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and other similarly-situated and aggrieved employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

STEVEN KANE, on behalf of himself and
other similarly-situated employees,

Plaintiff,

vs.

SMITHFIELD DIRECT, LLC, a Delaware
Limited Liability Company; and DOES 1
through 10, inclusive,

Defendants.

CASE NO. 21STCV13736

ASSIGNED FOR ALL PURPOSES TO:

The Honorable Yvette M. Palazuelos
Department 9

**FIRST AMENDED CLASS ACTION AND
REPRESENTATIVE ACTION COMPLAINT
FOR DAMAGES, RESTITUTION, AND
INJUNCTIVE RELIEF AND PENALTIES**

- 1. FAILURE TO PAY MINIMUM WAGES**
- 2. FAILURE TO PAY OVERTIME WAGES**
- 3. FAILURE TO PAY ALL VACATION WAGES**
- 4. FAILURE TO PROVIDE MEAL PERIODS**
- 5. FAILURE TO PROVIDE REST PERIODS**
- 6. FAILURE TO PROVIDE PAID SICK LEAVE**
- 7. FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS**

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Superior Court of California
County of Los Angeles

MAY 11 2021

Sherri R. Carter, Executive Officer/Clerk of Court

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- 8. FAILURE TO PAY WAGES TIMELY TO TERMINATED EMPLOYEES
- 9. UCL CLAIM
- 10. PAGA PENALTIES FOR FAILURE TO PAY MINIMUM WAGES
- 11. PAGA PENALTIES FOR FAILURE TO PAY OVERTIME WAGES
- 12. PAGA PENALTIES FOR FAILURE TO PAY ALL VACATION WAGES
- 13. PAGA PENALTIES FOR FAILURE TO PROVIDE MEAL PERIODS
- 14. PAGA PENALTIES FOR FAILURE TO PROVIDE REST PERIODS
- 15. PAGA PENALTIES FOR FAILURE TO PROVIDE PAID SICK LEAVE
- 16. PAGA PENALTIES FOR FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS
- 17. PAGA PENALTIES FOR FAILURE TO PAY WAGES TIMELY TO TERMINATED EMPLOYEES

DEMAND FOR JURY TRIAL

1 Plaintiff STEVEN KANE (“Plaintiff”), on behalf of himself and other similarly-situated
2 and aggrieved employees, hereby alleges as follows:

3 **I.**

4 **INTRODUCTION**

5 1. Plaintiff brings this proposed class action and PAGA Representative Action
6 against his former employer SMITHFIELD DIRECT, LLC, a Delaware Limited Liability
7 Company, and DOES 1-10 (collectively referred to as “Defendants”) for multiple wage and
8 hour violations under the California Labor Code to recover unpaid minimum, regular, and
9 overtime wages. Specifically, during all or a significant part of the Liability Period, which
10 includes the “Class Period” (which is defined at any time from four years prior to the
11 commencement of this action until the commencement of trial in the matter) and/or the “PAGA
12 Period” (which is defined at any time from one year and 65 days prior to the commencement of
13 this action until the commencement of trial in the matter), Plaintiff alleges Defendants did not
14 pay him or other hourly non-exempt employees properly-calculated overtime wages because
15 commissions and non-discretionary bonuses were not figured into their regular rate of pay for
16 purposes of payment of overtime, premium wages, and sick leave compensation. Defendants
17 also failed to properly pay all wages for all hours worked, including time spent undergoing
18 COVID-19 screening and time spent working off-the clock. Plaintiff additionally seeks to
19 recover damages and penalties for Defendants’ failure to pay all vacation wages and paid sick
20 leave, and seeks to recover compensation for Defendants’ failure to provide compliant meal and
21 rest periods. Plaintiff also brings this action for unfair competition under Business and
22 Professions Code sections 17200, *et seq.*

23 2. Plaintiff brings this lawsuit as a PAGA Representative Action on behalf of the
24 state of California, and aggrieved current and former employees. Pursuant to Labor Code
25 sections 2698, *et seq.*, Plaintiff seeks to recover civil penalties, and reasonable attorney’s fees
26 and costs. Plaintiff, by operation of law, has standing and capacity to sue as a representative of
27 the State of California. Plaintiff provided written notice of the specific provisions of the code
28 that Defendants violated, including the facts and theories to support the alleged violations, to

1 the LWDA and to Smithfield Direct, LLC on February 22, 2021. A true and correct copy of the
2 notice is attached as **Exhibit A** and incorporated by this reference. Defendants did not provide
3 notice of cure and the LWDA did not provide notice of investigation in the 65 days after notice
4 of the PAGA violations.

5 3. Pursuant to Cal. Labor Code sections 2698, *et seq.*, Plaintiff seeks to represent
6 all current and former aggrieved employees of Defendants who suffered one or more of the
7 alleged violations (“aggrieved employees”) during the PAGA Period.

8 II.

9 JURISDICTION AND VENUE

10 4. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
11 Civil Procedure section 395. Defendants conduct business throughout the County of Los
12 Angeles, and each Defendant is within the jurisdiction of this Court for service of process
13 purposes. The unlawful acts alleged have a direct effect on Plaintiff and other similarly-situated
14 employees within the State of California and Los Angeles County. Defendants employ
15 numerous employees in Los Angeles County and in California generally. There is no federal
16 question at issue for removal under 28 U.S.C. section 1331, as the issues herein are based solely
17 on California statutes and law, including the Labor Code, IWC Wage Orders, and the Code of
18 Civil Procedure.

19 5. Plaintiff alleges, on information and belief, that no federal question is raised and
20 that the Class Action Fairness Act (“CAFA”), 28 U.S.C. section 1332(d), does not apply, or in
21 the alternative, that exceptions for local case or controversy under the CAFA do apply and
22 prohibit removal of the action the federal court. Plaintiff is also informed and believes that
23 based on his rate of pay, his individual claims do not arise to the necessary amount in
24 controversy so as to implicate traditional jurisdiction under 28 U.S.C. section 1332(a) or
25 jurisdiction under the CAFA.

26 6. Further, as a representative action under the PAGA, the matter is not subject to
27 removal under 28 U.S.C. sections 1332(a)-(d). PAGA civil penalty actions are not subject to
28 federal jurisdiction.

III.

THE PARTIES

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3 7. Plaintiff STEVEN KANE is former employee of Defendants. At all relevant
4 times, he was employed by Defendants as a non-exempt Route Sales Representative/Associate
5 (“RSR”) in Los Angeles County. He was discharged from employment in or around November
6 2020.

7 8. Plaintiff alleges that all other non-exempt hourly RSR employees in the State of
8 California worked under Defendants’ policies and as a result, suffered the same violations
9 alleged herein.

10 9. Plaintiff is informed and believes, and based thereon alleges, that Defendant
11 SMITHFIELD DIRECT, LLC is a Delaware Limited Liability Company that supplies grocery
12 items and food products, mainly meat products, to its customers throughout California.
13 Defendant had contracts with Big Lots and Dollar General. Defendant’s headquarters is located
14 Smithfield, Virginia, and Defendant has at least two locations in California.

15 10. Pursuant to California Labor Code sections 558, 558.1, and 1197.1, Defendants
16 are employers of Plaintiff, and/or a person acting on behalf of Plaintiff’s employer, who
17 violated, or caused to be violated, any provision regulating minimum wages or hours and days
18 of work in the applicable order of the Industrial Welfare Commission, as well as California
19 Labor Code sections 203, 226, 226.7, 1193.6, and 1194, and as such, are liable as employers of
20 Plaintiff for such violations pursuant to California Labor Code sections 558, 558.1, and 1197.1.

21 11. At all times relevant Smithfield Direct, LLC did, and does, transact and conduct
22 business in the state of California, including, but not limited to, within the jurisdiction of the
23 Court. At all times relevant, Smithfield Direct, LLC was Plaintiff’s employer for purposes of
24 the California wage and hour laws at issue in this action.

25 12. Plaintiff is unaware of the true names, capacities, relationships, and extent of
26 participation in the conduct alleged of Defendants sued as DOES 1 through 10, but is informed
27 and believes, and based on that alleges, that DOE Defendants are legally responsible for the
28 wrongful conduct alleged, and sues these Defendants by such fictitious names. Plaintiff will

1 amend this complaint when their true names and capabilities are ascertained.

2 13. Plaintiff is informed and believes and, based thereon alleges, that each
3 Defendant, directly or indirectly, or through agents or other persons, employed Plaintiff and
4 other similarly-situated employees, and exercised control over their wages, hours, and working
5 conditions. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
6 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a
7 joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each
8 Defendant is legally attributable to the other Defendants.

9 IV.

10 **GENERAL ALLEGATIONS**

11 14. At all times during the Liability Period, Plaintiff and other similarly-situated and
12 aggrieved employees were employed by Defendants and each of them, including Doe
13 Defendants, within the state of California.

14 15. At all times during the Liability Period, Plaintiff and other similarly-situated and
15 aggrieved employees of Defendants worked under the same policies, practices, and procedures
16 relating to their employment, including those governing wage statements, vacation pay, paid
17 sick leave, recordkeeping, payment of wages, and provisions of meal and rest periods applicable
18 to Defendants' facilities.

19 16. At all times during the Liability Period, Defendants maintained common policies
20 and practices of failing to pay all required wages for all hours worked.

21 17. The California Labor Code and applicable IWC Wage Order and portions of the
22 California Code of Regulations provide that all persons employed in the State of California
23 shall be (1) presumed to be an hourly or non-exempt employee; (2) that all "hours worked" and
24 subject to the control of the employer, whether exercised or not, are to be paid at least the
25 minimum wage as determined by the State of California, and for overtime wages at either 1.5x
26 the regular rate of pay or 2.0x the regular rate of pay when "hours worked" exceeds 8 hours in a
27 single day or shift, or over 40 hours in a 168-total hour work. Labor Code sections 1194, *et seq.*
28 provide that notwithstanding any agreement to work for a lesser wage, an employee receiving

1 less than the legal overtime or minimum wage compensation is entitled to recover in a civil
2 action the unpaid balance of their owed compensation, including interest thereon, reasonable
3 attorneys' fees, and costs of suit.

