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14 **UNITED STATES DISTRICT COURT**

15 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

16 TROY M. LINDELL AND MARK POPE,  
ON BEHALF OF THEMSELVES AND  
ALL OTHERS SIMILARLY SITUATED,

17 PLAINTIFFS,

18 v.

19 SYNTHES USA, SYNTHES USA SALES  
20 LLC, SYNTHES SPINE COMPANY LP,

21 DEFENDANTS.

Case No. 1:11-CV-02053-LJO-BAM

**FIRST AMENDED CLASS ACTION  
COMPLAINT FOR:**

- (1) FAILURE TO REIMBURSE BUSINESS EXPENSES (CAL. LAB. CODE § 2802)
- (2) OTHER CALIFORNIA LABOR CODE VIOLATIONS
- (3) VIOLATION OF UNFAIR COMPETITION LAW (CAL. BUS. & PROF. CODE § 17200 et seq.)
- (4) CIVIL PENALTIES UNDER THE CALIFORNIA PRIVATE ATTORNEY GENERAL ACT (CAL. LABOR CODE § 2698 et seq.)

**DEMAND FOR JURY TRIAL**

1 Plaintiffs Troy M. Lindell and Mark Pope (“Plaintiffs”), on behalf of themselves and all  
2 others similarly situated (“Class Members”), complain and allege as follows:

3 **SUMMARY AND NATURE OF THE ACTION**

4 1. This is a class action, under Federal Rule of Civil Procedure 23, bringing claims under  
5 California law for expense reimbursement, unlawful deductions, unfair business practices, and  
6 civil penalties against Defendants Synthes USA, Synthes USA Sales LLC, Synthes Spine  
7 Company LP, and/or their owners, subsidiaries or affiliated companies doing business as Synthes  
8 (collectively, “SYNTHES,” or “Defendants”).

9 2. Plaintiffs and other similarly situated Sales Consultants were, are, or will be employed by  
10 SYTNHES during the four years prior to the filing of this action through the date of the final  
11 disposition of this action (“Class Members”), sell or sold medical devices, implants, and  
12 instruments on behalf of SYNTHES in California. Their sales-related duties are or were  
13 performed primarily in the field, away from SYNTHES’ offices or facilities. They made sales  
14 calls through in-person meetings with physicians and other medical staff at hospitals, doctors’  
15 offices, and other medical facilities and locations throughout California. Sales Consultants  
16 travelled to diverse hospitals, doctors’ offices, and other medical facilities to attend surgeries,  
17 performing such tasks as preparing operating rooms to implant SYNTHES devices, as well as  
18 answering questions and explaining the manner in which a device should be implanted. Sales  
19 Consultants often made several trips in one day to perform multiple sales calls, to deliver items,  
20 and to attend surgeries. They regularly worked more than forty hours a week and more than five  
21 days a week.

22 3. At all relevant times, SYNTHES compensated Sales Consultants, in whole or in part, on a  
23 commission basis. Commissions were deemed earned when SYNTHES received payment for the  
24 sale. Some Sales Consultants were paid on a salary plus commission basis (at a commission rate  
25 of between 2% and 8% of monthly sales), while others were eligible for straight commission,  
26 with no salary (at a regular commission rate of 12.5% of monthly sales).

27 4. At all relevant times, SYNTHES, by express policy and practice, expected and required  
28 Sales Consultants to use their own vehicles to travel to their assigned facilities within their

1 assigned territories, and to pay reasonable and necessary business expenses including but not  
2 limited to expenses for mileage, gasoline, auto insurance, auto repair and service, computer  
3 hardware and software, telephone, internet, business meal expenses, shipping expenses, and home  
4 office costs.

5 5. At some or all relevant times, by express policy and practice, SYNTHES did not  
6 reimburse those Sales Consultants paid straight commission for any in-territory business expenses  
7 or for any automobile expenses other than for travel to meetings or courses, although these  
8 expenses were reasonably necessary to the performance of Sales Consultants' duties for  
9 SYNTHES.

10 6. At all relevant times, also by express policy and practice, SYNTHES did not reimburse  
11 those Sales Consultants paid straight commission for any business expenses when they covered  
12 for another Sales Consultant on temporary leave.

13 7. In addition, at all relevant times, SYNTHES maintained an express policy and practice of  
14 deducting 50% of the list price of any item sold from Sales Consultants' commissions where  
15 SYNTHES did not receive payment for that item, for example, as a result of a mismatched  
16 purchase order number. Although SYNTHES' stated policy was that these deductions were to be  
17 made only from "unearned" commissions, the result of SYNTHES' policy to deduct 50% of the  
18 list price, where Sales Consultants were receiving a maximum of 12.5% commission on any item  
19 sold, by definition resulted in deductions from Sales Consultants' commissions for business  
20 losses attributable to SYNTHES.

21 8. Plaintiffs bring their reimbursement claims under California Labor Code § 2802, on behalf  
22 of Plaintiffs and all other individuals who are, will be, or have been employed as Sales  
23 Consultants paid straight commission by SYNTHES in California at any time during the four  
24 years prior to the initial filing of this action through the date of the final disposition of this action.  
25 Plaintiffs seek reimbursement for business expenses, and interest thereon; restitution; declaratory  
26 relief; and other equitable relief; as well as attorneys' fees and costs under California Code of  
27 Civil Procedure § 1021.5.

