

**Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 6/4/2020 8:15 AM
Reviewed By: R. Walker
Case #20CV365909
Envelope: 4412144**

KINGSLEY & KINGSLEY, APC
ERIC B. KINGSLEY, Esq., Cal. Bar No. 185123
eric@kingsleykingsley.com
KELSEY M. SZAMET, Esq., Cal. Bar No. 260264
kelsey@kingsleykingsley.com
DAVID KELEDJIAN, Esq., Cal. Bar No. 309135
davidk@kingsleykingsley.com
JESSICA ADLOUNI, Esq. Cal. Bar No 328571
jessica@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Telephone: (818) 990-8300
Fax: (818) 990-2903

Attorneys for Plaintiff and the Proposed Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

TRAE WENINGER, an individual, on behalf
of himself and others similarly situated

PLAINTIFF,

v.

BOOSTER FUELS, INC.; and DOES 1 thru
50, inclusive,

DEFENDANTS.

CASE NO. 20CV365909

[Case assigned for All Purposes to Hon. Judge
Patricia M. Lucas, in Dept. 3]

**FIRST AMENDED CLASS AND
REPRESENTATIVE ACTION
COMPLAINT**

1. Failure to Pay Wages and/or Overtime
Under Labor Code §§ 510, 511, 1194, and
1199
2. Failure to Provide Meal Breaks Pursuant
to Labor Code §§ 226.7 and 512
3. Penalties Pursuant to Labor Code § 203
4. Violation of Business & Professions Code
§ 17200
5. Penalties Pursuant to Labor Code §2699,
et seq.

1 Plaintiff TRAE WENINGER, an individual, on behalf of himself, all others similarly
2 situated, and on behalf of the people of the State of California and as an “aggrieved employee”
3 under Labor Code Private Attorneys General Act of 2004, §2699, et seq. (hereafter “PAGA”),
4 complains of Defendant BOOSTER FUELS, INC. (“Defendant”) and each of them, as follows:

5 **I.**

6 **INTRODUCTION**

7 1. This is a Class and Representative Action, pursuant to Code of Civil Procedure §
8 382, and Labor Code §2699, et seq., on behalf of Plaintiff and a Proposed Class defined as:

9 All persons who are employed or have been employed as an hourly
10 employee by BOOSTER FUELS, INC., in the State of California
11 since four (4) years prior to the filing of this action to the present.
12 (“Proposed Class”)

13 2. Plaintiff submitted this Complaint for filing on the date indicated in the signature
14 line below. Due to the unprecedented Court closure reflected in the Order issued by the Court on
15 March 16, 2020 suspending all non-essential functions for the duration of the “Shelter in Place”,
16 Plaintiff is uncertain as to when this Complaint will be accepted for filing and conformed by the
17 Clerk of this Court. Plaintiff takes the position that the applicable Statute of Limitations shall run,
18 in all respects, from the date of submission of the Complaint for filing as reflected in the signature
19 line below.

20 3. From at least four (4) years prior to the filing of this action continuing to the present,
21 Defendant has had a consistent policy of failing to pay wages and/or overtime to all Proposed Class
22 members when they work more than eight hours in a day or forty hours in a week. Plaintiff and
23 other Proposed Class members were not properly compensated for overtime at the appropriate rate
24 of pay because Defendant failed to lawfully adopt an alternative workweek schedule in compliance
25 with Industrial Welfare Commission (“IWC”) Wage Order 9-2001(3)(B)-(C) and the Labor Code.

26 4. From at least four (4) years prior to the filing of this action and continuing to the
27 present, Defendant has had a consistent policy of failing to inform Proposed Class members of
28 their right to take meal periods by way of a lawful policy and requiring Proposed Class members
within the State of California, including Plaintiff, to work at least five (5) hours without a meal

1 period and failing to pay such employees one (1) hour of pay at the employees' regular rate of
2 compensation for each workday that the meal period is not provided or provided after five (5)
3 hours, as required by California state wage and hour laws.

4 5. For at least four (4) years prior to the filing of this action continuing to the present,
5 Defendant has failed to comply with Industrial Welfare Commission ("IWC") Wage Order 9-
6 2001(7) by failing to maintain time records showing when Plaintiff and members of the Proposed
7 Class beings and ends each meal period.

8 6. For at least three (3) years prior to the filing of this action continuing to the present,
9 Defendant has failed to pay all wages due at the time of termination or resignation to Plaintiff and
10 the Proposed Class.

11 7. Plaintiff, on behalf of himself and all Proposed Class members brings this action
12 pursuant to Labor Code §§ 201, 202, 203, 226.7, 510, 511, 512, 1194, and 1199; Wage Order 9-
13 2001; and California Code of Regulations, Title 8, Section 11090, seeking unpaid wages/overtime,
14 meal period penalties, other penalties, injunctive and other equitable relief, and reasonable
15 attorneys' fees and costs.

16 8. Plaintiff, on behalf of himself and all Proposed Class members, pursuant to
17 Business & Professions Code §§ 17200-17208, also seeks injunctive relief, restitution, and
18 disgorgement of all benefits Defendant enjoyed from its unlawful conduct as described herein.

19 9. For at least one (1) year prior to the date of the letter sent to the Labor Workforce
20 and Development Agency ("LWDA") and Defendant giving notice of the claims pursuant to
21 PAGA and continuing to the present, Defendant has violated several Labor Code provisions, as
22 detailed below, giving rise to a claim pursuant to PAGA. Plaintiff, on behalf of himself and all
23 aggrieved employees presently or formerly employed by Defendant during the liability period as
24 defined in his PAGA notice letter (*see* Exhibit "1"), brings this representative action pursuant to
25 Labor Code §2699, et seq. seeking penalties for Defendant's failure to pay wages and/or overtime,
26 failure to provide compliant meal periods, and failure to pay all wages due upon termination.

