

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

JEREMY CIOE, on behalf of himself and all	)	
similarly situated persons,	)	
	)	<b>JURY TRIAL DEMANDED</b>
Plaintiff,	)	
	)	
v.	)	<b>No.</b>
	)	
SELECT COMFORT CORPORATION and	)	
SELECT COMFORT RETAIL	)	
CORPORATION,	)	
	)	
Defendants.	)	

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**CLASS ACTION COMPLAINT**

Plaintiff, Jeremy Cioe brings this action on behalf of himself and all persons similarly situated and alleges as follows upon personal knowledge as to the facts known to Plaintiff, and to other matters upon information and belief following investigation by counsel, against Defendants, Select Comfort Corporation and Select Comfort Retail Corporation (individually and collectively, “Select Comfort” or “Defendants”):

**INTRODUCTION**

1. This action seeks relief for past and present employees of Defendants’ retail stores, whom Defendants failed to timely pay overtime wages and compensation in violation of the Fair Labor Standards Act (FLSA) and the applicable state law.

**PARTIES, JURISDICTION AND VENUE**

2. Defendant Select Comfort Corporation is a Minnesota corporation, has its principal offices in Minneapolis, Minnesota, and is the parent company of Select Comfort Retail Company. Select Comfort Corporation perpetrated its conduct herein individually and/or by and through its agent Select Comfort Retail Corporation.

3. Defendant Select Comfort Retail Corporation is a Minnesota corporation, has its principal offices in Minneapolis, Minnesota, and caused Plaintiff and similarly situated Select Comfort employees to be employed and/or paid at Select Comfort Retail Stores. Select Comfort Retail Corporation is a wholly-owned subsidiary of Select Comfort Corporation.

4. Plaintiff is a citizen of the State of Illinois and resides in this judicial District.

5. The Court has jurisdiction over this action under 28 U.S.C. §§1331 and 1367, and 29 U.S.C. § 216(b).

6. The Court also has jurisdiction over the state-law claims under 28 U.S.C. §1367 because those claims are so related to the federal claim that they form part of the same case or controversy. As fully described in detail herein, Plaintiff's state and federal claims arise out of a common nucleus of operative fact; the above-described facts give rise both to Plaintiff's federal and state law claims as set forth below.

7. Venue is proper in this District under 28 U.S.C. § 1391 because one or more Defendants regularly do business in this judicial District, and a substantial part of the events or omissions giving rise to Plaintiff's claims arose in this District.

## **FACTS**

8. Defendants own and operate retail stores – collectively hereinafter, “Select Comfort Retail Stores” or “Retail Stores” – which are in the business of providing, marketing and distributing mattress and sleep-related products.

9. The duties of Defendants' Retail Store employees, classified as sales associates and in other or like job positions, are, *inter alia*, to market and sell mattresses, pillows, bedding and sleep-related accessories, provide service, consultation, product expertise, and

demonstrations to their customers, have command of the technology behind Select Comfort products and of how they work, and follow Select Comfort procedures.

10. Defendants have employed Plaintiff and other Retail Store employees, substantially on an hourly basis, and on a limited basis on commission and bonus, to perform such duties and operate Retail Stores in Illinois and in other States.

11. Defendants employed Plaintiff as a sales associate at the Select Comfort Retail Store located in Lombard, Illinois from approximately August 2007 to March 2008.

12. Years later, long after Plaintiff's employment ended and long after Defendants were required to pay Plaintiff overtime compensation in a timely fashion as required by applicable law, on December 7, 2010, Select Comfort sent an unsolicited form letter to Plaintiff enclosing a pay check in the amount of \$20.62, for past due and owing overtime compensation and interest. Defendants' letter stated that Plaintiff was owed "overtime pay in the sum of \$20.26, less applicable payroll taxes" plus interest. From review of the payroll stub enclosed with the letter, the monies paid were for due and owing overtime adjustment compensation for "commission OT" (as labeled by Defendants on the paystub) (i.e. compensation for "true-ups," as described more fully below). Practically no further explanation was included in the letter as to the number of uncompensated overtime hours and compensation involved.