28 9. Plaintiff Lindell brings deduction claims under California Labor Code §§ 221, 223, and

1 300, on behalf of Plaintiff Lindell and all other individuals who are, will be, or have been  
2 employed as Sales Consultants (whether or not paid straight commission) by SYNTHES at any  
3 time during the Class Period. Plaintiffs seek payment of wages unlawfully withheld as a result of  
4 improper deductions taken by SYNTHES; and interest thereon; waiting time penalties pursuant to  
5 California Labor Code §§ 201-203, restitution; declaratory relief; and other equitable relief; as  
6 well as attorneys' fees and costs under California Labor Code § 218.5.

7 10. Plaintiffs also bring claims for unfair business practices arising from their reimbursement  
8 claims and deduction claims, as described further below, under California Business and  
9 Professions Code § 17200 et seq.

10 11. Plaintiffs also seek civil penalties, as described further below, pursuant to the Private  
11 Attorney General Act, California Labor Code § 2698 et seq.

## 12 **JURISDICTION AND VENUE**

13 12. This Court has subject matter jurisdiction over this Complaint pursuant to the Class  
14 Action Fairness Act, 28 U.S.C. § 1332(d), because the allegations are brought on behalf of a class  
15 of similarly situated individuals, the aggregate amount in controversy is over \$5 million, the  
16 putative class members number more than 100, and no Plaintiff is a citizen of the same state as  
17 any Defendant.

18 13. This Court further has jurisdiction over this Complaint based on diversity jurisdiction, 28  
19 U.S.C. § 1332, as all Plaintiffs are citizens of California, and Defendants are citizens of Delaware  
20 and Pennsylvania. The amount in controversy for each of the Plaintiffs exceeds \$75,000.

21 14. This Court has personal jurisdiction over SYNTHES because SYNTHES conducts a  
22 significant portion of its business in California, employs Plaintiffs and Class Members in  
23 California, and has designated an agent for service of process in California.

24 15. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(a) because a  
25 substantial part of the events and omissions giving rise to Plaintiffs' claim occurred in this  
26 district.

27 16. Intradistrict assignment to Fresno is appropriate because the events and omissions giving  
28 rise to Plaintiffs' claim arose in Fresno and Kern counties.

**PARTIES**

**A. Plaintiff Troy M. Lindell**

17. Plaintiff Troy M. Lindell resides in Fresno, California. He is a citizen of California.

18. In July 1999, Mr. Lindell was hired by SYNTHES as a Sales Consultant. His compensation upon hire was a 4% commission on his sales and an automobile allowance of \$400 monthly, and he was told he was eligible for variable territory expenses of up to \$900 monthly.

19. In about November 2001, Mr. Lindell's compensation changed to straight commission, at a regular rate of 12.5% commission on his sales. Once Mr. Lindell's compensation changed to straight commission, he received no automobile allowance, and no reimbursement for in-territory business expenses.

20. From 2002 until 2011, Mr. Lindell's territory was concentrated within Fresno County, and included at least four different hospitals and other medical facilities. He also regularly covered sales calls to other hospitals and medical facilities outside his territory, in Merced, Hanford, Tulare, and Visalia. Mr. Lindell maintained an office at his home in Fresno.

21. Mr. Lindell worked up to seven days a week, and often as many as 80 hours in one week. He drove on average at least 200 miles a week carrying out his duties for SYNTHES.

22. Mr. Lindell was required to purchase supplies and equipment to perform his duties as a Sales Consultant, including but not limited to a cell phone, computer, software, fax, printer and paper, and to pay for internet and cell phone service, parking, and tolls.

23. Mr. Lindell was not reimbursed for his mileage or for his in-territory business expenses, all of which were required in order for him to perform his job.

24. At all relevant times, Mr. Lindell's paystubs did not identify any portion of his compensation as reimbursement for business expenses.

25. During his employment with SYNTHES as a Sales Consultant, Mr. Lindell was subject to numerous deductions from his commissions for past due, mismatched, and/or unpaid purchase orders, in the amount of 50% of the list price of each item, totaling approximately \$22,365 in the four years prior to the date of the initial filing of this action.

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1 **B. Plaintiff Mark Pope**

2 26. Plaintiff Mark Pope resides in Bakersfield, California. He is a citizen of California.

3 27. In February 2007, Mr. Pope was hired by SYNTHES as an Associate Sales Consultant.  
4 His compensation upon hire was \$50,000 a year, with eligibility for 0.5% commission as of  
5 March 1, 2007, and for 1% commission as of March 1, 2008. At the time of his hire, Mr. Pope  
6 was provided an automobile allowance of \$500 a month, and he was told he was eligible for  
7 variable territory expenses of up to \$900 per month.

8 28. While employed as an Associate Sales Consultant, SYNTHES assigned Mr. Pope to cover  
9 a sales territory spanning 400 miles, stretching from Porterville to Ridgecrest, including eight  
10 hospitals and other medical facilities.

11 29. On January 1, 2009, Mr. Pope was promoted to Sales Consultant, with compensation set  
12 at 12.5% commission on his sales. Once Mr. Pope began receiving straight commission, he  
13 received no salary, automobile allowance, or in-territory expense reimbursements.