27 ///

28 ///

1 **II.**

2 **JURISDICTION AND VENUE**

3 10. This Court has subject matter jurisdiction over all causes of action asserted herein
4 pursuant to Article VI, § 10 of the California Constitution and California Code of Civil Procedure
5 § 410.10 by virtue of the fact that this is a civil action in which the matter in controversy, exclusive
6 of interest, exceeds \$25,000, and because each cause of action asserted arises under the laws of the
7 State of California or is subject to adjudication in the courts of the State of California.

8 11. This Court has personal jurisdiction over Defendant because Defendant has caused
9 injuries in the County of Santa Clara and the State of California through their acts, and by their
10 violation of the California Labor Code, California state common law, and California Business &
11 Professions Code § 17200, *et seq.*

12 12. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
13 Civil Procedure § 395. Defendant operates within California and does business within Santa Clara
14 County. The unlawful acts alleged herein have a direct effect on Plaintiff and all Proposed Class
15 members within the State of California and the county of Santa Clara.

16 13. This case should be classified as complex according to Rule 3.400 of the California
17 Rules of Court, and assigned to a complex litigation judge and department, as it will involve
18 substantial documentary evidence, a large number of witnesses, and is likely to involve extensive
19 motion practice raising difficult or novel issues that will be time-consuming to resolve and would
20 require substantial post judgment judicial supervision.

21 **III.**

22 **PARTIES**

23 **A. PLAINTIFF**

24 14. Plaintiff TRAE WENINGER is a resident of California.

25 15. Plaintiff and all Proposed Class members, were regularly required to:

- 26 a. Work without being paid for all hours at the appropriate rate of pay;
27 b. Work without being provided lawful meal periods;
28 c. Work without Defendant maintaining records showing when Plaintiff and

members of the Proposed Class begins and ends each meal period.

16. Defendant willfully failed to compensate Plaintiff and all Proposed Class members for wages at the termination of their employment with Defendant.

17. As a result of this conduct, Defendant has engaged in unfair competition and unlawful business practices.

18. Plaintiff and all aggrieved employees as defined in his notice letter to the LWDA are “aggrieved employees” within the meaning of Labor Code § 2699, *et seq.* (see Labor Code §2699(c).)

B. DEFENDANTS

19. Defendant BOOSTER FUELS, INC. is believed to be a Delaware corporation operating within the State of California. Defendant’s corporate address is believed to be 1840 Gateway Drive, Suite 200, San Mateo, CA 94404. Upon information and belief, Defendant employed Plaintiff and similarly situated persons as hourly employees within California. Defendant has done and does business throughout the State of California.

20. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

21. Plaintiff is informed and believes, and based thereon alleges, that each Defendant acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the employer and/or joint employer of Plaintiff and the Proposed Class members.

22. Furthermore, Defendants acted in all respects as the employers or joint employers of the Proposed Class. Defendants, and each of them, exercised control over the wages, hours or

1 working conditions of the Proposed Class, or suffered or permitted the Proposed Class to work, or
2 engaged, thereby creating a common law employment relationship, with the Proposed Class.
3 Therefore, Defendants, and each of them, employed or jointly employed the Proposed Class.

4 **IV.**

5 **FACTUAL BACKGROUND**

6 23. Plaintiff and the Proposed Class are, and at all times pertinent hereto, have been
7 classified as non-exempt employees by Defendant. Defendant hires employees who work as
8 hourly employees who are paid on an hourly basis.

9 24. Upon information and belief, Plaintiff and the Proposed Class are covered by
10 California Industrial Welfare Commission Occupational Wage Order No. 9-2001 (Title 8 Cal.
11 Code of Regs. § 11090).

12 25. On a regular and consistent basis, Plaintiff and the Proposed Class members were
13 not paid at the proper rate of compensation for hours worked in excess of eight hours in a workday
14 or forty hours in a workweek because Defendant failed to lawfully adopt an alternative workweek
15 schedule in compliance with IWC Wage Order 9-2001(3)(B)-(C) and the Labor Code.

16 26. Defendant failed to inform Plaintiff and the Proposed Class of their right to take
17 meal periods by way of a lawful policy. Plaintiff and all Proposed Class members have been
18 forced by Defendant to work over five (5) hours in one day without being provided a thirty (30)
19 minute uninterrupted meal break and not being compensated one (1) hour of pay at the regular rate
20 of compensation for each workday that a meal period was not provided or provided after five (5)
21 hours, all in violation of California labor laws, regulations, and Industrial Welfare Commission
22 Wage Orders.

23 27. Defendant has failed to comply with IWC Wage Order 9-2001(7) by failing to
24 maintain time records showing when the employee begins and ends each meal period.

25 28. Defendant willfully failed to pay wages and compensation, when Plaintiff and all
26 Proposed Class members quit or were discharged. This failure was willful, without legal
27 justification, and interfered with Plaintiff's and Class members' rights.

