

FILED

2024 MAY -7 PM 2:50

STEPHANIE BOHRER, CLERK

BY NATALIE BASHAW
DEPUTY

JAMES HAWKINS APLC

James R. Hawkins, Esq. SBN 192925
Christina M. Lucio, Esq. SBN 253677
Mitchell J. Murray, Esq. SBN 285691
9880 Research Drive, Suite 200
Irvine, CA 92618
TEL: (949) 387-7200
FAX: (949) 387-6676

Attorneys for Plaintiff, DENNIS TONY DUTRA, on behalf of
himself and all others similarly situated

KINGSLEY & KINGSLEY, APC

ERIC B. KINGSLEY, Esq. (SBN 185123)
eric@kingsleykingsley.com
LIANE KATZENSTEIN LY, Esq., (SBN 259230)
liane@kingsleykingsley.com
JESSICA BULAON, Esq. (SBN 340749)
jessi@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Tel: (818) 990-8300, Fax (818) 990-2903

Attorneys for Plaintiff, DANIELLE MARCY, on behalf of
himself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN JOAQUIN

DENNIS TONY DUTRA and DANIELLE
MARCY, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

J.R. SIMPLOT COMPANY, a Nevada
Corporation; and DOES 1 through 50,
inclusive,

Defendant.

CASE NO. STK-CV-UOE-2021-002402

Assigned for All Purposes to:
Hon. Robert T. Waters, Dept. 11B

**THIRD AMENDED CLASS AND
REPRESENTATIVE ACTION
COMPLAINT FOR:**

- 1) Failure to Pay Minimum Wages;
- 2) Failure to Pay Overtime Wages;
- 3) Failure to Provide Meal Breaks;
- 4) Failure to Provide Rest Breaks;
- 5) Failure to Timely Pay Wages During Employment;

COPY

FILED

- 6) Failure to Timely Pay Wages At Separation;
- 7) Knowing and Intentional Failure to Comply with Itemized Wage Statement Provisions;
- 8) Violation of the California Unfair Competition Laws;
- 9) Civil Penalties Under the Private Attorney's General Act, Labor Code § 2698 et seq.

JURY TRIAL DEMANDED

Plaintiffs, DENNIS TONY DUTRA and DANIELLE MARCY, on behalf of themselves and all others similarly situated, complains of Defendant J.R. SIMPLOT COMPANY, a Nevada Corporation, and DOES 1 through 50, inclusive, and each of them, and for causes of action alleges:

I.

INTRODUCTION

1. The purpose of this Third Amended Complaint is to consolidate the following cases into the present action:

1. *Dennis Tony Dutra v. J.R. Simplot Company, San Joaquin Superior Court, Case No. STKCV-UOE-2021-4841 ("Dutra PAGA Action");*
2. *Danielle Marcy v. J.R. Simplot Company, U.S.D.C. Eastern District of California, Case No. 2:22-cv-00523-TLN-CKD ("Marcy Class Action"); and*
3. *Danielle Marcy v. J.R. Simplot Company, U.S.D.C. Eastern District of California, Case No. 2:22-cv-01971-TLN-CKD ("Marcy PAGA Action")*

2. This is a Class Action, pursuant to Code of Civil Procedure section 382, on behalf of Plaintiffs and the following Class Members:

- 1 a. All current and former hourly, non-exempt drivers employed by Defendant in
2 California from January 24, 2019 to January 24, 2024 (the “Dutra Class
3 Members”); and
4 b. All current and former non-exempt employees of Defendant in California who
5 were paid at least one meal break premium from January 24, 2019 to January
6 24, 2024 (the “Marcy Class Members”).
- 7 3. From January 24, 2019, Defendant consistently maintained and enforced against Dutra
8 Class Members, the following unlawful practices and policies, in violation of California state
9 wage and hour laws: a) failing to pay all wages earned, including minimum wages and overtime;
10 b) failing to provide lawful meal and rest periods; c) failing to timely pay wages during
11 employment and at termination; d) failing to provide accurate itemized wage statements; e)
12 failing to provide paid sick leave; and f) failing to keep accurate records.
- 13 4. From at least January 24, 2019, Defendant consistently maintained and enforced against
14 Marcy Subclass Members, who received at least one meal break premium, the following unlawful
15 practices and policies, in violation of California state wage and hour laws: a) failing to provided
16 lawful meal periods, b) failing to timely pay wages during employment and at termination, and
17 c) failing to provide accurate wage statements.
- 18 5. Plaintiffs also bring this action pursuant to the PAGA on a representative basis on behalf
19 of the following Aggrieved Employees or PAGA Members:
20 1. All current and former non-exempt employees of Defendant in California from
21 March 20, 2020 to January 24, 2024 (the “Dutra PAGA Members”); and
22 2. All current and former non-exempt employees of Defendant who were paid at least
23 one meal break premium from January 25, 2021 to January 24, 2024.
- 24 6. Plaintiffs bring this suit on behalf of themselves and the Aggrieved Employees during the
25 relevant time period to recover civil penalties and address the employer’s violations of the
26 California Labor Code and the IWC Wage Order.
27
28

1 7. Plaintiffs on behalf of themselves, all Class Members, all Aggrieved Employees bring
2 this action pursuant to Labor Code sections 201, 202, 203, 204, 210, 216, 218.5, 221-224, 226,
3 226(a), 226.3, 226.7, 245-249, 510, 512, 558, 1174, 1175, 1182.2, 1194, 1194.2, 1195, 1197,
4 1197.1, 1198, Industrial Wage Order 9 and 4, and Cal Code Regs. Title 8, § 11090, seeking
5 unpaid wages, penalties, injunctive and other equitable relief, and reasonable attorneys' fees and
6 costs.