14 30. From January 2009 until mid-2010, Mr. Pope covered the same 400 mile territory as he  
15 did while working as an Associate Sales Consultant. Mr. Pope drove on average at least 400  
16 miles a week in carrying out his duties for SYNTHES.

17 31. Mr. Pope maintained an office at his home in Bakersfield, and was required to purchase  
18 supplies and equipment for that office including but not limited to a cell phone, computer,  
19 software, fax, printer and paper, and to pay for internet and cell phone service, parking, tolls, and  
20 business meal expenses. Mr. Pope was not reimbursed for his mileage or for his business  
21 expenses, all of which were required in order for him to perform his job.

22 32. At all relevant times, Mr. Pope's paystubs did not identify any portion of his  
23 compensation as reimbursement for business expenses.

24 **C. Defendants SYNTHES**

25 33. SYNTHES is a medical device company that markets and sells medical implants  
26 including, for example, plates, screws, rods, biomaterials, disc replacement, instrumentation, and  
27 other devices for trauma, spinal, and orthopedic surgery. SYNTHES is, was, or will be an  
28 employer of Plaintiffs and Class Members, as described herein.

1 34. Defendant Synthes USA Sales, LLC is a citizen of the State of Delaware and the  
2 Commonwealth of Pennsylvania. It is a Delaware Limited Liability Company and maintains its  
3 principal place of business at 1302 Wrights Lane East, West Chester, Pennsylvania 19380. At  
4 some or all relevant times, Synthes USA Sales LLC is or was an employer of Plaintiffs and Class  
5 Members. At some relevant times, Synthes USA Sales LLC is listed as the employer on itemized  
6 wage statements issued to Plaintiffs and Class Members.

7 35. Defendant Synthes USA is a citizen of the state of Delaware and the Commonwealth of  
8 Pennsylvania. It maintains its principal place of business at 1302 Wrights Lane East, West  
9 Chester, Pennsylvania 19380. It is a General Partnership, and the citizenship of its partners is  
10 Pennsylvania and Delaware because they are Delaware corporations with their principal place of  
11 business in Pennsylvania. At some or all relevant times, Synthes USA is or was an employer of  
12 Plaintiffs and Class Members. At some relevant times, Synthes USA is listed as the employer on  
13 itemized wage statements issued to Plaintiffs and Class Members.

14 36. Defendant Synthes Spine Company LP is a citizen of the State of Delaware and the  
15 Commonwealth of Pennsylvania. It is or was a Delaware Limited Partnership among Synthes,  
16 Inc., Synthes (U.S.A.), and SMGT, Inc. Synthes Spine Company, L.P. maintains and/or  
17 maintained its principal place of business at 1302 Wrights Lane East, West Chester, Pennsylvania  
18 19380. At some or all relevant times, Synthes Spine Company LP is or was an employer of  
19 Plaintiffs and Class Members. At some relevant times, Synthes Spine Company is listed as the  
20 employer on itemized wage statements issued to Plaintiffs and Class Members.

21 **CLASS ACTION ALLEGATIONS**

22 37. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on  
23 behalf of the classes defined below.

24 **A. Reimbursement Class Claims**

25 38. Plaintiffs bring their reimbursement claims (under Cal. Lab. Code § 2802, for unfair  
26 business practices under Cal. Bus. & Prof. Code § 17200, and for related penalties under the  
27 California Private Attorney General Act) on behalf of a class of all current, former and future  
28 Sales Consultants paid straight commission who have been, are, or will be employed by

1 SYNTHES in California at any time during the four years prior to the filing of this action through  
2 the date of the final disposition of this action.

3 39. The members of the class are sufficiently numerous that joinder of all members is  
4 impracticable. Plaintiffs are informed and believe that at any one time there are approximately 75  
5 Sales Consultants working for Synthes in California and, due to employee turnover, are informed  
6 and believe that during the four year class liability period, the Class Members comprise more than  
7 one hundred current and former Sales Consultants. On information and belief, a substantial  
8 majority of the Sales Consultants are, were, and/or will be subject to SYNTHES policies of  
9 failure to reimburse business expenses. In addition, the class includes unknown future class  
10 members who will become employed as Sales Consultants prior to the entry of judgment in this  
11 action. Class Members are widely dispersed geographically throughout California. Plaintiffs are  
12 informed and believe that current employees among the Class Members as well as former  
13 employees are unwilling to bring individual law suits because they fear retaliation on the part of  
14 SYNTHES.

15 40. There are questions of law and fact common to the class that are answerable on a common  
16 basis classwide, and these questions predominate over individual questions. For the  
17 reimbursement claims, common questions subject to common answers classwide include, but are  
18 not necessarily limited to, the following:

- 19 a. Whether SYNTHES has a policy or practice of failing to compensate or indemnify  
20 Class Members for their necessarily incurred employment-related expenses and losses;
- 21 b. Whether the Class Members have necessarily incurred employment-related expenses  
22 and losses in carrying out their employment duties for SYNTHES;
- 23 c. Whether SYNTHES has failed to indemnify Class Members for their necessary  
24 employment-related expenses and losses in violation of Cal. Labor Code § 2802;
- 25 d. Whether SYNTHES has required Class Members to sign policies as a condition of  
26 their employment purporting to waive their rights under Cal. Labor Code § 2802,  
27 which are invalid under Cal. Labor Code § 2804;
- 28 e. Whether SYNTHES' failure to indemnify Class Members for their necessary

1 employment-related expenses and losses constitutes an unlawful, unfair, and/or  
2 fraudulent business practice under Cal. Business & Professions Code § 17200, *et seq.*

3 41. The claims alleged by Plaintiffs are typical of the claims of the class. As set forth herein,  
4 Plaintiffs have been subjected to the illegal policies and practices they challenge here on behalf of  
5 a class, including failure to provide reimbursement for all necessarily and actually incurred  
6 business expenses.