4 18. Plaintiff and each similarly-situated and aggrieved employee worked in excess of
5 the maximum regular rate hours set by the IWC in the above Wage Orders, regulations, or
6 statutes, and are therefore entitled to appropriate overtime compensation at time and a half (1½)
7 rate of their regular pay, and when applicable, double-time rates as set forth by the above Wage
8 Orders, regulations, and/or statutes.

9 19. During workweeks in which they worked overtime, Plaintiff and other similarly-
10 situated and aggrieved employees earned non-discretionary bonus compensation and
11 commissions.

12 20. Plaintiff and each similarly-situated and aggrieved employee regularly worked
13 overtime hours exceeding 8 hours per day, but were not paid at the correct overtime rate of pay
14 because non-discretionary bonuses and commissions were not included in their regular rate of
15 pay, as required by Labor Code sections 510 and 1194, and section 3 of the applicable IWC
16 wage order. Thus, the regular rate of pay was not properly calculated for purposes of calculating
17 the proper overtime payment. As a result, Defendants failed to pay all overtime wages.

18 21. Furthermore, because Plaintiff and each similarly-situated and aggrieved
19 employee were not paid at the correct overtime rate of pay, Defendants further did not provide
20 sick pay and sick leave based on the amounts required by law. Plaintiff was paid sick leave at
21 his base rate of pay, which was less than required under either of the two methods of sick leave
22 calculation in California.

23 22. At all times during the Liability Period, Defendants maintained a common policy
24 and practice of failing to pay Plaintiff and other similarly-situated and aggrieved employees for
25 all hours worked. Defendants did not pay Plaintiff and others similarly-situated and aggrieved
26 employees for time spent undergoing daily medical checks, which involved Defendants taking
27 employees' temperature to ensure they are not sick and potentially infected with the
28 Coronavirus. Furthermore, Defendants routinely and regularly contacted Plaintiff and others

1 similarly situated and aggrieved via telephone and/or text message while Plaintiff and others
2 similarly situated and aggrieved were off-the-clock to inform them of the following day's
3 delivery load, without paying any compensation for these hours worked, which resulted in the
4 failure to pay for all hours worked as required by law, including the failure to pay at least
5 minimum wage for all hours worked, and the applicable overtime pay for overtime hours
6 worked.

7 23. At all times during the Liability Period, Plaintiff and other similarly-situated and
8 aggrieved employees were also subject to a uniform policy of failing to pay all vacation wages
9 upon termination of employment and indeed, they were not paid all vacation wages earned and
10 accrued upon termination of employment as required by law.

11 24. Defendants did not maintain a meal and rest period policy applicable to Plaintiff
12 and other similarly-situated and aggrieved employees.

13 25. Defendants did not maintain a compliant meal period policy applicable to
14 Plaintiff and other similarly-situated and aggrieved employees, nor did they inform their
15 employees, including Plaintiff, that they were permitted to take meal periods as provided under
16 the California Labor Code.

17 26. At all times during the Liability Period, Plaintiff and other similarly-situated and
18 aggrieved employees were regularly prevented from taking timely compliant meal periods of at
19 least thirty minutes and prior to the end of their fifth hour of work. Instead, Plaintiff and other
20 similarly-situated and aggrieved employees were rarely permitted meal periods, but yet were
21 still required to record a meal period was taken.

22 27. For the same reasons, Plaintiff and other similarly-situated and aggrieved
23 employees were also not provided an opportunity to take a second meal period when they
24 worked shifts greater than 10 hours.

25 28. At all times during the Liability Period, the Defendants, and each of them,
26 required Plaintiff and similarly-situated and aggrieved employees to work without taking
27 statutory meal periods and failed to pay similarly-situated employees an hour's pay in lieu
28 thereof.

1 29. Plaintiff and similarly-situated and aggrieved employees were not provided with
2 off-duty rest periods of at least ten minutes. Instead, Plaintiff and other similarly-situated and
3 aggrieved employees were not relieved off all duty in order to take any rest periods.

4 30. Defendants did not provide off-duty rest periods of at least ten minutes for every
5 four hours or major fraction thereof worked as required by law. At all times during the Liability
6 Period, the Defendants, and each of them, required Plaintiff and similarly-situated and
7 aggrieved employees to work without taking statutory rest periods and failed to pay the
8 employees an hour's pay in lieu thereof.

9 31. As a result of the failures to pay all minimum, regular, overtime, vacation, and
10 sick leave wages, as described herein, Defendants further failed to pay Plaintiff and all other
11 similarly-situated and aggrieved employees timely during employment as required by Cal.
12 Labor Code section 204.

13 32. At all times during the Liability Period, the Defendants, by virtue of centralized
14 and uniform pay policies, failed to provide accurate, itemized wage statements to Plaintiff and
15 similarly-situated and aggrieved employees, as required by Labor Code section 226. The wage
16 statements did contain the address of the legal entity that is the employer of Plaintiff and other
17 similarly-situated and aggrieved employees. Furthermore, the wage statements did not
18 accurately state the total hours worked, the net and gross wage earned, or all applicable hourly
19 rates in effect during the pay period and the corresponding number of hours worked at each
20 hourly rate.

21 33. Plaintiff's employment ended in or around November 30, 2020. At the time of
22 his separation from employment, he was owed sick leave, vacation wages, minimum wages,
23 regular wages, overtime wages, and meal and rest period premium wages from Defendants for
24 all hours worked during the Liability Period. Similarly, Defendants failed to pay all wages and
25 premiums owed Plaintiff, and other similarly-situated and aggrieved terminated employees, as
26 required by Labor Code section 203.

27 34. During the Liability Period, the Defendants failed to pay all wages owed to
28 terminated similarly-situated and aggrieved employees. As a result, Plaintiff and other

1 similarly-situated and aggrieved employees are owed waiting time penalties.

2 35. Defendants have engaged in unfair business practices in California and willingly
3 and knowingly have practiced, employed, and utilized the employment patterns and practices
4 alleged in this complaint in violation of Business & Professions Code sections 17200, *et seq* in
5 an attempt to improperly lower the costs of doing business to gain an unfair economic
6 advantage.

7 V.

8 **CLASS ACTION ALLEGATIONS**

9 36. Plaintiff brings this action on behalf of himself and all others similarly situated
10 as a class action pursuant to Code of Civil Procedure section 382. The members of the Plaintiff
11 Class are defined as follows:

12 All individuals employed by Defendants in the State of California as
13 hourly Route Sales Representatives/Associates and/or any other similar
14 job title or position at any time four years prior to the filing of this
complaint until the time of trial in this action (the “Class” or “Plaintiff
Class”).

15 37. Further, Plaintiff brings this action on behalf of himself and all other similarly-
16 situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

17 Plaintiff Subclass One (“Minimum Wage Subclass”): All members of
18 the Plaintiff Class who, within the applicable limitations period, were
19 subject to a policy of not being compensated for all hours worked or
under Defendants’ control at the applicable minimum wage.

20 38. Further, Plaintiff brings this action on behalf of himself and all other similarly-
21 situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

22 Plaintiff Subclass Two (“Overtime Subclass”): All members of the
23 Plaintiff Class who, within the applicable limitations period, were subject
24 to a policy of not being compensated for all hours worked or under
Defendants’ control in excess of eight hours per day and/or forty hours
per week at the applicable overtime wage.

25 39. Further, Plaintiff brings this action on behalf of himself and all other similarly-
26 situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

27 Plaintiff Subclass Three (“Regular Rate of Pay Subclass”): All members
28 of the Plaintiff Class employed by Defendants in the State of California
who, within the applicable limitations period, were subject to the policy

and/or practice of failing to include all non-discretionary bonus compensation and commissions into the regular rate of pay for purposes of calculating overtime premium pay and paid sick leave.

40. Further, Plaintiff brings this action on behalf of himself and all other similarly-situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

Plaintiff Subclass Four (“Vacation Subclass”): All members of the Plaintiff Class who, within the applicable limitations period, were subject to the policy and/or practice of not being compensated for all earned vacation wages upon termination.

41. Further, Plaintiff brings this action on behalf of himself and all other similarly-situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

Plaintiff Subclass Five (“First Meal Period Subclass”): All members of the Plaintiff Class who, within the applicable limitations period, worked a shift of five hours or more and were subject to the policy and/or practice not to provide a compliant 30-minute meal period or one hour of pay at the employee’s regular rate of pay in lieu thereof.

42. Further, Plaintiff brings this action on behalf of himself and all other similarly-situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

Plaintiff Subclass Six (“Second Meal Period Subclass”): All members of the Plaintiff Class who, within the applicable limitations period, worked a shift of ten hours or more and were subject to the policy and/or practice not to provide a compliant second 30-minute meal period or one hour of pay at the employee’s regular rate of pay in lieu thereof.

43. Further, Plaintiff brings this action on behalf of himself and all other similarly-situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

Plaintiff Subclass Seven (“Rest Period Subclass”): All members of the Plaintiff Class who, within the applicable limitations period, worked a shift of 3.5 hours more and were subject to the policy and/or practice not to provide a compliant a rest period for every 4 hours worked, or major fraction thereof, or one hour of pay at the employee’s regular rate of pay in lieu thereof.

44. Further, Plaintiff brings this action on behalf of himself and all other similarly-situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

Plaintiff Subclass Eight (“Sick Pay Subclass”): All members of the Plaintiff Class who, within the applicable limitations period, were subject to the policy and/or practice of not being provided with appropriately

1 calculated sick pay.

2 45. Further, Plaintiff brings this action on behalf of himself and all other similarly-
3 situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

4 Plaintiff Subclass Nine (“Wage Statement Subclass”): All members of
5 the Plaintiff Class who, within the applicable limitations period, were
6 subject to the policy and/or practice of not providing accurate itemized
7 wage statements.

