer, within the meaning contemplated under U.S.C. § 203(d).

55. Plaintiffs and other members of the putative collective action are employees, within the meaning contemplated, pursuant to 29 U.S.C. § 203(e).

56. Plaintiffs and other members of the putative collective action, during all relevant times, engaged in commerce or in the production of goods for commerce, or were employed in an enterprise engaged in commerce or in the production of goods for commerce.

57. None of the exemptions of 29 U.S.C. § 213 applies to Plaintiffs or other similarly situated employees.

58. Upon information and belief, Defendants violated the FLSA by failing to pay Plaintiffs and other members of the putative collective action minimum wages for hours worked in any given week.

59. Upon information and belief, the failure of Defendants to pay Plaintiffs and other members of the putative collective action their rightfully-owed wage was willful.

60. By the foregoing reasons, Defendants are liable to Plaintiffs and members of the putative collective action in an amount to be determined at trial, plus liquidated damages in the amount equal to the amount of unpaid wages, interest and attorneys' fees and costs.

**SECOND CAUSE OF ACTION AGAINST DEFENDANTS:
FLSA OVERTIME COMPENSATION**

61. Plaintiffs repeat and re-allege the allegations set forth in paragraphs 1 through 60 hereof.

62. Pursuant to 29 U.S.C § 207, "no employer shall employ any of his employees

who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

63. AXA Financial is an employer, within the meaning contemplated, pursuant to 29 U.S.C. § 203(d).

64. Plaintiffs and other members of the putative collective action are employees, within the meaning contemplated, pursuant to 29 U.S.C. §203(e).

65. Plaintiffs and other members of the putative collective action, during all relevant times, engaged in commerce or in the production of goods for commerce, or were employed in an enterprise engaged in commerce or in the production of goods for commerce.

66. 29 U.S.C. §213 exempts certain categories of employees from minimum wage obligations. None of these exemptions apply to Plaintiffs or other similarly situated employees.

67. Upon information and belief, Defendants violated the FLSA by failing to pay Plaintiffs and other members of the putative collective action overtime wages at a rate of one and one-half times the normal rate of pay for all hours worked over 40 in any given week.

68. Upon information and belief, the failure of Defendants to pay Plaintiffs and other members of the putative collective action their rightfully owed wages was willful.

69. By the foregoing reasons, Defendants are liable to Plaintiffs and members of the putative collective action in an amount to be determined at trial, plus liquidated damages in the amount equal to the amount of unpaid wages, interest, attorneys’ fees and costs.

**THIRD CAUSE OF ACTION AGAINST DEFENDANTS:
NEW YORK OVERTIME COMPENSATION**

70. Plaintiffs repeat and re-allege the allegations set forth in paragraphs 1 through 69 hereof.

71. AXA Financial is an employer, within the meaning contemplated, pursuant to New York Labor Law Article 19 § 651(6) and the supporting New York State Department of Labor Regulations.

72. Plaintiffs and other members of the putative class action are employees, within the meaning contemplated, pursuant to New York Labor Law Article 19 § 651(5) and the supporting New York State Department of Labor Regulations.

73. 12 NYCRR §142-2.2 requires that “[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee’s regular rate....”

74. New York Labor Law Article 19 § 663, provides that “[i]f any employee is paid by his employer less than the wage to which he is entitled under the provisions of this article, he may recover in a civil action the amount of any such underpayments, together with costs and such reasonable attorney’s fees.”

75. Upon information and belief, Plaintiffs and other members of the putative class worked more than forty hours a week while working for Defendants.

76. Upon information and belief, Plaintiffs and other members of the putative class action did not receive overtime compensation for all hours worked in excess of forty hours in any given week.

77. Consequently, by failing to pay to Plaintiffs and other members of the putative class action overtime compensation, Defendants violated New York Labor Law Article 19 § 663 and 12 NYCRR § 142-2.2.

78. Upon information and belief, Defendants’ failure to pay overtime compensation

to the Plaintiffs and members of the putative class action was willful.