13. At relevant times including during the past three years, Plaintiff and the Class, including similarly situated employees and sales associates, worked hours in excess of 40 hours per week, including during time periods for which they earned commissions. Defendants themselves admit that Plaintiff worked overtime hours, as Defendants issued Plaintiff the above-described check for previously unpaid overtime compensation.

14. At such relevant times when Defendants did purport to pay Plaintiff and other Retail Store employees overtime, Defendants only paid time and one-half of the employees' hourly wage, rather than time and one-half of their regular rate of pay – which, as required by law is an average hourly rate derived from hourly wages *and* applicable commissions and bonus pay (collectively herein, “commissions”) combined – and/or Defendants failed to properly or timely pay overtime adjustments (or “true-ups”) by adding-in commissions earned to the regular rate of pay upon which overtime is based. A “true-up,” as used herein means the re-computation of the hourly and overtime rates of pay for each work week worked by Plaintiff and each Class member, after applying the commission payment attributable to that week to the hourly rate of pay.

15. Prior to receipt of the unsolicited check, Plaintiff and the Class never received true-up compensation for overtime worked as required by applicable law and as per their agreement with Defendants to be properly paid for overtime as part of their jobs.

16. Defendants keep computerized records of Plaintiff's and the Class members' work time, and have failed to accurately record or to pay them for all overtime and time worked in a timely fashion in accordance with applicable law.

17. In fact, Defendants' above-described paystub attached to their December 2010 letter to Plaintiff erroneously recorded Plaintiff's true-up compensation as being for a fictitious pay period starting November 23, 2010 and ending November 27, 2010. This pay period is clearly inaccurate as Plaintiff stopped working for Defendants in the year 2008.

18. The form nature of the aforementioned December 7, 2010 letter and check sent by Defendants to Plaintiff, without provocation, demonstrates that Defendants' conduct similarly affects Plaintiff and other Select Comfort employees.

19. The timing of the form letter is ominous, for Defendants issued the letter just twenty-one days after the conclusion of another collective and class action lawsuit in which Defendants allegedly failed to properly pay their Retail Store employees proper compensation including overtime in violation of the Fair Labor Standards Act (FLSA).

20. Indeed, on information and belief Defendants would not have sent Plaintiff and the Collective payment for overtime true-ups if more than three-years (the FLSA statute of limitations for willful violations) had expired since such payments were due.

21. Plaintiff and other Retail Store employees are entitled to know the circumstances in which these long overdue overtime payments were calculated, and are entitled to any additionally owing true-ups, overtime, liquidated damages, penalties and interest.

### **COLLECTIVE ACTION ALLEGATIONS**

22. Plaintiff brings Count I of this Complaint as a collective action pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b), on behalf of himself and the following Collective:

All individuals who worked in a Select Comfort Retail Store in the United States, for more than 40 hours in a week, in a pay period in which commissions (or bonuses) were earned, as a sales associate or in another Retail Store job classification, at any time from January 28, 2008 to the date of trial.<sup>1</sup>

Excluded from the Collective are current and former executives and officers of Defendants, Defendants' counsel, Plaintiff's counsel, and any member of the judiciary presiding over this action.

23. An FLSA collective action will benefit Plaintiff and other employees who were similarly subject to Defendants' practice of failing to timely or correctly pay overtime wages.

24. The number and identity of such similarly situated employees are ascertainable

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<sup>1</sup> Plaintiff reserves the right to amend or expand the Collective definition as a result of discovery or further investigation.

from Defendants' records.

25. The facts set forth herein satisfy the lenient requirements for maintenance of a collective action under Section 216(b) of the FLSA.

## **COUNT I**

### **VIOLATION OF THE FAIR LABOR STANDARDS ACT (29 U.S.C. § 201 *et. seq.*)**

26. Plaintiff repeats and realleges paragraphs 1-25 as if fully set forth herein, and brings Count I pursuant to the FLSA on behalf of himself and the Collective.