7 8. Plaintiffs, on behalf of himself and all Class Members, pursuant to Business and
8 Professions Code sections 17200-17208, also seeks injunctive relief and restitution of all benefits
9 Defendant enjoyed from their failure to pay all wages, including proper sick pay and overtime, to
10 Plaintiffs and the Class Members.

11 II.

12 JURISDICTION AND VENUE

13 9. Defendant removed this case from the California Superior Court of California, County of
14 San Joaquin to the United States District Court for the Eastern District of California based upon
15 its contention that jurisdiction existed under the Class Action Fairness Act of 2005.

16 10. On November 21, 2023, the United States District Court for the Eastern District of
17 California, based upon a stipulation of the parties, remanded this case to the California Superior
18 Court of California, County of San Joaquin.

19 10. This Court has jurisdiction over this action pursuant to the California Constitution
20 Article VI §10, which grants the California Superior Court original jurisdiction in all causes
21 except those given by statute to other courts. The statutes under which this action is brought do
22 not give jurisdiction to any other court. Venue as to each Defendant is proper in this judicial
23 district pursuant to Code of Civil Procedure section 395. On information and belief, Defendant
24 do business in the County of San Joaquin and each Defendant is within the jurisdiction of this
25 Court for service of process purposes.
26
27
28

11. The unlawful acts alleged herein have a direct effect on Plaintiffs and those similarly situated within the State of California and within San Joaquin County. On information and belief, Defendant employ numerous Class Members and Aggrieved Employees throughout California. All of the claims Plaintiffs assert for themselves, and for others similarly situated he seeks to represent, relate exclusively to hours of work performed solely within the State of California. None of the claims Plaintiffs assert for themselves, or for others similarly situated he seeks to represent, relate to hours of work performed outside of the State of California.

12. The California Superior Court also has jurisdiction in this matter because the individual claims of the members of the Classes herein are under the seventy-five thousand dollar (\$75,000.00) jurisdictional threshold for Federal Court inclusive of damages including penalties, and the aggregate claim, including attorneys' fees, is under the five million dollar (\$5,000,000.00) threshold of the Class Action Fairness Act of 2005. Further, there is no federal question at issue, as the issues herein are based solely on California statutes and law, including the Labor Code, IWC Wage Orders, CCP, California Civil Code, and B&PC.

13. This Court has jurisdiction over Defendant because, upon information and belief, each Defendant is either a resident of California, has sufficient minimum contacts in California, or otherwise intentionally avails itself of the California market so as to render the exercise of jurisdiction over it by the California Courts consistent with traditional notions of fair play and substantial justice.

III.

PARTIES

14. Plaintiff DENNIS TONY DUTRA is a resident of City of Tracy, County of San Joaquin, California. At all relevant times herein, he has been employed by Defendant as a driver in the State of California.

15. Plaintiffs Dutra was hired by Defendant on or about February 22, 2016, and his employment ended on or about March 17, 2020.

1 16. Plaintiff DANIELE MARCY is a resident of California. At all relevant times
2 herein, he has been employed by Defendant in the State of California.

3 17. Defendant J.R. SIMPLOT COMPANY is a Nevada corporation, headquartered in
4 Boise, Idaho. It is an international food and agriculture company. Defendant maintained
5 operations in the County of San Joaquin where Plaintiffs worked.

6 18. Plaintiffs are informed and believes, and thereon alleges, that at all relevant times
7 mentioned herein, Defendant are organized and existing under the laws of California, and were at
8 all times mentioned herein licensed and qualified to do business in California. On information and
9 belief, Plaintiffs allege that at all relevant times referenced herein Defendant did and continue to
10 transact business throughout California.

11 19. Whenever in this complaint reference is made to any act, deed, or conduct of
12 Defendant, the allegation means that Defendant engaged in the act, deed, or conduct by or through
13 one or more of its officers, directors, agents, employees, or representatives, who was actively
14 engaged in the management, direction, control, or transaction of the ordinary business and affairs
15 of Defendant.

16 20. The true names and capacities of Defendant, whether individual, corporate,
17 associate, or otherwise, sued herein as DOES 1 through 50, inclusive, are currently unknown to
18 Plaintiffs, who therefore sue Defendant by such fictitious names. Plaintiffs are informed and
19 believe, and based thereon allege that each of the Defendant designated herein as a DOE is legally
20 responsible in some manner for the unlawful acts referred to herein. Plaintiffs will seek leave of
21 court to amend this Complaint to reflect the true names and capacities of the Defendant designated
22 hereinafter as DOES when such identities become known.

23 21. Plaintiffs are informed and believe, and based thereon allege, that Defendant
24 acted in all respects pertinent to this action as the agent of the other Defendant, carried out a joint
25 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant
26 are legally attributable to the other Defendant.
27
28

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

IV.

FACTUAL BACKGROUND

22. Defendant operated an international food and agriculture company, at all times during the liability period, and have conducted business in the County of San Joaquin and elsewhere within California.

23. At all times set forth herein, Defendant employed Plaintiff Dutra and other persons in the capacity of drivers or equivalent positions with similar job duties, however titled, throughout the state of California.

24. Defendant employed Plaintiff Dutra as a driver of Defendant's trucks during the liability periods. Plaintiffs drove only routes in California and delivered loads only in California. In that capacity, Plaintiffs' duties included driving Defendant's trucks/trailers to various terminals and yards as well as performing pick-up and delivery to various client locations in and around California.

25. Defendant continues to employ drivers, or individuals in equivalent positions with similar job duties, however titled, throughout the state of California.

26. Defendant also employs other Non-Exempt Employees, besides drivers, such as Plaintiff Marcy.

27. Plaintiffs are informed and believe, and thereon allege, that Defendant is and was advised by skilled lawyers and other professionals, employees, and advisors with knowledge of the requirements of California's wage and employment laws.