79. By the foregoing reasons, Defendants have violated New York Labor Law Article 19 § 663 and 12 NYCRR § 142-2.2 and are liable to Plaintiffs and members of the putative class action in an amount to be determined at trial, plus interest, attorneys' fees, and costs.

**FOURTH CAUSE OF ACTION AGAINST DEFENDANTS:
FAILURE TO PAY WAGES**

80. Plaintiffs repeat and re-allege the allegations set forth in paragraphs 1 through 78 hereof.

81. Pursuant to Article Six of the New York Labor Law, workers, such as the Named Plaintiffs and other members of the putative class, are protected from wage underpayments and improper employment practices.

82. Pursuant to New York Labor Law § 652, "Every employer shall pay to each of its employees for each hour worked a wage of not less than... \$5.15 on and after March 31, 2000, \$6.00 on and after January 1, 2005, \$6.75 on and after January 1, 2006, \$7.15 on and after January 1, 2007."

83. Pursuant to Labor Law § 190, the term "employee" means "any person employed for hire by an employer in any employment."

84. As persons employed for hire by Defendants, Plaintiffs are "employees," as understood in Labor Law § 190.

85. Pursuant to Labor Law § 190, the term "employer" includes any "person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service."

86. As entities that hired the Plaintiffs, AXA Financial is an "employer."

87. Plaintiffs' agreed upon wage rate and/or minimum wage rate and/or overtime

compensation rate was within the meaning of New York Labor Law §§ 190, 191, and 652.

88. Pursuant to Labor Law § 191 and the cases interpreting same, workers such as the Named Plaintiffs and other members of the putative class are entitled to be paid all their weekly wages “not later than seven calendar days after the end of the week in which the wages are earned.”

89. In failing to pay the Named Plaintiffs and other members of the putative class minimum wages and overtime payments for time worked after forty hours in one week, Defendants violated Labor Law § 191.

90. Pursuant to Labor Law § 193, “No employer shall make any deduction from the wages of an employee,” such as the Named Plaintiffs and other members of the putative class, that is not otherwise authorized by law or by the employee.”

91. By withholding minimum wages, and overtime compensation from the Named Plaintiffs and other members of the putative class, pursuant to New York Labor law § 193 and the cases interpreting same, Defendants made unlawful deductions in wages owed to the Named Plaintiffs and other members of the putative class.

92. Pursuant to New York Labor Law § 663, “If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action the amount of any such underpayments, together with costs all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total of such underpayments found to be due. Any agreement between the employee, and the employer to work for less than such wage shall be no defense to such action.”

93. By withholding minimum wages, and overtime compensation from the Named

Plaintiffs and other members of the putative class, pursuant to New York Labor law § 193 and the cases interpreting same, Defendants made unlawful deductions in wages owed to the Named Plaintiffs and other members of the putative class.

94. Upon information and belief, Defendants' failure to pay the Named Plaintiffs and other members of the putative class minimum wages and overtime compensation was willful.

95. By the foregoing reasons, Defendants have violated New York Labor Law § 198 and are liable to the Named Plaintiffs and other members of the putative class in an amount to be determined at trial, interest, attorneys' fees and costs.

WHEREFORE, Plaintiffs, individually and on behalf of all other persons similarly situated who were employed by AXA ADVISORS, LLC, AXA FINANCIAL SERVICES, LLC, and AXA NETWORK, LLC and/or any other entities affiliated with or controlled by AXA ADVISORS, LLC, AXA FINANCIAL SERVICES, LLC, and AXA NETWORK, LLC demand judgment:

(1) on their first cause of action, against Defendants in an amount to be determined at trial, plus liquidated damages in the amount equal to the amount of unpaid wages, interest, attorneys' fees and costs,

(2) on their second cause of action against Defendants in an amount to be determined at trial, plus liquidated damages, interest, attorneys' fees and costs;

(3) on their third cause of action against Defendants in an amount to be determined at trial, plus liquidated damages, interest, attorneys' fees and costs;

(4) on their fourth cause of action against Defendants in an amount to be determined at trial, plus liquidated damages, interest, attorneys' fees and costs; and

(5) whatever other and further relief the Court may deem appropriate.

Dated: New York, New York
March 12 11, 2012

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