28 29. As a result of the acts alleged herein, Defendant violated Labor Code §2699, *et seq.*

1 V.

2 CLASS ACTION ALLEGATIONS

3 30. Plaintiff brings this action on behalf of himself and all others similarly situated as
4 a Class Action pursuant to § 382 of the Code of Civil Procedure. Plaintiff seeks to represent a
5 proposed class composed of and defined as follows:

6 All persons who are employed or have been employed as an hourly
7 employee by BOOSTER FUELS, INC., in the State of California
8 since four (4) years prior to the filing of this action to the present.
9 (“Proposed Class”)

10 31. Plaintiff reserves the right under Rule 3.765(b) of the California Rules of Court to
11 amend or modify the class description with greater specificity, by division into subclasses, or by
12 limitation to particular issues.

13 32. This action has been brought and may properly be maintained as a class action
14 under the provisions of § 382 of the Code of Civil Procedure because there is a well-defined
15 community of interest in the litigation and the Proposed Classes are easily ascertainable.

16 **A. NUMEROSITY**

17 33. The potential members of the Proposed Class as defined are so numerous that
18 joinder of all the members of the Proposed Class is impracticable. While the precise number of
19 proposed Class members has not been determined at this time, Plaintiff is informed and believes
20 that Defendant currently employ, and during the relevant time periods employed over 50 members
21 of the Proposed Class.

22 34. Plaintiff alleges that Defendant’s employment records would provide information
23 as to the number and location of all Proposed Class members. Joinder of all members of the
24 Proposed Class is not practicable.

25 **B. COMMONALITY**

26 35. There are questions of law and fact common to the Proposed Class that predominate
27 over any questions affecting only individual Proposed Class members. These common questions
28 of law and fact include, without limitation:

a. Whether Defendant failed to pay wages and/or overtime compensation as

required by the Labor Code and Wage Orders under Labor Code §§ 510, 1194, and 1199;

b. Whether Defendant violated Labor Code §§ 226.7, 512, and IWC Wage Order 9-2001 or other applicable IWC Wage Orders, by failing to inform Plaintiff and the Proposed Class of their right to take meal periods and by failing to provide required meal periods throughout the term of employment and failing to compensate said employees one (1) hours wages in lieu of rest periods;

c. Whether Defendant violated Labor Code Wage Order 9-2001 or other applicable IWC Wage Orders, and Cal. Code Regs., Title 8, Section 11090 by failing to keep records of meal periods;

d. Whether Defendant violated §§ 201-203 of the Labor Code by failing to pay compensation due and owing at the time that any Proposed Class member's employment with Defendant terminated;

e. Whether Defendant violated § 17200, *et seq.* of the Business & Professions Code by engaging in the acts previously alleged; and

f. Whether Plaintiff and the members of the Proposed Class are entitled to equitable relief pursuant to Business & Professions Code § 17200, *et seq.*

g. Whether Defendant violated Labor Code § 2699, *et seq.* by engaging in the acts alleged herein.

C. TYPICALITY

36. The claims of Plaintiff are typical of the claims of the Proposed Class. Plaintiff and all members of the Proposed Class sustained injuries and damages arising out of and caused by Defendant's common course of conduct in violation of laws, regulations that have the force and effect of law, and statutes as alleged herein.

D. ADEQUACY OF REPRESENTATION

37. Plaintiff will fairly and adequately represent and protect the interests of the members of the Proposed Class.

38. Counsel who represent Plaintiff and the Proposed Class are competent and experienced in litigating large employment class actions.

1 **E. SUPERIORITY OF CLASS ACTION**

2 39. A class action is superior to other available means for the fair and efficient
3 adjudication of this controversy. Individual joinder of all Proposed Class members is not
4 practicable, and questions of law and fact common to the Proposed Class predominate over any
5 questions affecting only individual members of the Proposed Class. Each member of the Proposed
6 Class has been damaged and is entitled to recovery by reason of Defendant's illegal policy and/or
7 practice of failing to pay all wages due, failing to provide meal periods, and failing to pay all wages
8 upon resignation or termination.

9 40. Class action treatment will allow those similarly situated persons to litigate their
10 claims in the manner that is most efficient and economical for the parties and the judicial system.
11 Plaintiff is unaware of any difficulties that are likely to be encountered in the management of this
12 action that would preclude its maintenance as a class action.

13 **VI.**

14 **FIRST CAUSE OF ACTION**

15 **PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS**

16 **FAILURE TO PAY WAGES AND/OR OVERTIME UNDER**

17 **LABOR CODE §§ 510, 511, 1194, AND 1199**

18 41. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates
19 by reference all previous paragraphs.

20 42. Defendant engaged in a practice of failing to pay wages and/or overtime pursuant
21 to Labor Code §§ 510, 511, 1194, and 1199.

22 43. Labor Code §§ 1194 and 1199 require an employer to pay its employees the legal
23 minimum wage and the legal overtime compensation applicable. Labor Code § 510(a) states that
24 eight hours of labor constitutes a day's work and any work in excess of eight hours in one workday
25 and any work in excess of 40 hours in any one workweek must be compensated at the rate of no
26 less than one and one-half times the regular rate of pay for an employee. Any work in excess of
27 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay.

28 44. Labor Code § 511 and IWC Wage Order 9-2001(3)(B) provide, upon the proposal

1 of an employer, for the adoption of an alternative workweek schedule that authorizes work by the
2 affected employees for no longer than ten (10) hours per day within a 40-hour workweek without
3 the payment to the affected employees of an overtime rate of compensation pursuant to this section.
4 A proposal to adopt an alternative workweek schedule shall be deemed adopted only if it receives
5 approval in a secret ballot election by at least two-thirds of affected employees in a readily
6 identifiable work unit.