8 46. Further, Plaintiff brings this action on behalf of himself and all other similarly-
9 situated persons in a Subclass of the Plaintiff Class, which is defined as follows:

10 Plaintiff Subclass Ten (“Waiting Time Subclass”): All members of the
11 Plaintiff Class who, within the applicable limitations period, either
12 voluntarily or involuntarily separated from their employment, and were
13 subject to the Defendants’ policy and/or practice of failing to timely
14 pay wages upon termination.

15 47. Plaintiff brings this action on behalf of himself and all other similarly-situated
16 persons in a Subclass of the Plaintiff Class, which is defined as follows:

17 Plaintiff Subclass Eleven (“The UCL Subclass”): All members of the
18 Plaintiff Class, within the applicable limitations period, who are owed
19 restitution as a result of Defendants’ business acts and practices to the
20 extent such acts and practices are found to be unlawful, deceptive,
21 and/or unfair.

22 48. Plaintiff reserves the right under California Rules of Court, Rule 3.765(b) and
23 other applicable law to amend or modify the class definition with respect to issues or in any
24 other ways. Plaintiff is the Named Representative and is a member of the Plaintiff Class.
25 Plaintiff seeks class-wide recovery based on the allegations set forth in this complaint. The
26 Court can define the Plaintiff Class and create additional subclasses as may be necessary or
27 desirable to adjudicate common issues and claims of the Plaintiff Class Members if, based on
28 discovery of additional facts, the need arises.

 49. As set forth in the Prayer, below, Plaintiff will move the Court to try the UCL
Subclass Claims before the Court in Equity before trying the legal claims to a trier of fact in this
action. See, *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156-157; *Pellegrino v. Robert Half*
Intern., Inc. (2010) 181 Cal.App.4th 713 “[B]etter practice” is for “the trial court [to]
determine the equitable issues before submitting the legal ones to the jury.”]. Same, *Hodge v.*

1 *Superior Court* (2006) 145 Cal.App.4th 278, 284 and *Nwosu v. Uba* (2004) 122 Cal.App.4th
2 1229, 1238, 1244.

3 50. This action has been brought and may be maintained as a class action pursuant to
4 Code of Civil Procedure section 382 because there is a well-defined community of interest in
5 the litigation and the proposed Plaintiff Class is easily ascertainable through the records
6 Defendants are required to keep.

7 51. Numerosity. The members of the Plaintiff Class are so numerous that individual
8 joinder of all of them as Plaintiff is impracticable. While the exact number of the Plaintiff Class
9 Members is unknown to Plaintiff at this time, Plaintiff is informed and believes and thereon
10 alleges that there are more than 100 Plaintiff Class Members.

11 52. Commonality. Common questions of law and fact exist as to all Plaintiff Class
12 Members and predominate over any questions that affect only individual members of the
13 Plaintiff Class. These common questions include, but are not limited to:

- 14 a. Did Defendants violate Labor Code sections 510, 1197, or 1194 by
15 failing to pay minimum, regular, and/or overtime wages for all hours
16 worked, including time subject to Defendants' control?
- 17 b. Did Defendants fail to pay all wages by failing to pay all overtime wages
18 as a result of failing to properly calculate the regular rate of pay?
- 19 c. Did Defendants fail to pay all sick wages by failing to properly calculate
20 the regular rate of pay?
- 21 d. Did Defendants violate Labor Code section 227.3 by failing to pay all
22 vacation wages accrued and earned?
- 23 e. Did Defendants violate Labor Code sections 201 and/or 202 by not
24 paying Plaintiff Class Members who are no longer employed by
25 Defendants all earned wages, including minimum wages, overtime
26 wages, vacation wages, and sick wages upon their termination of
27 employment? If so, were such violations "willful" within the meaning of
28 Labor Code section 203?

- f. Whether Defendants violated Labor Code sections 512 and 226.7 by failing to provide compliant first and second meal periods, or pay one hour of pay in lieu thereof for each missed, untimely, or interrupted meal period?
- g. Whether Defendants violated Labor Code 226.7 and section 11 of the applicable IWC Wage Order regarding meal periods?
- h. Whether Defendants violated Labor Code section 226.7 by failing to provide compliant rest periods, or pay one hour of pay in lieu thereof for each missed, untimely, or interrupted rest period?
- i. Whether Defendants violated Labor Code section 226.7 and section 12 of the applicable IWC Wage Order regarding rest periods?
- j. Whether Defendants engaged in business acts or practices which violate California's Unfair Competition Law ("UCL") as it relates to their policies and practices as to wages and pay?
- k. What are the effects and the extent of any injuries sustained by the Plaintiff Class and Plaintiff Subclass Members and appropriate type and/or measure of damages?
- l. What is the appropriateness and nature of relief to each Plaintiff Class and Subclass Member?
- m. What is the extent of liability of each Defendant, including DOE defendants, to each Plaintiff Class and Subclass Member?

53. Typicality. Plaintiff's claims are typical of the claims of the other members of the Plaintiff Class. Plaintiff and other members of the Plaintiff Class were subject to the same policies and practices of Defendants resulting in underpayment of minimum and overtime hours and the failure to pay all vacation and sick wages. Defendants failed to provide accurate, itemized wage statements to Plaintiff and members of the Plaintiff Class. Defendants did not provide for compliant meal or rest periods or pay premiums in lieu thereof. Defendants also failed to pay all wages owed to Plaintiff and Plaintiff Class Members upon termination of

1 employment.

2 54. Adequacy. Plaintiff will adequately and fairly protect the interests of the
3 members of the Plaintiff Class. Plaintiff has no interest adverse to the interests of absent
4 Plaintiff Class Members. Plaintiff is represented by attorneys who have substantial class action
5 experience in wage-and-hour and class action law.

6 55. Superiority. A class action is superior to other available means for fair and
7 efficient adjudication of the claims of the Plaintiff Class and would be beneficial for the parties
8 and the Court. Class action treatment will allow a large number of similarly-situated and
9 aggrieved persons to prosecute their common claims in a single forum, simultaneously,
10 efficiently, and without the unnecessary duplication of effort and expense that numerous
11 individual actions would require. The damages suffered by each Plaintiff Class Member are
12 relatively small in the sense pertinent to class action analysis, and the expense and burden of
13 individual litigation would make it extremely difficult or impossible for the individual Plaintiff
14 Class Members to seek and obtain individual relief. A class action will serve an important
15 public interest by permitting such individuals to effectively pursue recovery of the sums owed
16 to them. Further, class litigation prevents the potential for inconsistent or contradictory
17 judgments raised by individual litigation.

18 **VI.**

19 **CAUSES OF ACTION**

20 **FIRST CAUSE OF ACTION**

21 **FAILURE TO PAY MINIMUM WAGES FOR ALL HOURS WORKED**

22 **(Labor Code §§ 204, 1194, 1194.2, and 1197)**

23 **(On Behalf of Plaintiff and the Minimum Wage Subclass Against Each Defendant)**

24 56. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
25 full herein.

26 57. Labor Code section 1197 states: “The minimum wage for employees fixed by the
27 commission or by any applicable state or local law, is the minimum wage to be paid to
28 employees, and the payment of a lower wage than the minimum so fixed is unlawful.”

58. Labor Code section 1198 states: “The maximum hours of work and the standard

1 conditions of labor fixed by the commission shall be the maximum hours of work and the
2 standard conditions of labor for employees. The employment of any employee for longer hours
3 than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

4 59. Labor Code section 221 states: “It shall be unlawful for any employer to collect
5 or receive from an employee any part of wages theretofore paid by said employer to said
6 employee.”

7 60. Labor Code section 223 states: “Where any statute or contract requires an
8 employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower
9 wage while purporting to pay the wage designated by statute or by contract.”

10 61. Section 4 of the applicable IWC Wage Order provides that an employer may not
11 pay employees less than the applicable minimum wage for all hours worked.

12 62. Labor Code section 1194(a) states: “Notwithstanding any agreement to work for
13 a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime
14 compensation applicable to the employee is entitled to recover in a civil action the unpaid
15 balance of the full amount of this minimum wage or overtime compensation, including interest
16 thereon, reasonable attorney’s fees, and costs of suit.”

17 63. As set forth herein, Defendants willfully breached their obligation to pay
18 minimum and regular wages to Plaintiff and members of the Minimum Wage Subclass for all
19 hours worked.

20 64. Plaintiff and members of the Minimum Wage Subclass did not receive proper
21 protections and benefits of the laws governing the minimum wages. As set forth above,
22 members of the Minimum Wage Subclass were not paid all minimum and regular wages for all
23 hours worked.

24 65. Furthermore, Plaintiff and other members of the Minimum Wage Subclass were
25 not properly paid for all hours worked including, but not limited to, the time Plaintiff and
26 members of the Minimum Wages Subclass spent undergoing health screenings and answering
27 telephone calls and/or text messages while off-the-clock.

28 66. As a result of the unlawful acts of Defendants, Plaintiff and the Plaintiff Class

1 and the Minimum Wage Subclass he seeks to represent have been deprived of minimum and
2 regular wages and/or other compensation in amounts to be determined at trial, and are entitled
3 to recovery of such amounts, plus interest thereon, liquidated damages in an amount equal to the
4 wages unlawfully unpaid, attorneys' fees, and costs to the fullest extent permitted by law.

5 67. Plaintiff and the Plaintiff Class he seeks to represent request relief as described
6 below.

7 **SECOND CAUSE OF ACTION**
8 **FAILURE TO PAY OVERTIME WAGES**
9 **(Labor Code §§ 510 and 1194)**
10 **(On Behalf of Plaintiff and the Overtime and Regular Rate of Pay Subclasses**
11 **Against Each Defendant)**

12 68. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
13 full herein.