28. Plaintiffs are informed and believe, and thereon allege, that during the relevant time frame, Defendant compensated Plaintiffs, Class Members, and Aggrieved Employees on an hourly basis.

29. Plaintiff is informed and believes, and thereon alleges, that during the relevant time period, Plaintiff and Aggrieved Employees performed work for Defendant within the State of California.

1 30. As a matter of Defendant's policy and practice, Plaintiffs, Class Members, and
2 Aggrieved Employees were required to remain on call during meal and rest breaks, and were
3 required to carry work cell phones or other communications devices while on purported breaks.
4 This was a requirement on each shift that Plaintiffs worked for Defendant.

5 31. Plaintiffs alleges that multiple of Defendant's personnel, including dispatch
6 personnel, informed Plaintiffs, Class Members, and Aggrieved Employees of Defendant's policy
7 and practice that work-related communications would occur throughout the workday and that it
8 was necessary for Plaintiffs, Class Members, and Aggrieved Employees to keep their work cell
9 phones on and accessible at all times of the workday (including without limitation during meal and
10 rest periods), due to the likeliness of work-related communications occurring while they were in
11 the field. Plaintiffs and, upon information and belief, Class Members and Aggrieved Employees
12 answered work-related communications throughout their workday, including during meal and rest
13 periods. Because meal periods were unpaid and off-the-clock, when Plaintiffs and, upon
14 information and belief, Class members and Aggrieved Employees answered work-related
15 communications during meal periods, they were not compensated for such time.
16

17 32. Plaintiffs and, upon information and belief, Class Members and Aggrieved
18 Employees conducted themselves in accordance with Defendant's on-call policy and therefore
19 worked during their meal periods without pay.

20 33. On a regular and consistent basis, Plaintiff, Class Members, and Aggrieved
21 Employees were subjected to late, missed, or short meal breaks due to heavy workloads and
22 sufficient staffing and/or coverage.

23 34. Plaintiff alleges that they can show shifts and workweeks during which he, and
24 upon information and belief the Class Members, were required to work during meal periods
25 without pay by comparing time records to the cell phone records for the company issued phone.

26 35. Plaintiffs are informed and believe, and thereon allege, that during the relevant time
27 period, Plaintiffs, Class Members, and Aggrieved Employees were not paid for the time that meal
28

1 periods were purportedly taken even when such meal periods were not lawfully provided and
2 employees were required to remain on call.

3 36. Upon review and inspection of Plaintiff Marcy's pay records, Defendant paid
4 approximately twenty-six (26) meal premiums to Plaintiff as a result of its failure to provide lawful
5 meal periods. These meal premiums were paid to Plaintiff in the following pay periods:

- 6 a. 12/03/18-12/16/18
- 7 b. 4/22/19-5/5/19
- 8 c. 5/20/19-6/2/19
- 9 d. 8/12/19-8/25/19
- 10 e. 8/26/19-9/8/19
- 11 f. 9/23/19-10/6/19
- 12 g. 10/7/19-10/20/19
- 13 h. 11/4/19-11/17/19
- 14 i. 12/16/19-2/29/20
- 15 j. 3/23/20-4/5/20
- 16 k. 6/1/20-6/14/20
- 17 l. 6/15/20-6/28/20
- 18 m. 8/10/20-8/23/20
- 19 n. 11/16/20-11/29/20
- 20 o. 5/17/21-5/30/21

21
22 37. Thus, for each of the above-listed pay periods, Plaintiff Marcy suffered the
23 underlying violations of not being provided a lawful meal period in violation of Labor Code §§
24 226.7 and 512.

25 38. Plaintiffs are informed and believe, and thereon allege, that during the relevant time
26 period, Plaintiff were not paid for each hour worked as required by California law.

27 39. As a result of Defendant's unlawful policies, practices, and procedures as described
28

1 herein, Plaintiffs allege that themselves, Class Members, and Aggrieved Employees are entitled to
2 minimum wages for the hours worked during purported meal periods. The time for purported meal
3 periods was not paid; however, because Plaintiffs, Class Members, and Aggrieved Employees
4 were required to work in that they were required to answer work-related communications, such
5 time should have been paid as hours worked. As such, Plaintiffs alleges that they suffered an
6 underpayment in the form of unpaid wages for time during purported meal periods during each
7 pay period that he worked for Defendant.

8 40. In addition, Plaintiffs further allege that Defendant failed to pay Plaintiff Dutra and,
9 upon information and belief, failed to pay Dutra Class Members, and Aggrieved Employees
10 properly for all forms of remuneration, including incentives, bonuses, and differentials when
11 calculating the regular rate for overtime purposes.

12 41. By way of example only, Plaintiff Dutra allege that they and, upon information and
13 belief, Dutra Class Members and Aggrieved Employees earned, among other things, non-
14 discretionary incentives or bonuses. To that end, Plaintiff Dutra was paid a \$988.83 incentive or
15 bonus on December 12, 2019; however, upon information and belief, Defendant did not recalculate
16 the regular rate for the period of time during which the incentive or bonus was earned. This
17 resulted in an underpayment of overtime wages.

18 42. By way of further example only, Plaintiffs Dutra alleges that he was paid a
19 \$2050.00 incentive or bonus on December 14, 2017; however, upon information and belief,
20 Defendant did not recalculate the regular rate for the period of time during which the incentive or
21 bonus was earned. This resulted in an underpayment of overtime wages.

22 43. By way of further example only, Plaintiff Dutra alleges that he was paid a \$1157.81
23 incentive or bonus on December 13, 2018; however, upon information and belief, Defendant did
24 not recalculate the regular rate for the period of time during which the incentive or bonus was
25 earned. This resulted in an underpayment of overtime wages.

26 44. By way of example only, Defendant paid a meal period premium to Plaintiff Dutra
27
28

1 during the pay period of December 3, 2018 through December 16, 2018, but did not pay such
2 premium at the properly calculated regular rate. Thus, Plaintiff was underpaid for the premium.