7 42. Plaintiffs will fairly and adequately represent the interests of the class. Plaintiffs are  
8 members of the class they seek to represent, do not have any conflicts of interest with other Class  
9 Members, and will prosecute the case vigorously on behalf of all Class Members. Plaintiffs'  
10 counsel are competent and experienced in litigating employment class actions, including wage  
11 and hour class actions.

12 43. Class certification is also appropriate pursuant to Rule 23(b)(3) of the Federal Rules of  
13 Civil Procedure because common questions of fact and law predominate over any questions  
14 affecting only individual members of the class, and because a class action is superior to other  
15 available methods for the fair and efficient adjudication of this litigation.

16 44. Class certification under Rule 23(c)(4) is appropriate as to SYNTHES' liability, including  
17 whether SYNTHES' policy and practices of failing to reimburse business expenses for Class  
18 Members paid on straight commission constitute a violation of law, as set forth herein.

19 **B. Deduction Class Claims**

20 45. Plaintiff Lindell brings his deduction claims (under Cal. Lab. Code §§ 221, 223, 300, and  
21 §§ 201-203, for related unfair business practices under Cal. Bus. & Prof. Code § 17200, and for  
22 related civil penalties under the California Private Attorney General Act) on behalf of a class of  
23 all current, former and future Sales Consultants (whether or not paid straight commission) who  
24 have been, are, or will be employed by SYNTHES in California at any time during the four years  
25 prior to the filing of this action through the date of the final disposition of this action.

26 46. The members of the class are sufficiently numerous that joinder of all members is  
27 impracticable. Plaintiffs are informed and believe that at any one time there are approximately 75  
28 Sales Consultants working for Synthes in California and, due to employee turnover, are informed

1 and believe that during the four year class liability period, the Class Members comprise more than  
2 one hundred current and former Sales Consultants. In addition, the class includes unknown future  
3 class members who will become employed as Sales Consultants prior to the entry of judgment in  
4 this action. Plaintiffs are informed and believe that a substantial majority of Sales Consultants  
5 are, were, or will be subject to the deductions challenged herein. Class Members are widely  
6 dispersed geographically throughout California. Plaintiffs are informed and believe that current  
7 employees among the Class Members as well as former employees are unwilling to bring  
8 individual law suits because they fear retaliation on the part of SYNTHES.

9 47. There are questions of law and fact common to both classes that are answerable on a  
10 common basis classwide, and these questions predominate over individual questions. For the  
11 deduction claims, common questions subject to common answers classwide include, but are not  
12 necessarily limited to, the following:

- 13 a. Whether SYNTHES' commission deduction policy constitutes a violation of  
14 California Labor Code §§ 221, 223, and/or 300;
- 15 b. Whether SYNTHES has failed to pay all wages due and owing to those class members  
16 within 72 hours of termination from those Sales Consultants from whom it took  
17 unlawful deductions, and whether those Class Members are therefore entitled to  
18 waiting time penalties pursuant to California Labor Code § 203;
- 19 c. Whether SYNTHES' commission deduction policy constitutes an unlawful, unfair,  
20 and/or fraudulent business practice under Cal. Business & Professions Code § 17200,  
21 *et seq.*

22 48. The claim as alleged by Plaintiff Lindell is typical of the claims of the class. As set forth  
23 herein, Plaintiff Lindell has been subjected to the illegal policies and practices he challenges here  
24 on behalf of a class, including being subject to a policy that provides for deductions from his  
25 wages in the amount of fifty percent of the list price of items based on errors with purchase orders  
26 and/or where the purchaser did not provide payment within 30 days, although the commission  
27 amount he received for each completed sale was regularly set much lower, at 12.5% of the list  
28 price of each item, and because he has failed to receive all wages due and owing within 72 hours

1 after his separation from SYNTHES.

2 49. Plaintiff Lindell will fairly and adequately represent the interests of the class. Plaintiff is a  
3 member of the class he seeks to represent, does not have any conflicts of interest with other Class  
4 Members, and will prosecute the case vigorously on behalf of all Class Members. Plaintiffs'  
5 counsel are competent and experienced in litigating employment class actions, including wage  
6 and hour class actions.

7 50. Class certification is also appropriate pursuant to Rule 23(b)(3) of the Federal Rules of  
8 Civil Procedure because common questions of fact and law predominate over any questions  
9 affecting only individual members of the class, and because a class action is superior to other  
10 available methods for the fair and efficient adjudication of this litigation.