27. Defendants, by their conduct set forth above, knowingly and willfully violated the FLSA, 29 U.S.C. § 201 *et. seq.*

28. At relevant times, Plaintiff and other Retail Store employees were "employees" within the meaning of the FLSA, 29 U.S.C. § 203(e)(1), and Defendants were "employers" within the meaning of the FLSA, 29 U.S.C. § 203(d). In fact, Defendants themselves admit that Plaintiff is a non-exempt employee who was owed overtime wages long ago, by sending Plaintiff the above-described unsolicited check and paystub for an overtime adjustment.

29. Within the past three years, Defendants failed to timely pay Plaintiff and other Retail Store employees overtime adjustments (*i.e.* true-ups) for all periods due and owing.

30. Defendants failed to accurately and timely record overtime compensation adjustments (*i.e.* true-ups), due to Retail Store employees, based upon commissions they earned during pay periods within the past three years in which they worked in excess of 40 hours per week.

31. In instances when Defendants did pay overtime to Plaintiff and other Retail Store employees, Defendants paid only 1.5 times their hourly wage, but failed to timely and properly

pay 1.5 times their regular rate of pay (i.e., 1.5 times a composite of the hourly wage and applicable commissions combined).

32. It is no secret that overtime true-ups must be timely paid as a matter of law. The FLSA and relevant regulations require overtime true-ups to be paid not later than in the next payday after the employer can reasonably compute and arrange for payment of the additional compensation. *E.g.*, 29 U.S.C. § 207; 29 CFR Pt. 778.106.

33. Defendants were able to compute and arrange for payment of the “Commission OT” payments or true-ups due to Plaintiff and the Collective just after their applicable commissions were earned, long ago. But, Defendants only recently decided to remit the true-up compensation – just a handful of days after termination of a prior above-described lawsuit alleging FLSA violations and unpaid overtime against Defendant(s), and long after this compensation was required to be paid, *i.e.*, after many pay periods and paydays have lapsed.

34. When Defendants did pay overtime true-ups – i.e. when sending Plaintiff and other members of the Collective an unsolicited check, like the check remitted to Plaintiff on December 7, 2010 as more fully described above – such payment was untimely as it was paid two years after payment of the true-up was due, though Defendants easily could have computed and arranged for payment of such amounts while Plaintiff was still in their employ. *E.g.*, 29 CFR Pt. 778.106.

35. Plaintiff’s employment with Select Comfort ceased in approximately March 2008 and the relevant commission used to calculate the overtime true-up was thus earned no later than approximately that time.

36. Defendants are therefore in violation of the FLSA and all relevant regulations since they did not promptly pay Plaintiff and the Collective when such overtime wages could

have reasonably been computed and arranged for payment and not later than the next payday after such computations could be made. *E.g.*, 29 CFR Pt. 778.106, 29 CFR Pt. 778.119.

37. The failure to timely pay such true-ups within this time period is willful, and grounds for liquidated damages in the entire amount of the non-timely payment of the true-up. *E.g.*, *James Dominici, et al., v. Board of Education of the City of Chicago*, 881 F. Supp. 315 (N.D. Ill. 1995). Subsequent payment of overtime wages or true-ups, such as through the long overdue checks Defendants paid to Plaintiff and other members of the Collective, does not discharge Defendants' other liabilities to timely pay overtime compensation including without limitation liability for liquidated damages. *E.g.*, *Birbalas v. Cueno Printing Industries, Inc.*, 140 F.2d 826, 828 (7th Cir. 1944).

38. Indeed, the November 2010 phony pay period stated on Plaintiff's above-described pay stub (§ 12 *supra*), for which Defendants tendered to Plaintiff an overtime payment in December 2010, appears intentionally calculated to begin a mere week *after* final disposition of the above-described Select Comfort employee lawsuit alleging improper payment of wages and overtime to a class of certain Retail Store employees, and evidences a phony accounting method for overtime payment that is intended to show in Defendants' records that overtime was timely paid, when in fact it was not.