3 45. In addition, Plaintiffs further allege that Defendant failed to pay Plaintiff Dutra and,
4 upon information and belief, failed to pay Dutra Class Members, and Aggrieved Employees
5 properly for all forms of meal period premiums.

6 46. By way of further example only, in the pay period beginning on 12/3/2018 and
7 ending on 12/16/2018, Plaintiff Marcy's hourly rate was \$20.97 per hour. In this pay period,
8 Defendant paid Plaintiff a nondiscretionary bonus titled "Safety Award" of \$159.36. In the same
9 pay period, Defendant also paid Plaintiff a meal premium at the rate of \$20.97. Thus, Defendant
10 paid the meal premium to Plaintiff at her straight hourly rate and not at the proper blended rate.

11 47. By way of further example only, in the pay period beginning on 6/15/2020 and
12 ending on 6/28/2020, Plaintiff Marcy's hourly rate was \$27.10 per hour. In this pay period,
13 Defendant paid Plaintiff a nondiscretionary bonus titled "Safety Award" of \$491.81. In the same
14 pay period, Defendant also paid Plaintiff a meal premium at the rate of \$27.10. Thus, Defendant
15 paid the meal premium to Plaintiff at her straight hourly rate and not at the proper blended rate.

16 48. By way of further example only, Plaintiffs allege that they and, upon information
17 and belief, the Dutra Class Members and Aggrieved Employees received bonuses/incentives in the
18 form of a gift card in November of each year, but such sums were not incorporated into the regular
19 rate of pay for overtime purposes during the period that the incentive or bonus was earned. This
20 resulted in an underpayment of overtime wages.

21 49. In addition, upon information and belief, Defendant also failed to pay sick pay at
22 the regular rate, because Defendant failed to include all forms of remuneration (such as the above-
23 mentioned incentive or bonus) in calculation of the regular rate. This resulted in underpayment of
24 such sums and a failure to pay sick pay earned during employment within the requisite time
25 following termination of employment.

26 50. Plaintiffs are informed and believe, and thereon allege, that during the relevant time
27
28

1 frame, Plaintiffs, Class Members, and Aggrieved Employees were not timely paid all wages due
2 and owing during employment and upon separation from Defendant.

3 51. Plaintiffs are informed and believe, and thereon allege, that Defendant know,
4 should know, knew, and/or should have known that Plaintiffs and the other Dutra Class Members,
5 and Aggrieved Employees were entitled to receive minimum wages and overtime wages for all
6 hours worked and sick pay wages under Labor Code §§ 245, 246, 510, 1194, and 1197 but were
7 not receiving such compensation.

8 52. Defendant also failed to provide accurate, lawful itemized wage statements to
9 Plaintiffs and the Class Members, and Aggrieved Employees in part because of the above specified
10 violations.

11 53. Defendant has also made it difficult to determine applicable rates of pay and
12 account with precision for the unlawfully withheld wages and deductions due to be paid to Non-
13 exempt Employees, including Plaintiffs, during the liability period because they did not implement
14 and preserve a lawful record-keeping method to record all hours worked, and non-provided rest
15 and meal periods owed to employees as required for non-exempt employees by California Labor
16 Code section 226, and applicable California Wage Orders.

17 54. Plaintiffs are informed and believe, and thereon allege, that at all times herein
18 mentioned, Defendant knew that they had an obligation to timely pay wages during employment
19 under Labor Code section 204 and they knew that at the time of termination of employment (or
20 within 72 hours thereof for resignations without prior notice as the case may be) they had a duty
21 to accurately compensate Plaintiffs, Class Members, and Aggrieved Employees for all wages owed
22 including straight time, overtime, sick pay, and that Defendant had the financial ability to pay such
23 compensation, but willfully, knowingly, recklessly, and/or intentionally failed to do so in part
24 because of the above-specified violations.

25 55. Plaintiffs, Class Members, and Aggrieved Employees are covered by applicable
26 California IWC Wage Orders and corresponding applicable provisions of the California Code of
27
28

1 Regulations, Title 8, section 11000 *et seq.*

2 **V. CLASS ACTION ALLEGATIONS**

3 56. Plaintiffs bring this action on behalf of himself and all others similarly situated as
4 a class action and thus, seeks class certification under § 382 of the Code of Civil Procedure.

5 **57. Plaintiff's proposed subclasses are comprised of and defined as:**

- 6 a. "Dutra Class Action Subclass": All current and former hourly, non-exempt
7 drivers employed by Simplot in California from January 24, 2019 to January
8 24, 2024.
- 9 b. "Marcy Class Action Subclass": All current and former non-exempt employees
10 of Simplot in California who were paid at least one meal break premium from
11 January 24, 2019 to January 24, 2024.

12 58. Plaintiffs reserve the right to amend or modify the class description with greater
13 specificity or further division into subclasses or limitation to particular issues.

14 59. This action has been brought and may properly be maintained as a class action
15 under the provisions of § 382 of the Code of Civil Procedure because there are questions of law
16 or fact common to class members that predominate over any questions affecting only individual
17 members, and that a class action is superior to other available methods.

18 **A. Numerosity**

19 60. The potential members of the Class as defined are so numerous that joinder of all
20 the members of the Class is impracticable. While the precise number of Class Members has not
21 been determined at this time, Plaintiffs are informed and believe that Defendant currently
22 employ, and during the relevant time periods employed, several hundred employees, within the
23 State of California, in positions as Non-Exempt Employees in San Joaquin County and disbursed
24 throughout California during the liability period and who are or have been affected by
25 Defendant's unlawful practices as alleged herein.

1 61. Accounting for employee turnover during the relevant periods necessarily
2 increases this number substantially. Upon information and belief, Plaintiffs allege Defendant's
3 employment records would provide information as to the number and location of all Class
4 Members.