11 51. Class certification under Rule 23(c)(4) is appropriate as to SYNTHES' liability, including  
12 whether SYNTHES' policy and practices of taking commission deductions constitute a violation  
13 of law, as set forth herein.

#### 14 **FURTHER FACTUAL BACKGROUND**

##### 15 **A. Business Expenses and Failure to Reimburse Class Members**

16 52. The allegations of each of the preceding paragraphs are realleged and incorporated herein  
17 by reference.

18 53. SYNTHES operates, and at all times during the Class Period has done business,  
19 throughout California.

20 54. Since at least four years prior to the filing of this action, SYNTHES has maintained  
21 business expense policies and/or practices that deny lawful reimbursement and/or compensation  
22 to their Sales Consultants.

23 55. At some or all relevant times, beginning at a date unknown to Plaintiffs, SYNTHES  
24 maintained a Sales Policy manual stating express policies requiring Sales Consultants to pay for  
25 expenses incurred in direct consequence of discharging their sales duties on behalf of SYNTHES,  
26 without reimbursement, including but not necessarily limited to the following policies:

- 27 a. Sales Consultants who are paid on a straight commission basis are expressly not  
28 eligible for an automobile allowance or in-territory business expense reimbursements.

- 1           b. Sales Consultants who are paid on a straight commission basis who are assigned to  
2           cover the territory of another Sales Consultant are expressly not eligible for business  
3           expense reimbursements while they cover that territory, and are subject to a reduced  
4           commission of 4% of sales.
- 5           c. All Sales Consultants, Associate Sales Consultants, and Territory Assistants—  
6           regardless of whether they are paid on a straight commission or not—may submit  
7           mileage for reimbursement “only in cases when traveling to a meeting or a course in  
8           lieu of flying.”
- 9           d. “All Synthes Consultants are to maintain a separate and dedicated business phone line  
10           for Synthes business,” but “[t]he expenses for the Synthes phone line, phone  
11           equipment and cell phones are the responsibility of the Consultant.” The business  
12           phone number is listed on the Consultant’s business card, and “should be answered  
13           using the name ‘Synthes’ in the opening greeting or salutation.” Further, “[a]n  
14           answering machine or answering service must identify Synthes in the salutation and  
15           must give the 800 number as a contact in case of emergency, as well as the pager  
16           number of the Consultant.” Sales Consultants receiving straight commission are not  
17           entitled to reimbursement for these business phone expenses.
- 18           e. “All Sales Consultants are required to purchase a computer based on the specification  
19           provided by Synthes,” and “[i]t is the responsibility of the Sales Consultant to obtain  
20           and maintain a maintenance/service agreement for his/her PC.”

21           56. At some or all relevant times, beginning on about June 23, 2010, SYNTHES maintained a  
22           “Travel and Expense Policy” providing, *inter alia*, that “[f]ield employees who are on straight  
23           commission will not be reimbursed for their expenses while they are in-territory.”

24           57. On information and belief, SYNTHES required Plaintiffs and Class Members to sign an  
25           acknowledgment that they had read and understood the policies and procedures described in, *inter*  
26           *alia*, the “Synthes Sales Policy & Procedure Manual,” and the “Synthes Sales Policy Manual.”  
27           At least one of these acknowledgements (for example, one signed by Plaintiff Lindell and dated  
28           February 28, 2007) state that the signatory “understand[s] that this manual is not a contract.” The

1 acknowledgement for the “new Synthes Employee Policy Manual” signed by Plaintiff Lindell and  
2 dated February 8, 2000, states that “Synthes reserves the right to change these policies for any  
3 reason at any time,” as does the acknowledgement signed by Plaintiff Pope and dated February  
4 28, 2007.

5 58. The business expenses incurred by Plaintiffs and Class Members that were not reimbursed  
6 by SYNTHES but are not necessarily limited to, the following:

- 7 a. Maintenance of a motor vehicle and all travel-related expenses, including vehicle  
8 insurance, mileage, gasoline, parking, and tolls incurred while driving their vehicles  
9 for business.
- 10 b. Purchase, maintenance and use of cellular telephones and monthly service plans for  
11 communications with Defendants’ customers, prospective customers, and other  
12 employees for business.
- 13 c. Purchase, maintenance and use of home office equipment such as computers, printers,  
14 copiers, faxes, internet, and related supplies used to produce and communicate  
15 documents and information for customers and sales presentations.
- 16 d. Business meal expenses for customers and prospective customers including meals at  
17 restaurants and take-out meals provided on the sites of hospitals, doctors’ offices, and  
18 the locations of other customers and prospective customers.

19 59. SYNTHES has maintained the same business policies and/or practice related to  
20 reimbursement and deductions, or substantially similar business policies and/or practices,  
21 throughout California and throughout the Class Period.

22 60. SYNTHES is aware and informed that Sales Consultants regularly incur business  
23 expenses in the discharge of their duties, as employees, without receiving any reimbursements.  
24 SYNTHES nevertheless fails and refuses to reimburse Sales Consultants for expenses incurred by  
25 them in their work soliciting and selling medical devices to SYNTHES’ customers and  
26 prospective customers throughout California.

27 61. Plaintiffs and Class Members have been harmed by SYNTHES’ unlawful business  
28 expense policies and/or practices in that they have not been paid for business expenses incurred

1 while employed by SYNTHES, as alleged above, thereby diminishing their agreed-upon  
2 compensation, in amounts to be proved at trial.