39. In fact, Defendants waited to pay Plaintiff and other members of the Collective their true-up payments until after the conclusion of another collective and class action lawsuit in which Defendants allegedly failed to properly pay their Retail Store employees overtime in violation of the Fair Labor Standards Act. Defendants long ago retained counsel to represent them in defending allegations in that lawsuit and therefore to advise them regarding such matters. However, it was only after the conclusion of that lawsuit that Defendants sent their

form letter and overtime adjustment check to Plaintiff and the Collective, which attempted to finally pay them true-ups for overtime compensation they earned and were entitled to receive up to years ago.

40. At relevant times Defendants did not make a good faith effort to comply with their duties to compensate Plaintiff and other Retail Store employees as required by the FLSA.

41. As a result of Defendants' aforementioned conduct, Plaintiff and other Retail Store employees were denied proper overtime wages as set forth above for time worked in excess of 40 hours per week within the past three years, and are entitled to damages, liquidated damages and lost wages, as permitted by the FLSA, in amounts to be proven at trial.

### **CLASS ACTION ALLEGATIONS**

42. Plaintiff also brings Counts II of this Complaint individually and, pursuant to F.R.C.P. 23, as representative of the following Class of similarly situated individuals:

All individuals who worked in a Select Comfort Retail Store in the United States, for more than 40 hours in a week, in a pay period in which commissions (or bonuses) were earned, as a sales associate or in another Retail Store job classification, at any time from January 28, 2001 to the date of trial.<sup>2</sup>

Excluded from the Class are current and former executives and officers of Defendants, Defendants' counsel, Plaintiff's counsel, and any member of the judiciary presiding over this action.

43. Plaintiff reasonably believes that the Class is so numerous that joinder of all members of the Class impracticable.

44. Defendants' unlawful conduct as set forth herein is generally applicable with respect to the Class as a whole, so that final injunctive relief or corresponding declaratory relief

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<sup>2</sup> Plaintiff reserves the right to amend or expand the Class definition in connection with his motion for class certification and/or as a result of discovery and further investigation.

is appropriate.

45. Plaintiff's claims are typical of the claims of other Class members.

46. Plaintiff will fairly and adequately protect the interests of the Class; Plaintiff has no interests antagonistic to said Class members; and Plaintiff has retained counsel competent and experienced in class action litigation.

47. A class action provides a superior and manageable method for fairly and efficiently adjudicating this controversy because, among other things, joinder of all members of the Class is impracticable, and many members of the Class cannot feasibly vindicate their rights by individual suits because the monetary value of their recoveries are outweighed by the burden and expense of litigating individual actions against the corporate Defendants.

48. Common questions of law and fact exist as to all members of the Class, and predominate over questions affecting only individual Class members, including, without limitation, as follows:

- a. Whether Defendants failed to properly or timely pay overtime, or overtime true-ups, to Plaintiff and the Class;
- b. Whether Plaintiff and the Class were to be paid overtime wages as part of their agreement with Defendants;
- c. Whether Defendants timely paid Plaintiff and the Class earned overtime wages;
- d. Whether Defendants fully paid Plaintiff and the Class earned overtime wages;
- e. Whether Defendants' conduct violates the IWPCA and similar state statutes; and
- f. Whether Plaintiff and the Class are entitled to any damages and penalties allowed by applicable law.

## COUNT II

### VIOLATION OF THE ILLINOIS WAGE PAYMENT AND COLLECTION ACT AND SIMILAR STATE WAGE ACTS

49. Plaintiff repeats and realleges paragraphs 1-25 and 42-48 as if fully alleged herein, and brings Count II individually and on behalf of the Class.

50. The same conduct giving rise to Plaintiff's claims above gives rise to Defendants' violations of the Illinois Wage Payment and Collection Act (IWPCA) and similar state statutes.

51. Defendants are employers and Plaintiff and members of the Class are employees within the meaning of the IWPCA and similar state statutes. *E.g.*, 820 ILCS § 115/2.

52. At hire and continuing thereafter, Defendants agreed to pay Plaintiff and the Class members for time worked, at agreed-upon "wages" as defined by the IWPCA and similar state statutes where Select Comfort Retail Stores are located. *E.g.*, 820 ILCS § 115/2.

53. Defendants agreed to pay Plaintiff and other Class members wages and overtime which includes true-ups as more fully described above.