5 **B. Commonality**

6 62. There are questions of law and fact common to the Class predominating over any
7 questions affecting only individual Class Members. These common questions of law and fact
8 include, without limitation:

- 9 i. Whether Defendant paid minimum wage compensation to Plaintiffs and
10 Class Members for all hours worked;
11 ii. Whether Defendant accurately paid overtime to Plaintiffs and Class
12 Members;
13 iii. Whether Defendant were required to include incentives and bonuses in the
14 regular rate for overtime purposes;
15 iv. Whether Defendant were required to pay for time spent during meal
16 periods as hours worked;
17 v. Whether Defendant timely paid wages during employment in accordance
18 with Labor Code section 204, IWC Wage Order 9 and 4 or other
19 applicable IWC Wage Orders, and Cal Code Regs. Title 8, § 11090;
20 vi. Whether Defendant timely paid wages upon separation from Defendant
21 employ pursuant to Labor Code sections 201-203 and IWC Wage Order 9-
22 2001 or other applicable IWC Wage Orders, and Cal Code Regs. Title 8, §
23 11090;
24 vii. Whether Defendant paid sick pay at the regular rate as required by law;
25 viii. Whether Class Members are entitled to restitution and/or injunctive relief;
26 Whether Defendant violated Business and Professions Code section 17200
27
28

et seq. and applicable IWC Wage Orders which violation constitutes a violation of fundamental public policy;

- ix. Whether Plaintiffs and the Members of the Plaintiffs' Class are entitled to equitable relief pursuant to Business and Professions Code section 17200, et. Seq.;
- x. Whether Plaintiffs and the Members of the Plaintiffs' Class are entitled to relief in the form of back wages, penalties and interest for failure to pay minimum wages pursuant to Labor Code sections 1194 and 1197; and
- xi. Whether Plaintiffs and Members of the Plaintiffs' Class are entitled to penalties pursuant to Labor Code section 203 for failing to timely pay wages upon separation.

C. Typicality

63. The claims of Plaintiffs are typical of the claims which could be alleged by members of the proposed class, and the relief sought by Plaintiffs is typical of the relief which would be sought by members of the proposed class in individual actions. All class members were subject to the same policies and practices of Defendant, as alleged herein. Upon information and belief, Defendant's compensation practices affects all class members similarly, and Defendant benefited from the same type of unfair and/or wrongful acts as to each class member. Plaintiffs and members of the proposed class sustained similar losses, injuries and damages arising from the same unlawful, policies, practices, and procedures.

D. Adequacy of Representation

64. Plaintiffs will fairly and adequately represent and protect the interests of all members of the class in that she has no disabling conflicts of interest that would be antagonistic to those of the other members of the class. Plaintiffs have retained counsel who are competent and experienced in the prosecution of class action wage and hour violations.

E. Superiority of Class Action

65. The common questions of law and fact, as identified above, predominate over any

1 pertinent questions involving only individual class members, which will relate solely to the
2 quantum of relief due to individual class members. A class action is superior to the other
3 available means for the fair and efficient adjudication of this controversy because:

- 4 a. Common issues of law and fact, as identified above, substantially diminish the
5 interest of class members in individually controlling the prosecution of separate
6 actions;
- 7 b. A class action can be managed with efficiency and without undue difficulty
8 because Defendant's violations complained of herein have impacted the members
9 of the proposed class uniformly; and
- 10 c. Individual damages to any one class member may be relatively small, making the
11 expense of individual litigation prohibitive or impracticable for any individual
12 class member.

13 **VI. CAUSES OF ACTION**

14 **FIRST CAUSE OF ACTION**

15 **FAILURE TO PAY MINIMUM WAGES**

16 **(By Plaintiff Dutra and the Dutra Subclass)**

17 66. Plaintiffs incorporate each and every allegation set forth in all of the foregoing
18 paragraphs as if fully set forth herein.

19 67. Labor Code section 204 establishes the fundamental right of all employees in the
20 State of California to be paid wages, including minimum wage, straight time and overtime, in a
21 timely fashion for their work.

22 68. Labor Code section 1194 (a) provides that notwithstanding any agreement to
23 work for a lesser wage, any employee receiving less than the legal minimum wage or the legal
24 overtime compensation applicable to the employee is entitled to recover in a civil action the
25 unpaid balance of the full amount of this minimum wage or overtime compensation, including
26 interest thereon, reasonable attorney's fees, and costs of suit.

27 69. Labor Code section 1197 provides: The minimum wage for employees fixed by
28

1 the commission or by any applicable state or local law, is the minimum wage to be paid to
2 employees, and the payment of a lower wage than the minimum so fixed is unlawful.

3 70. Pursuant to Labor Code section 1198, it is unlawful to employ persons for longer
4 than the hours set by the Industrial Welfare Commission or under conditions prohibited by the
5 IWC Wage Order(s).

6 71. The applicable wage orders and California Labor Code §§ 1197 and 1182.12
7 establish the right of employees to be paid minimum wages for all hours worked, in amounts set
8 by state law.

9 72. Labor Code §§ 1194(a) and 1194.2(a) provide that an employee who has not been
10 paid the legal minimum wage as required by Labor Code § 1197 may recover the unpaid balance
11 together with attorneys' fees and costs of suit, as well as liquidated damages in an amount equal
12 to the unpaid wages and interest accrued thereon.

13 73. During all relevant periods, the California Labor Code and wage orders required
14 that Defendant fully and timely pay its non-exempt, hourly employees all wages earned and due
15 for all hours worked.

16 74. The IWC Wage Orders define "hours worked" as "the time during which an
17 employee is subject to the control of an employer, and includes all the time the employee is
18 suffered or permitted to work, whether or not required to do so."