14 69. Labor Code section 510 provides in pertinent part: "Eight hours of labor
15 constitutes a day's work. Any work in excess of eight hours in one workday and any work in
16 excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of
17 work in any one workweek shall be compensated at the rate of no less than one and one-half
18 times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall
19 be compensated at the rate of no less than twice the regular rate of pay for an employee. In
20 addition, any work in excess of eight hours on any seventh day of a workweek shall be
21 compensated at the rate of no less than twice the regular rate of pay of an employee."

22 70. Labor Code section 1198 states: "The maximum hours of work and the standard
23 conditions of labor fixed by the commission shall be the maximum hours of work and the
24 standard conditions of labor for employees. The employment of any employee for longer hours
25 than those fixed by the order or under conditions of labor prohibited by the order is unlawful."

26 71. Section 3 of the applicable IWC Wage Order provides that an employer may not
27 pay non-exempt employees less than the applicable overtime rate for all overtime hours worked.

28 72. As set forth herein, Defendants willfully breached their obligations to pay
overtime wages, violating the provisions of Labor Code sections 510 and 1194, and the
applicable Wage Order.

73. Through Defendants' conduct during the applicable statutory period including, but not limited to, the conduct alleged herein, including that alleged on information and belief, Defendants failed to pay Plaintiff and Plaintiff Class Members all overtime wages for all overtime worked based on incorrect regular rate of pay calculations all in violation of Labor Code sections 510 and 1198, and the applicable Wage Order.

74. As a result of the unlawful acts of Defendants, Plaintiff and the Plaintiff Class and the Overtime and Regular Rate of Pay Subclasses he seeks to represent have been deprived of overtime wages and/or other compensation in amounts to be determined at trial, and are entitled to recovery of such amounts, plus interest thereon, attorneys' fees, and costs.

75. Plaintiff and the Plaintiff Class he seeks to represent request relief as described below.

THIRD CAUSE OF ACTION
FAILURE TO PAY VACATION WAGES
(Labor Code §§ 227.3 and 218.5)
(On Behalf of Plaintiff and the Vacation Subclass Against Each Defendant)

76. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in full herein.

77. Cal. Labor Code section 227.3 states: "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination."

78. As set forth herein, Defendants willfully breached their obligations to pay vacation wages, violating the provisions of Labor Code section 227.3.

79. Through Defendants' conduct during the applicable statutory period including, but not limited to, the conduct alleged herein, including that alleged on information and belief, Defendants failed to pay Plaintiff and Plaintiff Class Members all vacation wages earned and

1 accrued upon termination of employment all in violation of Labor Code section 227.3.

2 80. As a result of the unlawful acts of Defendants, Plaintiff and the Plaintiff Class
3 and the Vacation Subclass he seeks to represent have been deprived of vacation wages and/or
4 other compensation in amounts to be determined at trial, and are entitled to recovery of such
5 amounts, plus interest thereon, attorneys' fees, and costs.

6 81. Plaintiff and the Plaintiff Class he seeks to represent request relief as described
7 below.

8 **FOURTH CAUSE OF ACTION**

9 **FAILURE TO PROVIDE MEAL PERIODS OR PAY IN LIEU THEREOF**

10 **(Labor Code §§ 226.7 and 512)**

11 **(On Behalf of Plaintiff and the First and Second Meal Period Subclasses Against Each**
12 **Defendant)**

13 82. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
14 full herein.

15 83. At all relevant times, Plaintiff and all other members of the Plaintiff Class were
16 employees of Defendants covered by Labor Code sections 226.7 and 512, and the applicable
17 Wage Order.

18 84. Labor Code section 226.7 provides as follows:

19 (b) An employer shall not require an employee to work during a meal
20 or rest or recovery period mandated pursuant to an applicable statute, or
21 applicable regulation, standard, or order of the Industrial Welfare
22 Commission, the Occupational Safety and Health Standards Board, or
23 the Division of Occupational Safety and Health.

24 (c) If an employer fails to provide an employee a meal or rest or
25 recovery period in accordance with a state law, including, but not
26 limited to, an applicable statute or applicable regulation, standard, or
27 order of the Industrial Welfare Commission, the Occupational Safety
28 and Health Standards Board, or the Division of Occupational Safety
and Health, the employer shall pay the employee one additional hour of
pay at the employee's regular rate of compensation for each workday
that the meal or rest or recovery period is not provided.

85. Labor Code section 512(a) provides as follows:

An employer shall 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, except that if the total work period per
day of the employee is no more than six hours, the meal period may be
waived by mutual consent of both the employer and employee. An

1 employer shall not employ an employee for a work period of more than
2 10 hours per day without providing the employee with a second meal
3 period of not less than 30 minutes, except that if the total hours worked is
4 no more than 12 hours, the second meal period may be waived by mutual
consent of the employer and the employee only if the first meal period
was not waived.

5 86. Labor Code section 1198 states: “The maximum hours of work and the standard
6 conditions of labor fixed by the commission shall be the maximum hours of work and the
7 standard conditions of labor for employees. The employment of any employee for longer hours
8 than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

9 87. Section 11(A) of the applicable Wage Order provides, in pertinent part: “No
10 employer shall employ any person for a work period of more than five (5) hours without a meal
11 period of not less than 30 minutes...”

12 88. Section 11(B) of the applicable Wage Order provides, in pertinent part: “An
13 employer may not an employee for a work period of more than ten (10) hours per day without
14 providing the employee with a second meal period of not less than 30 minutes...”

15 89. Defendants failed to provide members of the First and Second Meal Period
16 Subclasses with compliant meal periods as provided in Labor Code sections 226.7 and 512, and
17 failed to pay them the additional pay at the employee’s regular rate of compensation for each
18 work day in lieu of providing duty-free meal period(s).

19 90. Defendants’ policies were non-compliant because, among other reasons, they
20 failed to state employees are entitled to a meal period when working five hours or more, and
21 failed to state that employees are entitles to a second meal period, or premium wages in lieu of
22 meal period, after working periods of ten hours or more. Defendants policies were non-
23 compliant because they did not provide duty-free and uninterrupted meal periods of at least
24 thirty minutes.

25 91. As a result of Defendants’ failure to comply with their obligations under Labor
26 Code sections 226.7 and 512, and the applicable Wage Order, Plaintiff and the other members
27 of the First and Second Meal Period Subclasses have suffered damages in an amount, subject to
28 proof, to the extent they were not paid additional pay owed for the Defendants’ failure to

1 provide meal periods as required by the law.

2 92. At all times, Defendants engaged Plaintiff without having any policy to provide
3 compliant first or second meal periods in the manner required by law, nor did the Defendants
4 provide one hour of pay in lieu of non-compliant meal periods. Further, to the extent any breaks
5 were provided, they were late, less than 30 minutes, and/or Plaintiff was subject to Defendants'
6 control and being called upon to return to duty, and thus not relieved of all duty for a full
7 uninterrupted 30-minute time period.

8 93. Plaintiff and the Plaintiff Class and First and Second Meal Period Subclasses he
9 seeks to represent are entitled to recover the full amount of their unpaid additional pay for
10 Defendants' failure to provide statutory meal periods as required by law. Pursuant to Labor
11 Code section 218.6, Plaintiff and other members of the First and Second Meal Period
12 Subclasses are entitled to recover prejudgment interest on the amount of the additional pay
13 owed.

14 94. Plaintiff and the Plaintiff Class he seeks to represent request relief as described
15 below.

16 **FIFTH CAUSE OF ACTION**

17 **FAILURE TO PROVIDE MANDATED REST PERIODS
18 OR TO PAY ADDITIONAL WAGES IN LIEU THEREOF**

19 **(Cal. Labor Code §§ 226.7 and 558; § 12 of the Applicable IWC Wage Order)
20 (On behalf of Plaintiff and the Rest Period Subclass Against Each Defendants)**

21 95. Plaintiff hereby incorporates all preceding paragraphs of this Complaint as
22 though fully set forth herein.

23 96. Section 12(A) of the IWC Wage order mandates that employees be provided
24 with a rest period of ten (10) minutes per four (4) hours worked, or major fraction thereof.
25 Authorized rest period time shall be counted as hours worked for which there shall be no
26 deduction from wages.

27 97. Labor Code section 226.7(b) provides that no employer shall require an
28 employee to work during any mandated rest period.

98. Pursuant to Labor Code section 226.7(c) and, section 12(B) of the IWC Wage

1 order, an employee is entitled to one additional hour of pay at the employees' regular rate of
2 pay for each work day that the rest period was not provided.

3 99. On information and belief, and at all times relevant, Plaintiff alleges that he and
4 other members of the Rest Period Subclass were denied the required ten (10)-minute rest
5 periods for every four (4) hours, or major fraction thereof, worked per day as non-exempt
6 employees, and that Defendants further failed to provide compensation in lieu of rest periods
7 not provided.

8 100. Specifically, Defendants and each of them, failed to relieve Plaintiff and others
9 similarly situated in order to authorize and permit ten-minute rest periods.

10 101. Defendants did not permit or authorize Plaintiff and Rest Period Subclass
11 Members to take rest periods in accordance with California law by not offering paid rest periods
12 as required by law.

13 102. By their failure to provide Plaintiff and members of the Rest Period Subclass
14 with rest periods as required by California law, and failing to pay one hour of additional wages
15 in lieu of each rest period not provided, Defendants willfully violated Labor Code section 226.7
16 and section 12 of the applicable IWC Wage Order. Accordingly, Defendants are liable for one
17 hour of additional wages at the employee's regular rate of compensation for each work day that
18 a rest period was not lawfully provided.

19 103. As a result of Defendants' unlawful acts, Plaintiff and Rest Period Subclass
20 Members have been deprived of additional wages in amounts to be proven at trial, and are
21 entitled to recover such amounts, plus interest and penalties thereon, attorneys' fees and costs of
22 suit.

23 104. Plaintiff and the Plaintiff Class and Rest Period Subclass he seeks to represent
24 are entitled to recover the full amount of their unpaid additional pay for Defendants' failure to
25 provide statutory rest periods as required by law. Pursuant to Labor Code section 218.6,
26 Plaintiff and other members of the Rest Period Subclass are entitled to recover prejudgment
27 interest on the amount of the additional pay owed.