7 45. Defendant failed to pay wages and/or overtime to Plaintiff and all aggrieved
8 employees because Defendant failed to adopt an alternative workweek schedule that complies with
9 the election procedures set forth in IWC Wage Order 9-2001(3)(C) and Labor Code § 511. To
10 adopt an alternative workweek schedule, Defendant conducted a secret ballot election with only 6
11 employees despite there being far more than 6 employees present at work at the time of voting.
12 As such, Defendant failed to lawfully adopt an alternative workweek schedule and failed to
13 properly compensate Plaintiff and members of the Proposed Class for overtime when they worked
14 over eight hours in a workday or forty hours in a workweek.

15 46. By their policy of requiring Plaintiff and members of the Proposed Class to work
16 in excess of eight (8) hours in a workday and/or forty (40) hours in a workweek without properly
17 compensating them at the rate of one-half (1 ½) times their regular rate of pay, Defendant willfully
18 violated the provisions of Labor Code §§ 510, 1194 and 1199.

19 47. As a result of the unlawful acts of Defendant, Plaintiff and the Proposed Class
20 members have been deprived of wages and/or overtime in amounts to be determined at trial, and
21 are entitled to recovery of such amounts, plus interest and penalties thereon, attorneys' fees, and
22 costs.

23 **VII.**

24 **SECOND CAUSE OF ACTION**

25 **PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS**

26 **FAILURE TO PROVIDE MEAL PERIODS PURSUANT TO**

27 **LABOR CODE § 226.7 AND LABOR CODE § 512**

28 48. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates

by reference all previous paragraphs.

49. Labor Code §§ 226.7 and 512 require an employer to pay an additional hour of compensation for each meal period the employer fails to provide. Employees are entitled to a first meal period of at least thirty (30) minutes for shifts over five (5) hours, to be provided within the first five (5) hours of the shift, and a second meal period of at least thirty (30) minutes for shifts over ten (10) hours. If an employee is entitled to a second meal period, it must be provided after no more than ten (10) hours of work.

50. Defendant failed to maintain a policy informing Plaintiff and the Proposed Class of these rights.

51. Plaintiff and the Proposed Class consistently worked shifts over five (5) hours. Defendant failed to provide Plaintiff and the Proposed Class with timely meal periods of not less than thirty (30) minutes within the first five (5) hours of the shift as required by the Labor Code during the relevant time period. Defendant failed to pay a meal period premium, in lieu of providing a compliant meal period.

52. Further, IWC Wage Orders 9-2001(7), 5-2000(7), 5-1998(7) require Defendant to maintain time records showing, among other things, when the employee begins and ends each meal period. Labor Code § 1199 also prohibits an employer from causing any employee to work under conditions of labor prohibited by an order of the IWC or from violating, refusing, or neglecting to comply with any order of the commission's orders regarding wages, hours, and working conditions. Defendant does not record the time for Plaintiff and the Proposed Class. As such, Defendant has violated this statute and the Wage Order by failing to keep accurate records.

53. Pursuant to Labor Code § 226.7, Plaintiff and the Proposed Class are entitled to damages in an amount equal to one (1) hour of wages per missed meal break, per day in a sum to be proven at trial.

///

///

///

///

1 **VIII.**

2 **THIRD CAUSE OF ACTION**

3 **PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS**

4 **WAITING TIME PENALTIES UNDER LABOR CODE § 203**

5 54. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates
6 by reference all previous paragraphs.

7 55. Numerous members of the Proposed Class including the Plaintiff are no longer
8 employed by Defendant. They were either fired or quit Defendant's employ.

9 56. Defendant's failure to pay wages, as alleged above was willful in that Defendant
10 knew wages to be due but failed to pay them, thus entitling Plaintiff and the Proposed Class to
11 penalties under Labor Code § 203, which provides that an employee's wages shall continue as a
12 penalty until paid for a period of up to thirty (30) days from the time they were due.

13 57. Defendant has failed to pay Plaintiff and others a sum certain at the time of
14 termination or within seventy-two (72) hours of their resignation, and have failed to pay those
15 sums for thirty (30) days thereafter. Pursuant to the provisions of Labor Code § 203, Plaintiff and
16 the Proposed Class are entitled to a penalty in the amount of Plaintiff's and the Proposed Class
17 Members' daily wage multiplied by thirty (30) days.

18 **IX.**

19 **FOURTH CAUSE OF ACTION**

20 **PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS**

21 **UNFAIR COMPETITION PURSUANT TO BUSINESS & PROFESSIONS CODE § 17200**

22 58. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates
23 by reference all previous paragraphs.

24 59. This is a Class Action for Unfair Business Practices. Plaintiff, on behalf of himself,
25 on behalf of the general public, and on behalf of the Proposed Class, bring this claim pursuant to
26 Business & Professions Code § 17200, *et seq.* The conduct of Defendant as alleged in this
27 Complaint has been and continues to be unfair, unlawful, and harmful to Plaintiff, the general
28 public, and the Proposed Class. Plaintiff seeks to enforce important rights affecting the public

1 interest within the meaning of Code of Civil Procedure § 1021.5.

2 60. Plaintiff is a “person” within the meaning of Business & Professions Code § 17204,
3 and therefore has standing to bring this cause of action for injunctive relief, restitution, and other
4 appropriate equitable relief.

5 61. Business & Profession Code § 17200, *et seq.* prohibits unlawful and unfair business
6 practices.