19 75. At all times relevant, Plaintiff Dutra and Dutra Class Members consistently
20 worked hours for which they were not paid because Defendant frequently required Plaintiffs and
21 the Class Members to work off the clock, including without limitation for time spent during
22 purportedly provided meal breaks. Such time during on-duty or interrupted meal periods
23 constitutes hours worked which must be paid.

24 76. Plaintiffs are informed and believe that Defendant were aware that Plaintiff Dutra
25 and Dutra Class Members were working off the clock and that they should have been paid for
26 this time.

27 77. Defendant's policy and practice of not paying all minimum wages violates
28

1 California Labor Code §§ 204, 210, 216, 558, 1182.12, 1194, 1197, 1197.1, 1198, and the
2 applicable wage order 9-2001.

3 78. Due to Defendant's violations of the California Labor Code and wage orders,
4 Plaintiff Dutra and Dutra Class Members are entitled to recover from Defendant their unpaid
5 wages, statutory penalties, reasonable attorneys' fees and costs in this action, and pre-judgment
6 and post-judgment interest, as well as liquidated damages.

7 **SECOND CAUSE OF ACTION**

8 **FAILURE TO PAY OVERTIME**

9 **(Lab. Code, §§ 510, 1194, 1197, IWC Wage Order 9 and 4)**

10 **(By Plaintiff Dutra and the Dutra Subclass)**

11 79. Plaintiffs incorporate by reference each and every allegation contained above, as
12 though fully set forth herein.

13 80. At all times relevant, the IWC wage orders applicable to Plaintiff Dutra's and Non-
14 Exempt Driver's employment by Defendant provided that employees working for more than
15 eight (8) hours in a day or forty (40) hours in a workweek are entitled to overtime compensation
16 at the rate of one and one-half times the regular rate of pay for all hours worked in excess of
17 eight (8) hours in a day or forty (40) hours in a work week. An employee who works more than
18 twelve (12) hours in a day is entitled to overtime compensation at a rate of twice the regular rate
19 of pay. Labor Code §510 codifies the right to overtime compensation at the rate of one and one-
20 half times the regular rate of pay for all hours worked in excess of eight (8) hours in a day or
21 forty (40) hours in a work week and to overtime compensation at twice the regular rate of pay for
22 hours worked in excess of twelve (12) hours in a day or in excess of eight (8) hours in a day on
23 the seventh day of work in a particular work week.

24 81. At all times relevant, Plaintiff Dutra and Dutra Class Members consistently
25 worked in excess of eight (8) hours in a day and/or forty (40) hours in a week.
26
27
28

1 82. At all times relevant, Defendant failed to pay regular wages and overtime wages
2 to Plaintiff Dutra and Dutra Class Members by failing to pay for hours worked off the clock by
3 deducting time for meal periods which were not lawfully provided (as employees were required
4 to remain on duty and were frequently interrupted as set forth above).

5 83. On information and belief, at all times relevant, Defendant failed to pay regular
6 wages and overtime wages to Plaintiff Dutra and Dutra Class Members for off the clock work
7 during purported meal periods all while subject to the control of Defendant. Defendant knew or
8 should have known this was occurring. Yet Defendant failed to pay for all time worked while
9 subject to the control of Defendant. To the extent such hours caused the employee to work over
10 40 hours in a week or over 8 hours in a day, the employee should have been paid at one and
11 one—half times the regular rate of pay for all hours worked in excess of eight (8) hours in a day
12 or forty (40) hours in a work week and to twice the regular rate of pay for hours worked in
13 excess of twelve (12) hours in a day or in excess of eight (8) hours in a day on the seventh day of
14 work in a particular work week for such time.

15 84. On information and belief, Defendant failed to pay its non-exempt drivers for
16 hours worked when it required Plaintiff Dutra and Members of the Dutra Subclass under the
17 control of Defendant, to remain on duty during purported meal periods without meeting the
18 lawful requirements for an on duty meal period.

19 85. On information and belief, Defendant violated the provisions of the Labor Code,
20 among others, §§510, 1194, 1197 and IWC Wage Order 9.

21 86. In addition, on information and belief, at all times relevant, Defendant failed to
22 accurately pay overtime wages to Plaintiffs Dutra and Dutra Class Members by failing to include
23 the earned bonuses and incentives into the regular rates of pay for overtime calculation purposes.

24 87. At all times relevant, Plaintiff Dutra and Dutra Class Members regularly
25 performed non-exempt work in excess of 50% of the time, and thus, were subject to the overtime
26
27
28

1 requirements of the applicable IWC wage orders and the Labor Code. Further, Defendant agreed
2 and did pay overtime under California law and thus waived any preemption defense.

3 88. Defendant's failure to pay Plaintiffs and Dutra Class Members the unpaid balance
4 of regular and overtime compensation violates the provisions of Labor Code §510 and §1194,
5 and the applicable IWC wage orders and is therefore unlawful. On information and belief and
6 based on that information and belief, Defendant compensated its non-exempt employees on an
7 hourly basis.

8 89. As a result of the unlawful acts of Defendant, Plaintiff Dutra and the Dutra
9 Subclass seek to represent have been deprived of minimum wages and overtime wages in
10 amounts to be determined at trial, and are entitled to recovery of such amounts, plus interest and
11 statutory penalties thereon, attorneys' fees, and costs, pursuant to Labor Code sections 558, 1194,
12 1197 and IWC Wage Order 9 and 4.

13 90. WHEREFORE, Plaintiff Dutra and the Dutra Subclass seeks to represent request
14 relief as described herein and below.

15 **THIRD CAUSE OF ACTION**

16 **FAILURE TO PROVIDE MEAL PERIODS OR**

17 **COMPENSATION IN LIEU THEREOF**

18 **(Lab. Code, §§226.7, 512, IWC Wage Order 9)**

19 **(By Plaintiff and the Class Members)**

20 91. Plaintiffs incorporate by reference each and every allegation contained above, as
21 though fully set forth herein.