28 105. Plaintiff and the Plaintiff Class he seeks to represent request relief as described

1 below.

2 **SIXTH CAUSE OF ACTION**
3 **FAILURE TO PROVIDE SICK PAY**
4 **(Labor Code § 246)**
5 **(On Behalf of Plaintiff and the Sick Pay Subclass Against Each Defendant)**

6 106. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
7 full herein.

8 107. Labor Code section 246(1) governs how Defendants were to calculate paid sick
9 leave. Specifically, Cal. Labor Code section 246(1) states:

10 [A]n employer shall calculate paid sick leave using any of the following
11 calculations:

12 (1) Paid sick time for nonexempt employees shall be calculated in the
13 same manner as the regular rate of pay for the workweek in which the
14 employee uses paid sick time, whether or not the employee actually
15 works overtime in that workweek.

16 (2) Paid sick time for nonexempt employees shall be calculated by
17 dividing the employee's total wages, not including overtime premium
18 pay, by the employee's total hours worked in the full pay periods of
19 the prior 90 days of employment.

20 (3) Paid sick time for exempt employees shall be calculated in the
21 same manner as the employer calculates wages for other forms of paid
22 leave time.

23 108. Labor Code section 246(i) further requires that an employer provide employees
24 written notice setting forth the amount of paid sick leave available either on an employee's
25 wage statement pursuant to Section 226 or in a separate writing on the designated pay date.

26 109. As described herein, Plaintiff was paid sick leave at his base rate of pay, which is
27 less than required under either of the two alternative methods of calculation under Cal. Lab.
28 Code section 246(1). Since the paid sick leave was improperly calculated, Defendants also did
not provide Plaintiff and members of the Sick Pay Subclass the proper written notice containing
the correct amount of paid sick leave.

110. As a result of the unlawful acts of Defendants, Plaintiff and members of the Sick
Pay Subclass have suffered and continue to suffer substantial injuries, losses and actual
damages related to Defendants' violations, including lost wages, lost interest on such wages,

1 and expense and attorney's fees in seeking to compel Defendants to fully perform their
2 obligations.

3 111. Accordingly, Plaintiff and the Plaintiff Class and the Sick Pay Subclass he seeks
4 to represent request relief as described below, including statutory penalties up to the maximum
5 amount as permitted by law.

6 **SEVENTH CAUSE OF ACTION**
7 **FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS**
8 **(Labor Code §§ 226 and 1174)**
9 **(On Behalf of Plaintiff and the Wage Statement Subclass Against Each Defendant)**

10 112. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
11 full herein.

12 113. Labor Code section 226, subdivision (a) requires Defendants to itemize in wage
13 statements all gross and net wages earned and to accurately report total hours worked by
14 Plaintiff and members of the Plaintiff Class. Defendants have knowingly and intentionally
15 failed to comply with Labor Code section 226, subdivision (a) on each and every wage
16 statement that should have been provided to Plaintiff and members of the Wage Statement
17 Subclass.

18 114. Labor Code section 1174 requires Defendants to maintain and preserve, in a
19 centralized location, among other items, records showing the names and addresses of all
20 employees employed, payroll records showing the hours worked daily by and the wages paid to
21 their employees. Defendants have knowingly and intentionally failed to comply with Labor
22 Code section 1174.

23 115. Section 7 of the applicable Wage Order requires Defendants to maintain time
24 records showing, including but not limited to, when the employee begins and ends each work
25 period, meal periods, split shift intervals and total daily hours worked in itemized wage
26 statements, and must show all deductions from payment of wages, and accurately report total
27 hours worked by Plaintiff and members of the Plaintiff Class.

28 116. Through Defendants' conduct during the applicable statutory period including,
but not limited to, the conduct alleged herein, including that alleged on information and belief,

1 Defendants failed to provide wage statements accurately reflecting all of the required
2 information, including but not limited to gross wages earned, net wages earned, the name and
3 address of the employer, accurate vacation accrual, accurate paid sick leave, the total hours
4 worked, and all applicable rates of pay and the total number of hours worked at each rate. This
5 information could not be readily determined from the face of the wage statement alone.

6 117. Plaintiff and members of the Wage Statement Subclass suffered injuries as a
7 result of Defendants' intentional and knowing failure to provide to Plaintiff and members of the
8 Wage Statement Subclass accurate wage statements and to maintain the writings required by
9 Labor Code section 226(a).

10 118. As a direct result, Plaintiff and members of the Wage Statement Subclass have
11 suffered and continue to suffer substantial injuries, losses and actual damages related to
12 Defendants' violations, including lost wages, lost interest on such wages, and expense and
13 attorney's fees in seeking to compel Defendants to fully perform their obligations

14 119. Accordingly, Plaintiff and the Plaintiff Class and Wage Statement Subclass he
15 seeks to represent request relief as described below, including statutory penalties up to the
16 maximum amount as permitted by law. Plaintiff and the Plaintiff Class he seeks to represent
17 request relief as described below.

18 **EIGHTH CAUSE OF ACTION**

19 **FAILURE TO PAY WAGES OWED AT TERMINATION**

20 **(Labor Code §§ 201-203)**

21 **(On Behalf of Plaintiff and the Waiting Time Subclass Against Each Defendant)**

22 120. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
23 full herein.

24 121. Labor Code sections 201 and 202 require Defendants to pay employees all wages
25 due no later than 72 hours after resignation from employment, or immediately in the case of
26 discharge by the employer. Labor Code section 203 provides that if an employer willfully fails
27 to timely pay such wages, then the employer must, as a penalty, continue to pay the subject
28 employees' wages until the back wages are paid in full or an action is commenced. The penalty
cannot exceed 30 days of wages.

122. More than 30 days have passed since Plaintiff and members of the Waiting Time Subclass have left Defendants' employ.

123. As alleged above, Plaintiff and the proposed Waiting Time Subclass are entitled to compensation for unpaid minimum, regular, and overtime wages, vacation wages, sick leave wages, and premium wages for non-compliant meal and rest periods, but to date have not received such compensation.

124. As a consequence of Defendants' willful conduct in not paying wages owed, certain members of the Plaintiff Class are entitled to 30 days' wages as a penalty under Labor Code section 203 for failure to pay legal wages, with interest and attorneys' fees and costs.

125. Accordingly, Plaintiff and the Plaintiff Class and Waiting Time Subclass he seeks to represent request relief as described below, including statutory penalties up to the maximum amount as permitted by law.

126. Plaintiff and the Plaintiff Class he seeks to represent request relief as described below.

NINTH CAUSE OF ACTION

VIOLATIONS OF THE UNFAIR COMPETITION LAW

(Business and Professions Code §§ 17200, *et seq.*)

(On Behalf of Plaintiff and the UCL Subclass Against Each Defendant)

127. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in full herein.

128. The failure to pay minimum, regular, and overtime wages, vacation wages, sick leave wages, and meal and rest period premiums caused by Defendants' systematic and routine conduct constituted unlawful, deceptive, and unfair business acts and/or practices within the meaning of Business and Professions Code sections 17200, *et seq.*, including but not limited to a violation of the applicable State of California Industrial Welfare Commission Wage Orders, regulations and statutes, or is a practice which is otherwise unfair, deceptive, and unlawful.

129. This cause of action is brought under Business and Professions Code sections 17203 and 17204, commonly called the Unfair Competition Law. Under this cause of action and pursuant to Business and Professions Code section 17208, Plaintiff and members of the

1 proposed UCL Subclass seek restitution of premium wages and other pay owed, where such
2 wages were due during the Class Period, according to proof.

3 130. This cause of action is brought as a cumulative remedy as provided in Business
4 and Professions Code section 17205, and is intended as an alternative remedy for restitution for
5 Plaintiff, the “Minimum Wage Subclass,” the “Overtime Subclass,” the “Regular Rate of Pay
6 Subclass,” the “First Meal Period Subclass,” the “Second Meal Period Subclass,” the “Rest
7 Period Subclass,” the “Vacation Subclass,” and/or the “Sick Pay Subclass” for any portion of
8 time commencing within three (3) years before filing this complaint, and as the primary remedy
9 for Plaintiff, and aforementioned Subclasses for any portion of time during the *fourth year*
10 before filing this Complaint, as this period of time exceeds the general three-year statute of
11 limitations on statutory wage claims, and is a basis for restitution for all wage claims on an
12 equitable basis and subject to court adjudication.

13 131. As a result of Defendants’ unlawful and unfair business practice of failing to pay
14 minimum, regular, and overtime wages for all applicable hours worked, failing to pay premium
15 wages for non-compliant meal and rest periods, the failure to provide all meal and rest periods
16 as a matter of policy, and the failure to pay vacation and sick leave wages upon termination of
17 employment, Plaintiff and each member of the proposed “Minimum Wage Subclass,” the
18 “Overtime Subclass,” the “Regular Rate of Pay Subclass,” the “First Meal Period Subclass,”
19 the “Second Meal Period Subclass,” the “Rest Period Subclass,” the “Vacation Subclass,”
20 and/or the “Sick Pay Subclass” have suffered damages and are entitled to restitution in an
21 amount according to proof for a time period of four years prior to the filing of this Complaint
22 and until such time as (1) Defendants cease their unlawful business practices, (2) the
23 commencement of trial, and/or (3) a date otherwise determined by the Court pursuant to the
24 laws of California.

25 132. Plaintiff, on behalf of himself and the proposed UCL Subclass, requests the
26 violations of each Defendant be enjoined, and other equitable relief provided, as this court
27 deems proper, including an order requiring Defendants to make tax contributions on the accrued
28 wages in the form of FICA, Social Security, Medicare, Unemployment Insurance, or other

appropriate payments. Defendants' conduct, business acts, and practices undermined competition and were done in order to avoid costs other lawful employers comply with in order to avoid payment of full compensation, wages, and statutory penalties owed.