7 62. California’s wage and hour laws express fundamental public policies. Providing
8 employees with proper wages and compensation are fundamental public policies of this State and
9 of the United States. Labor Code § 90.5(a) articulates the public policies of this State to enforce
10 vigorously minimum labor standards, to ensure that employees are not required or permitted to
11 work under substandard and unlawful conditions, and to protect law-abiding employers and their
12 employees from competitors who lower their costs by failing to comply with minimum labor
13 standards.

14 63. Defendant has violated statutes and public policies as alleged herein. Through the
15 conduct alleged in this Complaint, Defendant has acted contrary to these public policies, have
16 violated specific provisions of the Labor Code, and have engaged in other unlawful and unfair
17 business practices in violation of Business & Profession Code § 17200, *et seq.*, depriving Plaintiff,
18 and all persons similarly situated, and all interested persons of rights, benefits, and privileges
19 guaranteed to all employees under law.

20 64. Defendant’s conduct, as alleged hereinabove, constitutes unfair competition in
21 violation of § 17200, *et seq.* of the Business & Professions Code.

22 65. Defendant, by engaging in the conduct herein alleged, either knew or in the exercise
23 of reasonable care, should have known that the conduct was unlawful. As such it is a violation of
24 § 17200, *et seq.* of the Business & Professions Code.

25 66. As a proximate result of the above-mentioned acts of Defendant, Plaintiff and
26 others similarly situated have been damaged in a sum as may be proven.

27 67. Unless restrained, Defendant will continue to engage in the unlawful conduct as
28 alleged above. Pursuant to the Business & Professions Code, this court should make such orders

or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by Defendant, its agents, or employees, of any unlawful or deceptive practices prohibited by the Business & Professions Code, and/or, including but not limited to, restitution and disgorgement of profits which may be necessary to restore Plaintiff and members of the Proposed Class the money Defendant has unlawfully failed to pay.

X.

FIFTH CAUSE OF ACTION

PENALTIES PURSUANT TO LABOR CODE §2699, ET SEQ.

67. Plaintiff, on behalf of himself and all aggrieved employees, reallege and incorporated by reference all previous paragraphs.

68. As a result of the acts alleged above and specifically incorporated herein, Plaintiff seeks penalties under Labor Code §2699, et seq use of Defendant's violation of Labor Code §§ 201, 202, 203, 226.7, 510, 511, 512, 1194, and 1199; Wage Order 9-2001; and California Code of Regulations, Title 8, Section 11090, which call for civil penalties.

69. For each such penalty, Plaintiff and the aggrieved employees are entitled to penalties in an amount to be shown at trial, subject to the following formula:

a. \$100 for the initial violation per employee per pay period.

b. \$200 for each subsequent violation per employee per pay period.

70. These penalties shall be allocated seventy-five percent (75%) to the LWDA and twenty-five percent (25%) to the affected employees.

71. On March 31, 2020, pursuant to Labor Code § 2699.3(a)(1), Plaintiff uploaded a notice letter to the LWDA¹ and mailed a letter by certified mail to Defendant BOOSTER FUELS, INC.'s entity address, which is 1840 Gateway Drive, Suite 200, San Mateo, CA 94404, as proscribed by the Code, describing Defendant's conduct in violation of Labor Code §§ 201, 202, 203, 226.7, 510, 511, 512, 1194, and 1199. (*see* Exhibit "1.") Plaintiff also obtained an e-filing

¹ Plaintiff electronically filed a PAGA Claim Notice to the LWDA, via the State of California Labor and Workforce Development Agency / Department of Industrial Relations website (<https://dir.tfaforms.net/266>).

confirmation from the LWDA confirming receipt of the notice (*see* Exhibit “2”).

73. As no letter evidencing the LWDA’s intention to investigate was received by Plaintiff’s Counsel within sixty-five (65) calendar days, Plaintiff is entitled to commence a civil action as though the LWDA had not chosen to investigate pursuant to Labor Code §2699.3(a)(2)(A). Plaintiff will also provide the LWDA with a filed-stamped copy of the First Amended Class and Representative Action Complaint immediately.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for the following relief:

1. For compensatory damages in the amount of unpaid wages and/or overtime not paid to Plaintiff and each member of the Proposed Class from at least four (4) years prior to the filing of this action to the present as may be proven;

2. For compensatory damages in the amount of Plaintiff’s and each Proposed Class members’ hourly wage for each meal period missed or taken late from at least four (4) years prior to the filing of this action to the present as may be proven;

3. For penalties pursuant to Labor Code § 203 for all employees who were terminated or resigned equal to their daily wage times thirty (30) days;

4. An award of prejudgment and post judgment interest;

5. An order enjoining Defendant and its agents, servants, and employees, and all persons acting under, in concert with, or for it from providing Plaintiff with proper wages and/or overtime, meal periods, and wages upon termination/resignation pursuant to Labor Code §§ 201, 202, 203, 226.7, 510, 511, 512, 1194, 1199, and IWC Wage Order 9-2001;

6. For restitution for unfair competition pursuant to Business & Professions Code § 17200, *et seq.*, including disgorgement or profits, in an amount as may be proven;

7. For penalties under Labor Code §2699, *et seq.* for Defendant’s violation of Labor Code §§ 201, 202, 203, 226.7, 510, 511, 512, 1194, and 1199, and IWC 9-2001.