22 92. Pursuant to Labor Code §512, no employer shall employ an employee for a work
23 period of more than five (5) hours without providing a meal break of not less than thirty (30)
24 minutes in which the employee is relieved of all of his or her duties. An employer may not
25 employ an employee for a work period of more than ten (10) hours per day without providing the
26 employee with a second meal period of not less than thirty (30) minutes, except that if the total
27
28

1 hours worked is no more than twelve (12) hours, the second meal period may be waived by
2 mutual consent of the employer and the employee only if the first meal period was not waived.

3 93. Plaintiffs and, upon information and belief, the Class Members were required to
4 carry work cell phones with them during purported meal and rest breaks, and were frequently
5 interrupted as a result.

6 94. Pursuant to the IWC wage orders applicable to Plaintiffs' and Class Members'
7 employment by Defendant, in order for an "on duty" meal period to be permissible, the nature of
8 the work of the employee must prevent an employee from being relieved of all duties relating to
9 his or her work for the employer and the employees must consent in writing to the "on duty"
10 meal period.

11 95. Upon information and belief, Plaintiffs and Class Members did not execute a
12 valid on duty meal period agreement. They did not consent in writing to an "on duty" meal
13 period. Further, the nature of the work of Plaintiffs and Class Members was not such that
14 Plaintiffs and Class Members are prevented from being relieved of all duties. Despite said
15 requirements of the IWC wage orders applicable to Plaintiffs' and Class Members' employment
16 by Defendant and Labor Code §512 and §226.7, Plaintiffs and Class Members were not provided
17 with meal periods and were not relieved of all duties during any meal periods Plaintiffs and Class
18 Members did take.

19 96. From at least January 24, 2019, Defendant failed to provide Plaintiffs and Class
20 Members, in their roles as Non-Exempt Employees, or equivalent positions with similar job
21 duties, however titled, first and sometimes second meal breaks of not less than thirty (30)
22 minutes pursuant to the IWC wage orders applicable to Plaintiffs' and Class Members'
23 employment by Defendant. In addition, Defendant failed to record meal periods for Plaintiff and
24 Class Members in accordance with the applicable IWC wage order. As a proximate result of the
25 aforementioned violations, Plaintiffs and Class Members have been damaged in an amount
26 according to proof at time of trial.
27
28

97. From at least January 24, 2019, Defendant failed to accurately pay meal break premiums to the Plaintiffs and their respective subclasses at the correct regular rate.

98. Pursuant to Labor Code §226.7, Plaintiff and Class Members are entitled to recover one (1) hour of premium pay for each day in which a meal period was not provided.

FOURTH CAUSE OF ACTION

FAILURE TO PROVIDE REST PERIODS OR

COMPENSATION IN LIEU THEREOF

(By Plaintiff Dutra and the Dutra Subclass)

99. Plaintiffs incorporate by reference each and every allegation contained above, as though fully set forth herein.

100. Pursuant to the IWC wage orders applicable to Plaintiff Dutra and Dutra Class Members employment by Defendant, "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 time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours worked or major fraction thereof.... Authorized rest period time shall be counted as hours worked, for which there shall be no deduction from wages." Labor Code §226.7(a) prohibits an employer from requiring any employee to work during any rest period mandated by an applicable order of the IWC.

101. Defendant were required to authorize and permit employees such as Plaintiff Dutra and Dutra Class Members to take rest periods, based upon the total hours worked at a rate of ten (10) minutes net rest per four (4) hours, or major fraction thereof, with no deduction from wages. Despite said requirements of the IWC wage orders applicable to Plaintiff Dutra's and Non-Exempt Driver's employment by Defendant, Defendant failed and refused to authorize and permit Plaintiff Dutra and the Dutra Subclass, in their roles as Dutra Class Members, or equivalent positions with similar job duties, however titled, to take ten (10) minute rest periods for every four (4) hours worked, or major fraction thereof.

1 102. Plaintiff Dutra and, upon information and belief, Dutra Class Members were
2 required to carry work cell phones with them during purported meal and rest breaks, and respond
3 to calls. Accordingly, employees were not free from employer control during purported rest
4 breaks and were frequently interrupted as a result of Defendant's policy and practice.

5 103. From at least January 24, 2019, Defendant failed to provide Plaintiff Dutra and
6 Dutra Class Members the required rest periods pursuant to the IWC wage orders applicable to
7 Plaintiff's and Class Members' employment by Defendant and Labor Code §226.7. As a
8 proximate result of the aforementioned violations, Plaintiff Dutra and Dutra Class Members have
9 been damaged in an amount according to proof at time of trial.

10 104. Pursuant to Labor Code §226.7, Plaintiff Dutra and the Dutra Subclass are entitled
11 to recover one (1) hour of premium pay for each day in which a rest period was not provided.

12 **FIFTH CAUSE OF ACTION**

13 **FAILURE TO TIMELY PAY WAGES DUE AND PAYABLE DURING**

14 **EMPLOYMENT**

15 **(By Plaintiffs and the Class Members)**

16 105. Plaintiffs incorporate by reference and realleges each and every allegation
17 contained above, as though fully set forth herein. Labor Code section 204 requires that all wages
18 are due and payable twice in each calendar month.

19 106. The wages required by Labor Code §§ 226.7, 510, 1194 and other sections became
20 due and payable to each employee in each month that he or she was not provided with a meal
21 period or rest period or paid minimum wage, straight or proper overtime wages to which he or she
22 was entitled.

23 107. Labor Code section 204(b)(1) provides that "all wages earned for labor in excess
24 of the normal work period shall be paid no later than the payday for the next regular payroll
25 period."

26 108. As set forth above, Defendant violated Labor Code § 204 by systematically refusing
27 to pay wages due under the Labor Code.