133. Plaintiff and the members of the UCL Subclass he seeks to represent request relief as described below, including restitution owed, in an amount according to proof, and for reasonable costs of suit and reasonable attorney's fees as provided by the Labor Code, Code of Civil Procedure section 1021.5, or other applicable law.

TENTH CAUSE OF ACTION

PAGA PENALTIES FOR FAILURE TO PAY MINIMUM WAGES FOR ALL HOURS WORKED (On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)

134. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in full herein.

135. Labor Code section 2699(a) provides: "[A]ny provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other employees pursuant to the procedures specified in Section 2699.3."

136. Labor Code section 2699(f)(2) provides: "For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions [] (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation."

137. Section 2699.3(a) applies to any alleged violation of Labor Code sections 1194 and 1194.1, and allows for recovery of PAGA civil penalties. Labor Code § 2699.5.

138. Defendants failed to pay all minimum wages, as alleged herein because Defendants did not pay Plaintiff and other aggrieved employees the legally compliant California

1 minimum wage rate for all hours worked including, but not limited to, the time Plaintiff and
2 other aggrieved employees spent undergoing health screening and answering telephone calls
3 and/or text messages while off-the-clock.

4 139. Defendants failed to pay all minimum wages during the PAGA Period. Plaintiff
5 will seek \$100 for the initial pay period an employee was underpaid, and \$200 for each
6 subsequent violation.

7 **ELEVENTH CAUSE OF ACTION**

8 **PAGA PENALTIES FOR FAILURE TO PAY OVERTIME WAGES**
9 **(On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)**

10 140. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
11 full herein.

12 141. “Notwithstanding any agreement to work for a lesser wage, any employee
13 receiving less than the legal minimum wage or the legal overtime compensation applicable to
14 the employee is entitled to recover in a civil action the unpaid balance of the full amount of this
15 minimum wage or overtime compensation, including interest thereon, reasonable attorney’s
16 fees, and costs of suit.” Labor Code § 1194(a).

17 142. “[A]ny provision of this code that provides for a civil penalty to be assessed and
18 collected by the Labor and Workforce Development Agency or any of its departments,
19 divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an
20 alternative, be recovered through a civil action brought by an aggrieved employee on behalf of
21 himself or herself and other current or former employees pursuant to the procedures specified in
22 Section 2699.3.” Labor Code § 2699(a).

23 143. “For all provisions of this code except those for which a civil penalty is
24 specifically provided, there is established a civil penalty for a violation of these provisions []
25 (2) If, at the time of the alleged violation, the person employs one or more employees, the civil
26 penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial
27 violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each
28 subsequent violation.” Labor Code § 2699(f)(2).

144. Section 2699.3(a) applies to any alleged violation of Labor Code sections 510,

1 1194, and 1194.1, and allows for recovery of PAGA civil penalties. Labor Code § 2699.5.

2 145. Defendants failed to correctly calculate the regular rate of pay when paying
3 overtime wages during the PAGA Period. Plaintiff will seek \$100 for the initial pay period an
4 employee was underpaid, and \$200 for each subsequent violation.

5 **TWELFTH CAUSE OF ACTION**

6 **PAGA PENALTIES FOR FAILURE TO PAY VACATION WAGES
(On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)**

7 146. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
8 full herein.

9 147. Labor Code section 227.3 states: “Unless otherwise provided by a collective-
10 bargaining agreement, whenever a contract of employment or employer policy provides for paid
11 vacations, and an employee is terminated without having taken off his vested vacation time, all
12 vested vacation shall be paid to him as wages at his final rate in accordance with such contract
13 of employment or employer policy respecting eligibility or time served; provided, however, that
14 an employment contract or employer policy shall not provide for forfeiture of vested vacation
15 time upon termination.”

16 148. Defendants failed to pay Plaintiff and other aggrieved employees all vacation
17 wages earned and accrued upon termination of employment.

18 149. Defendants’ conduct violates Labor Code Section 227.3

19 150. Labor Code section 2699(f)(2) provides for civil penalties for violations of the
20 Labor Code for which there is no corresponding civil penalty, including Labor Code section
21 227.3. The civil penalty is \$100 for the initial violation and \$200 for each subsequent violation
22 for each underpaid employee. Labor Code § 2699(f)(2).

23 **THIRTEENTH CAUSE OF ACTION**

24 **PAGA PENALTIES FOR FAILURE TO PROVIDE MEAL PERIODS OR PAY IN LIEU
THEREOF
(On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)**

25 151. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
26 full herein.

27 152. By failing to provide duty-free meal periods of at least 30 minutes for shifts of
28

1 five hours or more, which began before the end of the fifth hour of work, and a second 30-
2 minute meal period for shifts of ten hours or more, which began before the end of the tenth hour
3 of work, Defendants willfully violated Labor Code sections 226.7 and 512, and Wage Order 7-
4 2001.

5 153. By failing to pay employees one hour of pay at their regular rate of
6 compensation for each workday a meal period was not provided, Defendants willfully violated
7 Labor Code sections 226.7 and 512, and Wage Order 7-2001.

8 154. During the PAGA Period, Defendants failed to provide compliant meal periods.
9 Plaintiff will seek penalties of \$100 for the initial pay period an employee was underpaid, and
10 \$200 for each subsequent violation. Labor Code § 2699(f)(2).

11 **FOURTEENTH CAUSE OF ACTION**

12 **PAGA PENALTIES FOR FAILURE TO PROVIDE MANDATED REST PERIOD OR**
13 **TO PAY ADDITIONAL WAGES IN LIEU THEREOF**
(On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)

14 155. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
15 full herein.

16 156. By failing to authorize and permit rest periods of at least 10 minutes for every
17 four (4) hours or major fraction thereof worked per day, Defendants willfully violated
18 provisions of Labor Code section 226.7 and Wage Order 7-2001.

19 157. By failing to provide one hour of pay at their regular rate of compensation when
20 rest periods were not permitted or authorized, Defendants willfully violated the provisions of
21 Labor Code section 226.7 and Wage Order 7-2001.

22 158. During the applicable statutory period, Defendants failed to provide rest periods.
23 Plaintiff will seek penalties of \$100 for the initial pay period an employee was underpaid, and
24 \$200 for each subsequent violation. Labor Code § 2699(f)(2).

25 ///

26 ///

27 ///

28 ///

FIFTEENTH CAUSE OF ACTION

**PAGA PENALTIES FOR FAILURE TO PROVIDE SICK PAY
(On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)**

159. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in full herein.

160. Employers must calculate paid sick leave for non-exempt employees in one of two ways (Labor Code § 246 (l)):

(1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.

(2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

161. Defendants failed to correctly calculate the regular rate of pay when paying sick leave wages during the PAGA Period. Plaintiff will seek \$100 for the initial pay period an employee was underpaid, and \$200 for each subsequent violation.

SIXTEENTH CAUSE OF ACTION

**PAGA PENALTIES FOR FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS
(On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)**

162. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in full herein.

163. Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees an accurate itemized statement in writing showing, among other things, gross and net wages earned, total hours worked, and the number of hours worked at each hourly rate by the employee during the pay period. Labor Code § 226(a).

164. Defendants intentionally and willfully violated Section 226 by failing to provide wage statements which included information called for in Sections 226(a)(1) (2), (5) and (9).

165. Aggrieved employees are entitled to pursue PAGA civil penalties for violations of Labor Code section 226. Labor Code § 2699.5.

166. Labor Code section 226.3 provides for civil penalties for Section 226 violations.

1 Plaintiff seeks civil penalties of \$250 for initial violations and \$1,000 for subsequent violations.

2 **SEVENTEENTH CAUSE OF ACTION**

3 **PAGA PENALTIES FOR TO PAY WAGES OWED AT TERMINATION**
4 **(On Behalf of Plaintiff and Aggrieved Employees Against Each Defendant)**

5 167. Plaintiff incorporates and re-alleges the preceding paragraphs as if set forth in
6 full herein.

7 168. Labor Code sections 201-202 require employers to pay wages earned by
8 employees within certain times. Defendants had a consistent and uniform policy, practice, and
9 procedure of willfully failing to pay the earned wages of Defendants' employees and former
10 employees, within the time required by law.

11 169. Defendants failed to timely pay Plaintiff and other aggrieved employees all
12 wages when due, including final wages at termination, as required by Labor Code sections 201-
13 202.

14 170. An employer willfully failing to timely pay all wages during employment must,
15 as a statutory penalty, pay the wages for 30 days, or until paid in full. Labor Code § 203.

16 171. Defendants failed to pay Plaintiff and other aggrieved employees all final wages
17 in a timely manner as required by Labor Code section 203. Plaintiff will seek penalties of \$100
18 for the initial pay period an employee was not paid all final wages.