54. Pursuant to state wage laws such as the IWPCA and relevant regulations, Defendants must timely pay all agreed upon wages after they are earned, and also, after termination of employment. *E.g.*, 820 ILCS § 115/3 ("Every employer shall be required, at least semi-monthly, to pay every employee all wages earned during the semi-monthly pay period... Commissions may be paid once a month."); 820 ILCS § 115/4 (specifying brief, strict timelines for payment).

55. Contrary to these requirements, as set forth above Defendants failed to timely and properly compensate Plaintiff and the Class for all wages including overtime and true-ups as required by the agreement between Defendants and Plaintiff and the Class (and by applicable law – 29 U.S.C. § 207; 29 CFR Pt. 778.106; 820 ILCS § 105/4a; 56 Ill. Admin. Code § 210.420(b);

56 Ill. Admin. Code § 210.410; 56 Ill. Admin. Code § 210.430(i).

56. When Defendants have paid overtime true-ups to Plaintiff and other members of the Class, they failed to timely pay such compensation, paying them up to at least two years past due, as described more fully above (§ 12 *supra*), in violation of the IWPCA and other similar state law. *E.g.*, 820 ILCS § 115/3.

57. Defendants knowingly failed to pay and/or timely pay Plaintiff and the Class members said wages, in violation of their agreement with Plaintiff and the Class, and in violation of the IWPCA and similar state statutes as more fully set forth above.

58. As a result of Defendants' willful failure to timely pay wages due and owing to Plaintiff and the Class for time worked, Plaintiff and the Class members were damaged in violation of the IWPCA and similar state acts, in amounts to be proven at trial. *E.g.*, 820 ILCS § 115/14.

59. Plaintiff and other members of the Class are owed payment of statutory interest and penalties for Defendants' failure to timely pay wages, including, under the IWPCA, in the amount of "2% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid." *E.g.*, 820 ILCS § 115/14. Defendants' tardy true-up checks have failed to compensate Plaintiff and other members of the Class accordingly.

60. Plaintiff seeks to recover, from Defendants, any unpaid wages including overtime and overtime true-ups for the ten years prior to the filing of this suit, plus interest thereon for unpaid or untimely paid wages. *E.g.*, 820 ILCS § 115/4.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, prays that the Court grant the following relief:

- a. Find that this case may be properly maintained as a FLSA collective action, and as a class action, and appoint Plaintiff as Class representative and Plaintiff's counsel as Class counsel;
- b. Order issuance of a notice to the Collective;
- c. Find that the Defendants violated and willfully violated the FLSA, and enter judgment in Plaintiff's favor and against Defendants accordingly;
- d. Find that the Defendants violated the IWPCA and similar state overtime laws, and enter judgment in Plaintiff's favor and against Defendants accordingly;
- e. Award any back pay due to Plaintiff and the Collective for any unpaid or untimely paid overtime wages for the last ten years, and/or according to the applicable statute of limitations;
- f. Award liquidated damages to Plaintiff and the Collective equal to the amount of untimely paid and unpaid back wages and late "Commission OT" payments tendered by Defendants to Plaintiff and the Collective, pursuant to the FLSA;
- g. Award the full amount of wages due for all unpaid hours as allowed by the IWPCA (*e.g.*, 820 ILCS § 115/4) and the aforementioned similar state acts, plus interest thereon for unpaid or untimely paid wages (*e.g.*, 820 ILCS § 115/14);
- h. Award prejudgment interest with respect to the total amount of unpaid and untimely paid overtime compensation;
- i. Establish a constructive trust, until further order of the Court, consisting of any monies improperly held by Defendants from their above-described improper conduct;
- j. Award reasonable attorneys' fees and costs to Plaintiff's counsel as allowed by applicable law and statute; and
- k. Award such other and further relief as the Court deems just and appropriate, including prospective injunctive relief.

## **JURY DEMAND**

Plaintiff demands a trial by jury of all causes of action and matters.

Respectfully submitted,

Jeremy Cioe, on behalf of himself and all similarly  
situated persons

By: /s Ilan Chorowsky  
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