3 62. On wage statements provided to Plaintiffs and Class Members, SYNTHES did not  
4 identify any portion of the compensation paid to Plaintiffs and Class Members that was intended  
5 to reimburse Plaintiffs and Class Members for the expenses actually and necessarily incurred in  
6 the course of their employment for SYNTHES.

7 **B. Deductions from Commissions**

8 63. The allegations of each of the preceding paragraphs are realleged and incorporated herein  
9 by reference.

10 64. By express policy and practice, SYNTHES pays its Sales Consultants based, at least in  
11 part, on commissions. Some Sales Consultants are paid with salary plus commission (in the  
12 approximate amounts of 2% to 8% of sales), as were Plaintiffs when they began their  
13 employment with SYNTHES. Other Sales Consultants, as were Plaintiffs later in their  
14 employment with SYNTHES, are paid only a straight commission with no salary, at or about the  
15 amount of 12.5% commission on their sales.

16 65. By express policy and practice, SYNTHES provides that commissions are not earned until  
17 the completion of a sale, which SYNTHES defines to occur upon the receipt of payment by  
18 SYNTHES.

19 66. By express policy and practice, SYNTHES pays its Sales Consultants what it defines as  
20 “advances” on their commissions based on the sales made by each Sales Consultant. In general,  
21 these so-called advances were calculated based on purchase orders submitted to SYNTHES  
22 documenting the sales by each Sales Consultant.

23 67. By express policy and practice, SYNTHES maintained a policy of “deducting” from Sales  
24 Consultants’ commissions where payment was not received promptly by SYNTHES. At some or  
25 all relevant times, SYNTHES maintained an express policy and practice of taking deductions of  
26 50% of the list price of an item in situations including but not necessarily limited to the following  
27 situations:

- 28 a. When a customer refused payment because of an invalid or mismatched purchase order;

- 1 b. When the customer had returned an item for credit and SYNTHES could not locate a  
2 record of the return and the Sales Consultant could not provide proof of return;
- 3 c. In emergency situations (which frequently occurred), where Customer Service would ship  
4 an item without a purchase order number, and a Sales Consultant did not provide a  
5 purchase order within 25 days thereafter. (In this situation, by express policy and practice,  
6 SYNTHES would also charge the Sales Consultant for full freight charges.);
- 7 d. When an item was shipped as an evaluation with a purchase order to follow, where no  
8 purchase order followed. (In this situation, by express policy and practice, SYNTHES  
9 would also charge the Sales Consultant for full freight charges to and from the account.)

10 68. Although SYNTHES' stated policy was that the deductions would only be taken from  
11 "unaccrued" commissions, as a matter of practice, deductions were taken from earned  
12 commissions. The amount of the deduction—50% of the price of the list item—was substantially  
13 greater than the amount of regular commission any Sales Consultant could earn on any sale (from  
14 2% to 12.5% of the list price of each item). Thus, by definition, deductions were taken from  
15 commissions that were earned.

16 69. Deductions were also taken from earned commissions because, as an express policy and  
17 practice, SYNTHES stated that the deductions would be taken where any payment issues were  
18 not addressed "in an expedient manner as policy dictates that extensions or reversal will not be  
19 granted." Thus, once a Sales Consultant had an amount deducted from his or her pay, SYNTHES  
20 refused to refund the deducted amount even when the Sales Consultant corrected the deficiency,  
21 such as by later providing a corrected purchase order or reference number. SYNTHES' policy  
22 resulted in deductions being taken from Sales Consultant's commissions where payment was  
23 more than 30 days late. The deductions were taken even when the item had been used in surgery,  
24 and/or implanted in a patient.

25 **FIRST CAUSE OF ACTION**

26 **FOR REIMBURSEMENT OF BUSINESS EXPENSES**

27 **(VIOLATION OF CALIFORNIA LABOR CODE § 2802)**

28 70. The allegations of each of the preceding paragraphs are realleged and incorporated herein

1 by reference.

2 71. While acting on the direct instruction of SYNTHES and discharging their duties for them,  
3 Plaintiffs and similarly situated Class Members have incurred work-related expenses. Such  
4 expenses include, but are not limited to, the purchase or lease of vehicles, fuel, maintenance,  
5 insurance, parking, tolls, and other vehicle operating costs; maintenance and use of cellular  
6 telephones and monthly service plans for communications with Defendants' customers,  
7 prospective customers, and other employees for business; maintenance and use of home office  
8 equipment such as computers, printers, copiers, faxes, internet, and related supplies used to  
9 produce and communicate documents and information for customers and sales presentations; and  
10 business meal expenses for customers and prospective customers including meals at restaurants  
11 and take-out meals on the sites of hospitals, doctors' offices, and other locations of customers and  
12 prospective customers.

13 72. SYNTHES has failed to indemnify or in any manner reimburse Plaintiffs and similarly  
14 situated Class Members for these expenditures and losses, all of which constitute necessary and  
15 actually incurred business expenses. By requiring employees to pay expense and cover losses  
16 that they incurred in direct consequence of the discharge of their duties for SYNTHES and/or in  
17 obedience to SYNTHES' direction, SYNTHES has violated and continues to violate Cal. Lab.  
18 Code § 2802.