8. An award providing for payment of costs of suit;

9. An award of attorneys’ fees; and

10. Such other and further relief as this Court may deem proper and just.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED: June 4, 2020



Kelsey M. Szamet
Attorneys for Plaintiff TRAE WENINGER and the
Proposed Class

EXHIBIT “1”

KINGSLEY & KINGSLEY

| L A W Y E R S |

March 31, 2020

LABOR & WORKFORCE DEVELOPMENT AGENCY
Attn. PAGA Administrator
1515 Clay Street, Ste. 801
Oakland, CA 94612

Booster Fuels, Inc.
1840 Gateway Drive, Suite 200
San Mateo, CA 94404
Certified Mail: 7019 2280 0001 9316 0302

Re: TRAE WENINGER v. BOOSTER FUELS, INC.
California Labor Code § 2699 Penalties

Gentlepersons:

This office represents TRAE WENINGER (“Plaintiff”) and a proposed group of current and former employees working for BOOSTER FUELS, INC. (“Defendant”) in the State of California. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698, *et. seq.* We herein set forth the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to Plaintiff and all of Defendant’s aggrieved employees.

Plaintiff wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of a group of aggrieved employees defined as: All persons who are employed or have been employed as an hourly employee by BOOSTER FUELS, INC., in the State of California who worked one or more pay periods since one (1) year prior to the date of this letter and continuing to the present. (“aggrieved employees”).

Defendant engaged in a practice of failing to pay wages/overtime pursuant to Labor Code §§ 510, 511, 1194, and 1199. Labor Code §§ 1194 and 1199 require an employer to pay its employees the legal minimum wage and the legal overtime compensation applicable. Labor Code § 510(a) states that eight hours of labor constitutes a day’s work and any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek must be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay.

Labor Code § 511 and IWC Wage Order 9-2001(3)(B) provide, upon the proposal of an employer, for the adoption of an alternative workweek schedule that authorizes work by the affected employees for no longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation pursuant to this section. A proposal to adopt an alternative workweek schedule shall be deemed adopted only if it receives

LABOR & WORKFORCE DEVELOPMENT AGENCY

California Labor Code §2699 Penalties

March 31, 2020

Page 2 of 3

approval in a secret ballot election by at least two-thirds of affected employees in a readily identifiable work unit.

Here, Defendant has had a consistent policy of failing to pay wages and/or overtime to Plaintiff and all aggrieved employees because Defendant adopted an alternative workweek schedule that fail to comply with the election procedures set forth in IWC Wage Order 9-2001(3)(C) and the Labor Code. Defendant conducted a secret ballot election wherein only 6 employees cast a secret ballot, despite there being far more than 6 employees present at work at the time of voting. As such, Defendant failed to lawfully adopt an alternative workweek schedule and failed to properly compensate Plaintiff and all aggrieved employees for overtime when they worked over eight hours in a workday.

Labor Code § 512 states that an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes. Additionally, an employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes. Pursuant to Labor Code § 226.7(c), if an employer fails to provide an employee with a lawful meal period, the employer must pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that a thirty minute uninterrupted meal period was not provided, was not provided in full, or was not provided in a timely manner. Labor Code § 226.7 requires that an employer pay an employee one (1) hour of pay at the employee's regular rate of compensation for each workday that a thirty minute uninterrupted period was not provided, not provided in full, or was not provided in a timely manner.

Defendant failed to apprise Plaintiff and the aggrieved employees of their rights associated with meal periods and failed to provide compliant meal periods. Defendant required Plaintiff and the aggrieved employees to work shifts without providing them with meal periods of at least thirty minutes in length within the first five hours of their shifts. Further, Plaintiff and the aggrieved employees were not compensated with one (1) hour of wages for each missed meal period as required by Labor Code § 226.7.

Further, Industrial Welfare Commission ("IWC") Wage Order 9-2001 section 7(a)(3) requires an employer to keep records of when the employee begins and ends each work period and meal period. Labor Code § 1199 prohibits an employer from causing any employee to work under conditions of labor prohibited by an order of the IWC or from violating, refusing, or neglecting to comply with any order of the commission's orders regarding wages, hours, and working conditions. Defendant does not record the time for Plaintiff and the aggrieved employees. As such, Defendant has violated this statute and the Wage Order by failing to keep accurate records.

Labor Code § 203 provides that if "an employer willfully fails to pay...any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages

LABOR & WORKFORCE DEVELOPMENT AGENCY

California Labor Code §2699 Penalties

March 31, 2020

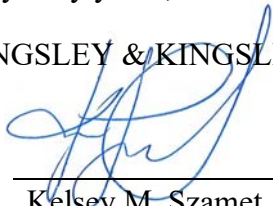
Page **3** of **3**

shall not continue for more than 30 days.” Here, Plaintiff and all aggrieved employees were not paid all wages due upon their separation from Defendant’s employ. As such, Plaintiff is an aggrieved employee and Defendant failed to pay Plaintiff and all aggrieved employees all wages due at the time of termination or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter in violation of Labor Code § 203.

We are constrained to move forward with the filing of this complaint alleging causes of action pursuant to Labor Code §§ 201, 202, 203, 226.7, 510, 511, 512, 1194, and 1199 with or without the PAGA claim. Thus, any action by the LWDA would not resolve the entirety of the case, and the interest of judicial economy will be served by allowing the case to proceed as a cohesive whole.

Very truly yours,

KINGSLEY & KINGSLEY, APC

By: 
Kelsey M. Szamet

KMS/dm

Cc: 1. LWDA Letter filed via Electronic Submission: <https://dir.tfaforms.net/266>

EXHIBIT “2”



State of California

Labor and Workforce Development Agency /
Department of Industrial Relations

Private Attorneys General Act (PAGA) – Filing

New PAGA Claim Notice

Your Information (Person Who is Filing)

Your First Name *

Kelsey

Your Last Name *

Szamet

Firm Name (if any) *

Kingsley & Kingsley

(Enter "in pro per" if you are representing yourself)

Your Email Address *

service@kingsleykingsley.