19 **VII.**

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiff STEVEN KANE, on behalf of himself and all other similarly-
22 situated and aggrieved employees, prays for judgment only as to those remedies which are
23 permissible in superior court or district court and not subject to being compelled to arbitration
24 as follows:

25 a. For certification of this action as a class action pursuant to Code of Civil
26 Procedure section 382;

27 b. For appointment of Plaintiff as the representatives of the Plaintiff Class and
28 Subclasses;

c. For appointment of counsel for Plaintiff as Class Counsel;

1 d. For an order bifurcating the action into liability and damages stages, or as
2 otherwise efficient for the administration of justice;

3 e. On the First and Second Causes of Action, for unpaid regular wages at minimum
4 wage or regular rate of pay, and/or overtime wages as required by Labor Code sections 1194-
5 1197 for each “Minimum Wage,” “Overtime,” and “Regular Rate of Pay” Subclass Member in
6 an amount according to proof;

7 f. On the First and Second Causes of Action, for liquidated damages under Labor
8 Code section 1194.2 for each “Minimum Wage” Subclass Member for unpaid minimum wages
9 under Labor Code section 1194;

10 g. On the Third Cause of Action for unpaid vacation pay to each “Vacation Pay”
11 Subclass Member pursuant to Labor Code section 227.3;

12 h. On the Fourth Cause of Action for unpaid Premium Wages for non-compliant
13 meal periods at one hour of regular rate of pay to each “First Meal Period” and “Second Meal
14 Period” Subclass Member pursuant to Labor Code sections 226.7 and 512, and Section 11 of the
15 applicable Wage Order;

16 i. On the Fifth Cause of Action for unpaid Premium Wages for non-compliant rest
17 periods at one hour of regular rate of pay to each “Rest Period” Subclass Member pursuant to
18 Labor Code section 226.7 and Section 12 of the applicable Wage Order;

19 j. On the Sixth Cause of Action for unpaid sick leave, interest, and an injunction
20 against the unlawful practice of calculating paid sick leave at in incorrect rate of pay to each
21 “Sick Pay” Subclass Member pursuant to Labor Code section 246(l);

22 k. On the Seventh Cause of Action for statutory damages and penalties under Labor
23 Code sections 226(e), to the extent provided by law, up to a maximum of \$4,000.00 per “Wage
24 Statement” Subclass Member, in an amount according to proof;

25 l. On the Eighth Cause of Action, for statutory damages of up to 30 days of pay at
26 the regular rate of pay for failing to timely remit payment of wages to former employees in the
27 “Waiting Time Subclass” pursuant to Labor Code sections 201-203, in an amount according to
28 proof;

1 m. On the Ninth Cause of Action, for the UCL Subclass, to recover all restitution for
2 minimum, regular, and overtime wages, meal and rest period premiums, and any other form of
3 wages, including but not limited to vacation and sick leave wages, that were not paid to
4 members of the UCL Subclass during the Class Period as a result of conduct of all Defendants.
5 Said restitution may be calculated in accordance with California Business and Professions Code
6 sections 17203 and 17204, including trial of UCL claims by the Court in equity before legal
7 claims, in an amount according to proof;

8 n. For restitution of wages and liquidated damages under Labor Code sections
9 1194, 1194.2, and 1197, in an amount to be assessed and according to proof;

10 o. This action be maintained as a PAGA Representative Action, and Plaintiff and
11 his counsel be provided with enforcement capability as if the action were brought by the DLSE;

12 p. For civil penalties under Labor Code section 2699 for failure to pay minimum
13 overtime wages pursuant to Sections 512 and 1194, in an amount according to proof;

14 q. For civil penalties under Labor Code sections 558 and 1197.1 for failing to pay
15 overtime wages for all hours worked, in an amount according to proof;

16 r. For recovery of all civil penalties as permitted by Labor Code section 2699 for
17 unpaid vacation wages owed pursuant to Labor Code section 227.3, in an amount according to
18 proof

19 s. For recovery of civil penalties under Labor Code section 2699 for failure to pay
20 all sick leave wages owed pursuant to Labor Code section 246 (l);

21 t. For civil penalties under Labor Code section 2699 for failure to provide meal
22 periods compliant with Labor Code sections 226.7 and 512, in an amount according to proof;

23 u. For civil penalties under Labor Code section 2699 for failure to pay all meal
24 period premiums due pursuant to Labor Code section 226.7, in an amount according to proof;

25 v. For civil penalties under Labor Code section 2699 for failure to authorize and
26 permit rest periods, pursuant to Labor Code section 226.7(a), in an amount according to proof;

27 w. For civil penalties under Labor Code section 2699 for failure to pay all rest
28 period premiums due pursuant to Labor Code section 226.7(b), in an amount according to proof;

x. For civil penalties under Labor Code section 2699(f)(2) for failing to timely pay all final wages at termination, and waiting time penalties, pursuant to Labor Code sections 201-203;

y. For civil penalties under Labor Code section 2699(f)(2) for failing to pay statutory waiting time penalties due pursuant to Labor Code section 203;

z. For all civil penalties to be distributed 75% to the LWDA and 25% to the aggrieved employees, subject to approval by the Court, pursuant to Labor Code section 2699(i);

aa. For Pre-Judgment and Post-Judgment interest, to the extent permitted by law as to any restitution recovery;

bb. For Attorneys' fees and costs of suit, including expert fees and fees, pursuant to California Labor Code sections 218.5, 1194, and 2698, *et seq.*, and/or Code of Civil Procedure section 1021.5 on a public benefit theory; and all other applicable state laws;

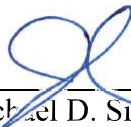
cc. For all interest accrued;

dd. For injunctive relief; and

ee. Such other legal equitable relief as this Court deems necessary, just, equitable and proper.

COHELAN KHOURY & SINGER

Dated: May 11, 2021

By: 
Michael D. Singer
J. Jason Hill
Counsel for Plaintiff STEVEN KANE

VIII.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial of all claims triable as of right by jury.

COHELAN KHOURY & SINGER

Dated: May 11, 2021

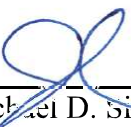
By: 
Michael D. Singer
J. Jason Hill
Counsel for Plaintiff STEVEN KANE

EXHIBIT A

COHELAN KHOURY & SINGER

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

TIMOTHY D. COHELAN, APLC*
ISAM C. KHOURY, APC
DIANA M. KHOURY, APC
MICHAEL D. SINGER, APLC •

(*Also admitted in the District of Columbia)
(•Also admitted in Colorado)

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JEFF GERACI
J. JASON HILL†
KRISTINA DE LA ROSA
ROSEMARY KHOURY

(† Also admitted in Illinois)

February 22, 2021

NOTICE VIA ONLINE SUBMISSION

California Labor and Workforce Development Agency

VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT

Smithfield Direct, LLC
200 Commerce St.
Smithfield, VA 23430

Smithfield Direct, LLC
c/o CT Corporation System
208 So Lasalle St, Suite 814
Chicago, IL 60604

Re: Notice pursuant to California Labor Code sections 2698, *et seq.*, the Private Attorneys General Act (“PAGA”), sent by Steven Kane on behalf of himself and all other aggrieved employees of Smithfield Direct, LLC in the State of California

Dear PAGA Administrator and Smithfield Direct, LLC:

Mr. Steven Kane (“Mr. Kane” or “Claimant”) submits notice of Labor Code and Industrial Welfare Commission Wage Order violations by Smithfield Direct, LLC (“Smithfield” or “Employer”). Mr. Kane seeks to represent himself and other aggrieved employees in a Private Attorneys General Act (“PAGA”) action against Smithfield pursuant to Labor Code §§ 2698, *et seq.* For purposes of this notice, “aggrieved employees” includes all of Employer’s non-exempt California employees paid, at least in part, with commission, and subject to the same or similar policies described below.

FACTUAL STATEMENT

Mr. Kane, a California resident, worked for Smithfield in California as a Route Sales Representative/Associate (“RSR”) from approximately November 2015 through November 2020. His core duties were delivering, stocking and selling product to retail stores such as Dollar General, Dollar Central and Big Lots. Mr. Kane was paid \$10.50 per hour, plus a weekly commission of \$425.00. Mr. Kane worked 5 days per week at a range of 45-50 hours per workweek.

Mr. Kane received commissions, in addition to his hourly wages while employed by Smithfield. Those additional amounts should have been included when calculating his regular rate of pay and used when paying overtime wages, premium wages, and sick leave wages, but were not.

For the last year or more, the Employer did not provide Claimant paid 10-minute rest periods for every four hours (or major fraction thereof) worked and did not provide premium wages in violation of Labor Code section 226.7 and IWC Wage Order 4-2001, section 12. See,

Vaquero v. Stoneledge Furniture (2017) 9 Cal.App.4th 98, (commission-based compensation system that did not pay an hourly rate for rest break violates California minimum wage statutes.

Claimant alleges that he and other aggrieved employees were never permitted paid rest break periods, nor paid one hour of pay at their at least minimum wages.

Mr. Kane asserts that RCR's in California generally worked 9-10 hour shifts per day without an unpaid 30-minute meal period for approximately every 5 hours worked. While there was occasional downtime, Mr. Kane alleges that Smithfield required him to falsify time records indicating unpaid meal periods 90% of shifts worked. This violates Labor Code section 226.7, 512(a) and IWC Wage Order 4-2001, section 11. Smithfield never paid one hour of pay in lieu of providing a meal period at any time during Mr. Kane's employment.

Further, Mr. Kane's wage statements on the commission plan show over 40-hours per week worked in a pay period, but no overtime was paid. In fact, due to low business volume, Mr. Kane's commission pay rate did not come close to meeting required California minimum wages, in violation of Labor Code sections 510, 1197, 1197.1, 1194, and/or Labor Code section 1194.2.

Similarly, Mr. Kane's wage statements show that due to the skewed commission plan, sick pay was not properly calculated at his regular rate of pay, but only his base commission pay rate in violation of California law. The same is true of vacation accrual, as wage statements show vacation accrual at less than minimum wage in violation of Labor Code section 227.3.

Mr. Kane's wage statements also violated California Labor Code section 226(a)(9) by failing to list the true and proper name of the employer, and in fact, the California Secretary of State website shows that the employer's true identity is Smithfield Direct, LLC, not "generically" Smithfield Direct, as there is no such registered name in California under Smithfield Direct. This mislead claimant and his counsel in determining the true identity of the employer as it was not correctly stated on pay statements. This implicates civil and statutory penalties under Labor Code section 226(e) and Labor Code section 226.3.

Finally, Mr. Kane separated from employment on November 13, 2020, but all final wages were not paid not paid until December 11, 2020. This violates Labor Code sections 203, 210 and 256 for untimely paid final wages, for which noncumulative civil penalties can be assessed for Mr. Kane and all other aggrieved employees pursuant to Labor Code section 2699(f)(2).

FAILURE TO PAY MINIMUM, REGULAR, AND OVERTIME WAGES

(Labor Code sections 218, 510, 1194, 1197, 1197.1, 1198, and 1199(c) and the "Minimum Wages" and "Hours and Days of Work" Sections of the Applicable Wage Order)

Labor Code section 510 provides in pertinent part: "Eight hours of labor constitutes a day's work. Any work in excess of 8 hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall 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 for an employee. In addition, any work in excess

of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.”