19 73. As a direct and proximate result of SYNTHES' conduct, Plaintiffs and similarly situated  
20 Class Members have suffered substantial losses according to proof, as well as pre-judgment  
21 interest, costs, and attorneys' fees pursuant to statute and applicable law.

22 74. Under California Labor Code § 2804, "Any contract or agreement, express or implied,  
23 made by any employee to waive the benefits of this article or any part thereof, is null and void,  
24 and this article shall not deprive any employee or his personal representative of any right or  
25 remedy to which he is entitled under the laws of this State."

26 75. On information and belief, SYNTHES required Plaintiffs and Class Members to sign  
27 policies as a condition of their employment purporting to waive their rights under Cal. Labor  
28 Code § 2802. Plaintiffs do not believe that these policies signed by Plaintiffs and Class Members

1 constitute contracts or agreements. In the alternative, however, if the policies signed by Plaintiffs  
2 and Class Members do constitute contracts or agreements, they are invalid under Cal. Labor Code  
3 § 2804.

4 **SECOND CAUSE OF ACTION**  
5 **FOR REPAYMENT OF UNLAWFUL DEDUCTIONS**  
6 **(VIOLATION OF CAL. LABOR CODE § 221, 223 and 300)**

7 76. The allegations of each of the preceding paragraphs are realleged and incorporated herein  
8 by reference.

9 77. California Labor Code § 221 provides: “It shall be unlawful for any employer to collect or  
10 receive from an employee any part of wages theretofore paid by said employer to said employee.”  
11 Commissions are wages within the meaning of Cal. Lab. Code § 221.

12 78. California Labor Code § 223 provides: “Where any statute or contract requires an  
13 employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage  
14 while purporting to pay the wage designated by statute or by contract.”

15 79. California Labor Code § 300 prohibits the assignment of wages, earned or to be earned,  
16 except in specifically limited circumstances, including, *inter alia*, that the assignment is contained  
17 in a separate written instrument, identifying specifically the transaction to which the assignment  
18 relates; that if by a married person, the written consent of the spouse is attached to the  
19 assignment; that a copy of the assignment shall be notarized and filed with the employer; that the  
20 assignment be revocable at any time by the maker thereof; and that no assignment of wages is  
21 valid unless the wages or salary have been earned, except for necessities of life, and then only to  
22 the person or persons furnishing such necessities of life directly and then only for the amount  
23 needed to furnish such necessities.

24 80. Cal. Lab. Code §§ 221, 223 and 300 prohibit deductions from an employee’s wages for  
25 reasonably expected business losses not under the control of the employee, and prohibit making  
26 the employee the insurer of the employer’s business losses.

27 81. In addition to Cal. Lab. Code §§ 221, 223 and 300, the anti-bond provisions of Cal. Lab.  
28 Code §§ 400-410 express the public policy of the State of California to protect employees’

1 expectations with regard to their wages, including their commissions, and to prevent fraud and  
2 deceit in the employment relationship.

3 82. SYNTHES' policy of deducting 50% of the list price of any item from Sales Consultants'  
4 earnings for SYNTHES' failure to receive prompt payment, where Sales Consultants'  
5 commissions are earned at the much lower rates of 2% to 12.5%, results in unlawful deductions in  
6 violation of Cal. Lab. Code §§ 221, 223, and 300 and is inconsistent with those statutes and with  
7 §§ 400-410.

8 83. SYNTHES' policy of refusing to reverse deductions once taken also results in unlawful  
9 deductions in violation of Cal. Lab. Code §§ 221, 223, and 300, and is inconsistent with those  
10 statutes and with §§ 400-410.

11 84. As a direct and proximate result of SYNTHES' conduct, Plaintiffs and similarly situated  
12 Class Members have suffered substantial losses according to proof, as well as pre-judgment  
13 interest, costs, and attorneys' fees pursuant to statute and applicable law.

14 **THIRD CAUSE OF ACTION**

15 **WAITING TIME PENALTIES**

16 **(VIOLATION OF CAL. LABOR CODE §§ 201 - 203)**

17 85. The allegations of each of the preceding paragraphs are realleged and incorporated herein  
18 by reference.

19 86. California Labor Code §§ 201 and 202 require SYNTHES to pay its employees all wages  
20 due within the time specified by law.

21 87. California Labor Code § 203 provides: "If an employer willfully fails to pay, without  
22 abatement or reduction, in accordance with sections 201, 201.5, 202 and 205.5, any wages of an  
23 employee who is discharged or quits, the wages of the employee shall continue as a penalty from  
24 the due date thereof at the same rate until paid or until an action therefor is commenced; but the  
25 wages shall not continue for more than 30 days."

26 88. SYNTHES intentionally failed to pay Plaintiff Lindell and Class Members portions of  
27 their earned commissions that SYTNHES knew were due and owing to Plaintiffs and Class  
28 Members, by deducting for late payments and non-payments by SYNTHES' customers and for

1 minor mistakes in recording sales orders, as set forth above.

2 89. More than thirty days have passed since Plaintiff Lindell and many other Class Members  
3 left SYNTHES' employ.