Your Street Name, Number and Suite/Apt *

16133 Ventura Boulevard,

Your Mobile Phone Number

8189908300

Your City *

Encino

Your Work Phone Number

Your State *

California ▼

Your Zip/Postal Code *

91436

Plaintiff Information

Plaintiff/Aggrieved Employee Name *

Trae Wninger

Plaintiff/Aggrieved Employee Occupation *

Hourly Employee

[Add Additional Plaintiffs](#)

Employer Information

Employer Entity Type

Please select... ▼

Employer Name *

Booster Fuels, Inc.

Maximum 80 Character Limit

Employer Street Name, Number and Suite/Apt

Employer City

Employer State

Employer Zip/Postal Code

Employer Industry

Add additional defendants

- ☐ Add any entity other than an individual
- ☐ Add an individual/sole proprietor employer

Notice General Information

Estimated Number of Employees Impacted by Violations

Notice Violations – Check All that Apply *

- ☐ Child Labor
- ☐ Misclassification Employee Classified as Contractor
- ☐ Misclassification NonExempt Classified as Exempt
- ☐ Minimum Wage
- ☒ Overtime
- ☐ Not paid for all hours worked
- ☒ Not paid wages due on termination
- ☐ Other Unpaid Wages
- ☐ Tips or Gratuities
- ☐ Payment or Reimbursement of Employee Expenses
- ☐ Improper Form of Payment Including NSF Checks
- ☐ Kickbacks
- ☒ Meal and Rest Breaks
- ☐ Sick Leave
- ☐ Lactation Accommodation (Labor Code 1030–1033)
- ☐ Not providing required time off, other
- ☐ Pay Discrimination on basis of sex, (Labor Code 1197.5)
- ☐ No Wage Statements
- ☐ Improper or Incomplete Wage Statements
- ☐ Other Notice or Posting or Recordkeeping
- ☐ Public Works (Labor Code 1720 – 1815)
- ☐ Apprenticeship (Labor Code 3070 – 3098)
- ☐ Occupational Safety and Health (Labor Code 6300 et seq)
- ☐ No Workers' Compensation
- ☐ Licensing, Registration, or Permit
- ☐ Unfair Immigration Activities
- ☐ Agricultural Labor Relations
- ☐ Industrial Homework
- ☐ Retaliation for Protected Status or Activity (Specify)
- ☐ Other

Child Labor – Specify Ages

PAGA Claim Type – Check All that Apply *

- ☒ Notice asserts one or more Labor Code violations listed in Labor Code 2699.5– not curable subject to 2699.3(a)
- ☐ Notice asserts one or more OSHA violations subject to requirements of 2699.3(b)
- ☐ Includes one or more violations not listed in Labor Code 2699.5 – curable subject to 2699.3(c)

Filing Fee

A filing fee of \$75 is required to file a new PAGA claim notice. Filing fees should be paid by check, made out to LWDA, and sent by regular mail to:

Department of Industrial Relations
Accounting Unit
455 Golden Gate Ave, 10th Floor
San Francisco, CA 94102

The check should be accompanied by a cover letter with sufficient information to identify the notice, including the LWDA case number assigned upon submission of this form.

Parties requesting in forma pauperis status should complete a Confidential Request to Waive Court Fees (Judicial Council Court Form FW-001) or similar form and submit it online with the notice below.

IFP

- ☐ I wish to claim In Forma Pauperis and am attaching a Confidential Request to Waive Court Fees (Judicial Council Court Form FW-001) or similar form to this submission.
- ☒ I declare that I have or will pay the filing fees required by statute [Labor Code section 2699.3(a)(1) (B)] according to the instructions on the PAGA home page, unless I have claimed in forma pauperis by checking the box below.

Notice and Other Attachments

PAGA Claim Notice (must be a .pdf) *

LWDA Letter – ...Fuels, Inc.pdf

Other Attachment – (if any) (must be a .pdf)

No file chosen

[Add Another Attachment](#)

Should you have questions regarding this online form, please contact PAGAInfo@dir.ca.gov

IMPORTANT NOTICE OF REDACTION RESPONSIBILITY: All filers must redact: Social Security or taxpayer identification numbers; dates of birth; names of minor children; & financial account numbers. This requirement applies to all documents, including attachments.

- ☒ I understand that, if I file, I must comply with the redaction rules consistent with this notice.

Thank you. If you provided an email address with your submission, a confirmation regarding your submission will be emailed to you. Otherwise, you can search for the case to verify that your submission was properly received.

[Click Here](#) to Search Case

Doug Menendez

From: noreply@salesforce.com on behalf of LWDA DO NOT REPLY <lwdadonotreply@dir.ca.gov>
Sent: Tuesday, March 31, 2020 4:45 PM
To: Service Email
Subject: Thank you for submission of your PAGA Case.

3/31/2020

LWDA Case No. LWDA-CM-781111-20

Law Firm : Kingsley & Kingsley

Plaintiff Name : Trae Wninger

Employer: Booster Fuels, Inc.

Item submitted: Initial PAGA Notice

Thank you for your submission to the Labor and Workforce Development Agency. Please make a note of the LWDA Case No. above as you may need this number for future reference when filing any subsequent documents for this Case.

If you have questions or concerns regarding this submission or your case, please send an email to pagainfo@dir.ca.gov.