Labor Code section 1194(a) states: “Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.”

Labor Code section 1198 provides: “The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

Labor Code section 1199, which is a statute listed for which PAGA default civil penalties are recoverable pursuant to Labor Code sections 2699.5 and 2699(f)(2), provides that:

Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars (\$100) or by imprisonment for not less than 30 days, or by both, who does any of the following:

- (a) Requires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission.
- (b) Pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission.
- (c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission.

Labor Code section 1197 states: “The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful. This section does not change the applicability of local minimum wage laws to any entity.”

Labor Code section 1197.1 states: “Any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, and any applicable penalties imposed pursuant to Section 203. For any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid. For each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed.”

Pursuant to the “Hours & Days of Work” Section of the applicable Wage Order, an employer may not pay non-exempt employees less than the applicable overtime rate for all overtime hours worked.

Pursuant to the “Minimum Wages” and “Hours & Days of Work” Sections of the applicable Wage Order, an employer may not pay employees less than the applicable minimum wage for all hours worked and provides that an employer may not pay non-exempt employees less than the applicable overtime rate for all overtime hours worked.

The Employer violates Labor Code sections 218, 510, 1194, 1197, and 1198, and the “Minimum Wages” and “Hours and Days of Work” Sections of the Applicable Wage Order because it does not pay Claimant and other aggrieved employees all minimum, regular, and overtime wages for all hours worked. The Employer fails to pay for all hours worked, including hours worked by Claimant and other aggrieved employees while undergoing daily medical checks by the Employer, which involves the Employer taking employees’ temperature to ensure they are not sick and potentially infected with the Coronavirus. Furthermore, the Employer routinely and regularly contacts Claimant and other aggrieved employees via telephone and/or text message while Claimant and other aggrieved employees are off-the-clock to inform them of the following day’s delivery load, without paying any compensation for these hours worked. Additionally, on information and belief, the Employer pays Claimant and other non-exempt employees non-discretionary bonuses and fails to incorporate these bonus payments into the employees’ regular rate of pay for purposes of calculating the accurate overtime rate of pay. As a result, the overtime wages paid by the Employer are inaccurate and underpaid.

Finally, neither Claimant nor other aggrieved employees under Smithfield’s commission plan were paid at least minimum wages for 10-minute rest periods in violation of *Vaquero, supra*.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of all aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PROVIDE MEAL AND REST PERIODS

(Labor Code sections 226.7, 512, and 1198, and the “Meal Period” and “Rest Period” Sections of the applicable IWC Wage Order)

Labor Code section 512(a) states in pertinent part: “[A]n 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. 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” Labor Code section 226.7(a) states that “no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.”

The “Rest Period” Section of applicable IWC Wage Order states: “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.” If an employer fails to provide an employee a rest period in accordance with the applicable provision of the order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation of each workday that the rest period is not provided.

Labor Code section 226.7(c) states: “[I]f an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the IWC, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.”

The Employer fails to provide Claimant and other aggrieved employees with legally compliant meal and rest periods on eligible workdays. The Employer regularly fails to provide a duty-free and uninterrupted meal period before the end of the fifth hour of work and fails to provide a second meal period on shifts of more than 10 hours, as required under California law. Furthermore, the meal periods provided to Claimant and other aggrieved employees were often short insofar as they were not at least 30 minutes in length, as required under California law. On information and belief, Claimant and other aggrieved employees did not waive their right to receive meal periods, including second meal periods and third rest periods on eligible shifts of more than ten hours. On information and belief, the Employer fails to provide Claimant and other aggrieved employees with legally compliant off-duty meal periods and duty-free rest periods as required by Labor Code sections 226.7 and 512, and sections 11 and 12 of the applicable IWC Wage Order. The Employer requires Claimant, and on information and belief, other non-exempt employees to punch in and out multiple times at the end of a shift and then adjusts the time clock punches to make it appear as though employees received compliant meal periods. Furthermore, the Employer fails to pay one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal and/or rest period was not provided, in accordance with California law.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

**FAILURE TO TIMELY PAY WAGES DUE DURING AND UPON TERMINATION OF
EMPLOYMENT**

(Labor Code sections 201, 202, 203, 204, 256, 1198, and 2699)

Labor Code section 201 states: “If an Employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.” Labor Code section 202 states: “If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.”

Labor Code section 203(a) states, in relevant part: “If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, 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 shall not continue for more than 30 days. An employee who secretes or absents themselves to avoid payment to them, or who refuses to receive the payment when fully tendered to them, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which the employee so avoids payment.”

Labor Code section 204(a) states, in pertinent part: “All wages . . . earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.” The “Minimum Wages” Section of the applicable Wage Order further states “every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period.”

Labor Code section 256 states: “The Labor Commissioner shall impose a civil penalty in an amount not exceeding 30 days of pay as waiting time under the terms of Section 203.”

As detailed above, the Employer fails to pay Claimant and other aggrieved employees all wages that were due and owing to them including meal and rest period premiums, and regular, minimum, and overtime wages within the required time during their employment and upon their separation of employment, in violation of the Labor Code and the applicable IWC Wage Order because of the violations alleged herein. Additionally, the Employer fails to timely pay aggrieved employees all wages due upon separation of employment. As a result, the Employer violated the above sections of the Labor Code.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of all aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PROVIDE PAID SICK LEAVE

(Labor Code sections 246, 248.5)

Employers must calculate paid sick leave for non-exempt employees in one of two ways:

- (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
- (2) Paid sick time for nonexempt employees shall be calculated by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days of employment.

Labor Code § 246 (1)

Mr. Kane was paid sick leave at his base rate of pay, which is less than required under either of the two alternative methods of calculation.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PAY ALL VACATION WAGES
(Labor Code sections 218.5, 218.6, 227.3, and 2698, *et seq.*)

California Labor Code section 227.3 states, in pertinent part: “Whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.”

The Employer failed to comply with Labor Code section 227.3 by failing to pay all vacation wages due and earned to Claimant and all other aggrieved employees. Claimant and other aggrieved employees accrued vacation wages on the total hours worked. Due to Employer’s failure to pay all wages, as detailed above, for all hours worked, the vacation wages paid to Claimant and other aggrieved employees were underpaid and incorrect.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

**CIVIL PENALTIES FOR VIOLATION OF
THE LABOR CODE AND IWC WAGE ORDERS**
(Labor Code sections 558, 558.1, and 1197.1)

Labor Code section 558 subjects any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of Part 2, Chapter 1, of the Labor Code or any provision regulating hours and days of work in any IWC Wage Order to a civil penalty in the amount of \$50 for any initial violation for each pay period in which an employee is underpaid in addition to an amount sufficient to recover underpaid wages, and \$100 for each subsequent violation in addition to an amount sufficient to recover underpaid wages, which shall be paid to each affected employee.

Labor Code section 558.1(a) states: “Any Employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the Employer for such violation.” Labor Code section 558.1 expressly defines “employer or other person acting on behalf of an employer” to include a “natural person who is an owner, director, officer, or managing agent of the employer.”

Accordingly, Claimant will pursue civil penalty or other lawful remedies for himself and other aggrieved employees, including recovery of attorney's fees, costs, and civil penalties to the extent allowed by law. However, pursuant to the recent California Supreme Court decision in *ZB, N.A. v. Superior Court* (2019) 8 Cal. 5th 175, 252 Cal. Rptr. 3d 228, 448 P.3d 239, Claimant does not seek underpaid wages as part of any anticipated PAGA action.

DUTIES OF EMPLOYER

(Labor Code sections 1174, 1174.5, 1175, and 1198, and the Applicable Wage Order)

Labor Code section 1174 describes certain duties of every employer in this state. Subsection (d) of this labor code section requires that payroll records show the hours worked daily by employees and the corresponding wages to be paid for the hours worked. The Employer violated this requirement by its failure to list the correct rate of pay. Labor Code section 1174.5 imposes a civil penalty of \$500 for an employer's failure to maintain accurate and complete records. This civil penalty is addition to the civil penalty of \$100 per pay period, per aggrieved employee that would be imposed pursuant to Labor Code section 2699 for a violation of Labor Code section 1174(d). Furthermore, Claimant and all other aggrieved employees are entitled to collect 25% of the penalty imposed pursuant to Section 2699.

The Employer fails to accurately record all accurate hours worked by Claimant and other aggrieved employees and fails to record all accurate wages to be paid.

Claimant will pursue all remedies on behalf of himself and other aggrieved employees, including recovery of attorney's fees, costs, damages and penalties to the extent allowed by law.

ATTORNEY'S FEES, COSTS, INTEREST AND PENALTIES

(Labor Code sections 226(e) and 2699(g)(1))

Labor Code sections 226(e) and 2699(g)(1) give employees the right to recover in a civil action, penalties, including interest thereon, reasonable attorney's fees, and costs of suit.

Pursuant to Labor Code sections 2699, *et seq.*, aggrieved employees are entitled to collect 25% of the penalty assessed. Accordingly, the Employer is liable for these items.

Labor Code section 226(e)(1) provides "[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees."

Labor Code section 2699(g)(1) provides "[e]xcept as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable

California LWDA
Smithfield Direct, LLC
Re: Steven Kane
February 22, 2021
Page | 9

attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part."

Claimant has already incurred costs and attorney's fees and will continue to incur costs as a result of the Employer's unlawful actions.

CONCLUSION

The facts and claims contained herein are based on the information available at the time of this writing. Therefore, if through discovery and/or expert review, Claimant becomes aware of additional claims, he reserves the right to revise these facts and/or add any new claims by amending the claim letter or by adding applicable causes of action.

Sincerely,
COHELAN KHOURY & SINGER



J. Jason Hill, Esq.

cc:
Via Email only
Emil Davtyan, Esq.
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