4 90. As a consequence of SYNTHES' willful conduct in not paying compensation for all hours  
5 worked, Class Members whose employment ended during the four years prior to the date of the  
6 initial filing of this action and continuing through the date of its final disposition are entitled to up  
7 to thirty days' unpaid wages under Labor Code § 203, together with interest thereon.

8 **FOURTH CAUSE OF ACTION**

9 **VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW**

10 **(CAL. BUS. & PROF. CODE § 17200)**

11 91. The allegations of each of the preceding paragraphs are realleged and incorporated herein  
12 by reference.

13 92. SYNTHES' acts and omissions alleged herein violate the California Unfair Competition  
14 Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq. Section 17200 prohibits unfair  
15 competition by engaging in, among other things, any unlawful or unfair business acts or practices.

16 93. Beginning on a date unknown to Plaintiffs, but at least as long ago as four years before the  
17 filing of this action, SYNTHES committed and continues to commit acts of unfair competition, as  
18 defined by the UCL, by, among other things, engaging in the acts and practices described herein.

19 94. SYNTHES' conduct as herein alleged has injured Plaintiffs and Class Members by  
20 wrongfully denying them earned wages and reimbursement for business expenses, and has injured  
21 Plaintiff Lindell by taking unlawful deductions from his wages, and therefore was substantially  
22 injurious to Plaintiffs and Class Members.

23 95. SYNTHES engaged in unfair competition in violation of the UCL by violating, inter alia,  
24 California Labor Code § 2802, California Labor Code §§ 221, 223, and 300, as well as California  
25 Labor Code § 203. Each of these violations constitutes an independent and separate violation of  
26 the UCL.

27 96. SYNTHES' course of conduct, acts, and practices in violation of the California laws  
28 mentioned in the above paragraph constitute a separate and independent violation of the UCL.

1 SYNTHES' conduct described herein violates the policy and spirit of such laws and otherwise  
2 significantly threatens and harms competition.

3 97. Plaintiffs, on behalf of themselves and Class Members, seek restitution in the amount of  
4 their unreimbursed business expenses and unpaid wages earned, and such other legal and  
5 equitable relief from SYNTHES' unlawful and willful conduct as the Court deems just and  
6 proper, as well as attorneys' fees and costs.

7 **FIFTH CAUSE OF ACTION**  
8 **VIOLATION OF PRIVATE ATTORNEY GENERAL ACT**  
9 **(CAL. LAB. CODE § 2698 ET SEQ.)**

10 98. The allegations of each of the preceding paragraphs are realleged and incorporated herein  
11 by reference.

12 99. On a representative and/or a class action basis, Plaintiffs seek recovery of penalties under  
13 the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code  
14 § 2698 et seq.

15 100. PAGA permits an "aggrieved employee" to recover penalties on behalf of himself  
16 and other current or former employees as a result of an employer's violations of the California  
17 Labor Code, including but not limited to violations of Cal. Lab. Code §§ 201-203, §§ 221, 223,  
18 and 300, and 2802.

19 101. As set forth above, Defendant has violated sections of the California Labor Code,  
20 including but not limited to Cal. Lab. Code §§ 201-203, §§ 221, 223, and 300, and 2802.

21 102. Plaintiffs are aggrieved employees because they are and/or were employed by the  
22 alleged violator and the alleged violations were committed against them.

23 103. Plaintiffs have complied with the PAGA notice provision set forth in Cal. Lab.  
24 Code § 2699.3(a)(1), by providing a certified letter dated December 16, 2011 to the Labor  
25 Workforce Development Agency and the employer of the specific provisions of the California  
26 Labor Code alleged to have been violated, including the facts and theories to support the alleged  
27 violations.

28 104. The Labor and Workforce Development Agency has not provided Plaintiffs with

1 notice that it intends to investigate the alleged violations, although more than 30 calendar days  
2 have elapsed since the December 16, 2011 postmark date of Plaintiffs' notice.

3 105. Plaintiffs request civil penalties against SYNTHES for its violations of California  
4 Labor Code, as provided under Cal. Lab. Code § 2699(f), plus reasonable attorneys' fees and  
5 costs, in amounts to be proved at trial.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs on behalf of themselves and all Class Members, pray for relief  
8 as follows:

- 9 A. Certification of this action as a class action on behalf of the proposed class;  
10 B. Designation of the Plaintiffs as Representatives of the classes they seek to represent;  
11 C. Appropriate civil penalties under Cal. Lab. Code §§ 2698 et seq.;  
12 D. An award of unpaid wages, penalties, liquidated damages, and restitution to be paid by  
13 SYNTHES according to proof;  
14 E. Pre-Judgment and post-judgment interest, as provided by law;  
15 F. Such other equitable relief as the Court may deem just and proper; and  
16 G. Attorneys' fees and costs of suit, including but not limited to expert fees and fees  
17 pursuant to Cal. Civ. Proc. Code § 1021.5, and any other applicable law.  
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1 Dated: February 27, 2012

Respectfully submitted,

2  
3 By:     /s/ Catha Worthman  
Catha Worthman

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**JURY TRIAL DEMAND**

Plaintiffs, on behalf of themselves and all Class Members, hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.

Dated: February 27, 2012

Respectfully submitted,

By: /s/ Catha Worthman  
Catha Worthman

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