DIR PAGA Unit on behalf of
Labor and Workforce Development Agency

Website: http://labor.ca.gov/Private_Attorneys_General_Act.htm

KINGSLEY & KINGSLEY

| L A W Y E R S |

March 31, 2020

LABOR & WORKFORCE DEVELOPMENT AGENCY
Attn. PAGA Administrator
1515 Clay Street, Ste. 801
Oakland, CA 94612

Booster Fuels, Inc.
1840 Gateway Drive, Suite 200
San Mateo, CA 94404
Certified Mail: 7019 2280 0001 9316 0302

Re: TRAE WENINGER v. BOOSTER FUELS, INC.
California Labor Code § 2699 Penalties

Gentlepersons:

This office represents TRAE WENINGER (“Plaintiff”) and a proposed group of current and former employees working for BOOSTER FUELS, INC. (“Defendant”) in the State of California. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698, *et. seq.* We herein set forth the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to Plaintiff and all of Defendant’s aggrieved employees.

Plaintiff wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of a group of aggrieved employees defined as: All persons who are employed or have been employed as an hourly employee by BOOSTER FUELS, INC., in the State of California who worked one or more pay periods since one (1) year prior to the date of this letter and continuing to the present. (“aggrieved employees”).

Defendant engaged in a practice of failing to pay wages/overtime pursuant to Labor Code §§ 510, 511, 1194, and 1199. Labor Code §§ 1194 and 1199 require an employer to pay its employees the legal minimum wage and the legal overtime compensation applicable. Labor Code § 510(a) states that eight hours of labor constitutes a day’s work and any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek must be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay.

Labor Code § 511 and IWC Wage Order 9-2001(3)(B) provide, upon the proposal of an employer, for the adoption of an alternative workweek schedule that authorizes work by the affected employees for no longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation pursuant to this section. A proposal to adopt an alternative workweek schedule shall be deemed adopted only if it receives

LABOR & WORKFORCE DEVELOPMENT AGENCY

California Labor Code §2699 Penalties

March 31, 2020

Page 2 of 3

approval in a secret ballot election by at least two-thirds of affected employees in a readily identifiable work unit.

Here, Defendant has had a consistent policy of failing to pay wages and/or overtime to Plaintiff and all aggrieved employees because Defendant adopted an alternative workweek schedule that fail to comply with the election procedures set forth in IWC Wage Order 9-2001(3)(C) and the Labor Code. Defendant conducted a secret ballot election wherein only 6 employees cast a secret ballot, despite there being far more than 6 employees present at work at the time of voting. As such, Defendant failed to lawfully adopt an alternative workweek schedule and failed to properly compensate Plaintiff and all aggrieved employees for overtime when they worked over eight hours in a workday.

Labor Code § 512 states that an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes. Additionally, an employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes. Pursuant to Labor Code § 226.7(c), if an employer fails to provide an employee with a lawful meal period, the employer must pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that a thirty minute uninterrupted meal period was not provided, was not provided in full, or was not provided in a timely manner. Labor Code § 226.7 requires that an employer pay an employee one (1) hour of pay at the employee's regular rate of compensation for each workday that a thirty minute uninterrupted period was not provided, not provided in full, or was not provided in a timely manner.

Defendant failed to apprise Plaintiff and the aggrieved employees of their rights associated with meal periods and failed to provide compliant meal periods. Defendant required Plaintiff and the aggrieved employees to work shifts without providing them with meal periods of at least thirty minutes in length within the first five hours of their shifts. Further, Plaintiff and the aggrieved employees were not compensated with one (1) hour of wages for each missed meal period as required by Labor Code § 226.7.

Further, Industrial Welfare Commission ("IWC") Wage Order 9-2001 section 7(a)(3) requires an employer to keep records of when the employee begins and ends each work period and meal period. Labor Code § 1199 prohibits an employer from causing any employee to work under conditions of labor prohibited by an order of the IWC or from violating, refusing, or neglecting to comply with any order of the commission's orders regarding wages, hours, and working conditions. Defendant does not record the time for Plaintiff and the aggrieved employees. As such, Defendant has violated this statute and the Wage Order by failing to keep accurate records.

Labor Code § 203 provides that if "an employer willfully fails to pay...any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages

LABOR & WORKFORCE DEVELOPMENT AGENCY

California Labor Code §2699 Penalties

March 31, 2020

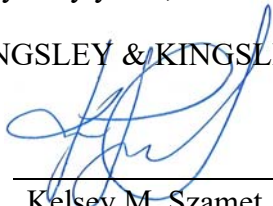
Page **3** of **3**

shall not continue for more than 30 days.” Here, Plaintiff and all aggrieved employees were not paid all wages due upon their separation from Defendant’s employ. As such, Plaintiff is an aggrieved employee and Defendant failed to pay Plaintiff and all aggrieved employees all wages due at the time of termination or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter in violation of Labor Code § 203.

We are constrained to move forward with the filing of this complaint alleging causes of action pursuant to Labor Code §§ 201, 202, 203, 226.7, 510, 511, 512, 1194, and 1199 with or without the PAGA claim. Thus, any action by the LWDA would not resolve the entirety of the case, and the interest of judicial economy will be served by allowing the case to proceed as a cohesive whole.

Very truly yours,

KINGSLEY & KINGSLEY, APC

By: 
Kelsey M. Szamet

KMS/dm

Cc: 1. LWDA Letter filed via Electronic Submission: <https://dir.tfaforms.net/266>