1 109. By way of example, Defendant failed to pay minimum wages for work performed
2 during unpaid meal periods.

3 110. By way of further example, Defendant failed to timely pay wages as required
4 because it did not pay overtime at the proper rate to employees by the payday for the next regular
5 payroll period after the payment of non-discretionary bonuses and incentives.

6 111. Labor Code section 210 (a) provides that "In addition to, and entirely independent
7 and apart from, any other penalty provided in this article, every person who fails to pay the wages
8 of each employee as provided in Sections 201.3, 204, 204b, 204.1, 204.2, 204.11, 205, 205.5, and
9 1197.5, shall be subject to a penalty as follow:

10 (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each
11 employee.

12 (2) For each subsequent violation, or any willful or intentional violation, two hundred
13 dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully
14 withheld.

15 103. As a result of the unlawful acts of Defendant, Plaintiffs and the Class he seeks to
16 represent have been deprived of wages in amounts to be determined at trial, and are entitled to
17 recovery of such amounts, penalties, plus interest thereon, attorneys fees, and costs, pursuant to
18 Labor Code § 210, 218.5, 218.6, 510, 1194.

19 **SIXTH CAUSE OF ACTION**

20 **FAILURE TO TIMELY PAY WAGES AT SEPARATION OR TERMINATION**

21 **(Cal. Lab. Code, §§ 201-203)**

22 **(By Plaintiffs and Class Members)**

23 112. Plaintiffs repeat and incorporate herein by reference each and every allegation
24 contained above, as though fully set forth herein.

25 113. Labor Code §§201-202 requires an employer who discharges an employee to pay
26 compensation due and owing to said employee immediately upon discharge and that if an
27
28

1 employee voluntarily leaves his or her employment, his or her wages shall become due and
2 payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-
3 two (72) hours previous notice of his or her intention to quit, in which case the employee is
4 entitled to his or her wages on their last day of work.

5 114. Labor Code §203 provides that if an employer willfully fails to pay compensation
6 promptly upon discharge, as required by Labor Code §§201-202, the employer is liable for
7 waiting time penalties in the form of continued compensation for up to thirty (30) work days.

8 115. Pursuant to Labor Code § 246(g)(1) and *Flores v. Dart Container Corp.*, No.
9 2:19-cv-00083 WBS EFB, 2020 U.S. Dist. LEXIS 93524 (E.D. Cal. May 27, 2020), sick pay that
10 has vested, been used, and paid constitutes wages.

11 116. During the relevant time period, Defendant willfully failed and refused, and
12 continue to willfully fail and refuse, to pay Plaintiffs and the Class Members who have separated
13 from employment their earned and unpaid wages including minimum wages for time spent
14 responding to calls during meal periods, overtime wages for Defendant failure recalculate
15 overtime pay based on incentives and bonuses, and sick pay wages for Defendant failure to
16 recalculate sick pay wages based on incentives and bonuses, either at the time of discharge, or
17 within seventy-two (72) hours of their voluntarily leaving Defendant' employ.

18 117. Plaintiff Dutra resigned on March 17, 2020 but Defendant did not pay him his
19 final paycheck until March 27, 2020. Plaintiff final paycheck did not include all wages earned
20 and owed at the time of separation including wages for time spent working during meal periods,
21 recalculation of overtime based on incentives and bonuses, or recalculation of sick pay based on
22 incentives and bonuses.

23 118. Plaintiff Marcy was not paid all of his wages in his final paycheck as a result of
24 the Defendant failing to pay meal break premiums at the correct regular rate.

25 119. Defendant's willful failure to pay Plaintiffs and Class Members who have
26 separated from employment their wages earned and unpaid at the time of discharge, or within
27
28

1 seventy-two (72) hours of their voluntarily leaving Defendant's employ, violates Labor Code
2 §§201-202.

3 120. The term "willful" in § 203 "means that the employer intentionally failed or
4 refused to perform an act which was required to be done." *Ghory v. Al-Lahham*, 209 Cal.App.3d
5 1487, 1492 (1989). There is no need to show an evil intent or deliberate purpose to defraud the
6 employee. *Armenta v. Osmose, Inc.* 135 Cal. App. 4th 314, 325 (2005) (rev. denied).

7 121. As a result, Defendant are liable to Plaintiffs and Class Members who have
8 separated from employment for waiting time penalties pursuant to Labor Code §203, in an
9 amount according to proof at the time of trial.

10 **SEVENTH CAUSE OF ACTION**

11 **KNOWING AND INTENTIONAL FAILURE TO COMPLY WITH ITEMIZED**
12 **EMPLOYEE WAGE STATEMENT PROVISIONS**

13 **(By Plaintiffs and Class Members)**

14 122. Plaintiffs repeat and incorporates herein by reference each and every allegation
15 set forth above, as though fully set forth herein.

16 123. Labor Code section 226(a) reads in pertinent part: "Every employer shall,
17 semimonthly or at the time of each payment of wages, furnish each of his or her employees,
18 either as a detachable part of the check, draft, or voucher paying the employee's wages, or
19 separately when wages are paid by personal check or cash, an accurate itemized statement in
20 writing showing (1) gross wages earned, (2) total hours worked by the employee... (4) all
21 deductions... (5) net wages earned, (6) the inclusive dates of the period for which the employee
22 is paid, (7) the name of the employee and only the last four digits of his or her social security
23 number or an employee identification number other than a social security number, (8) the name
24 and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect
25 during each the pay period and the corresponding number of hours worked at each hourly rate by
26 the employee....".

1 124. Further, the IWC Wage Orders require in pertinent part: Every employer shall
2 keep accurate information with respect to each employee including the following: (3) Time
3 records showing when the employee begins and ends each work period. Meal periods, split shift
4 intervals, and total daily hours worked shall also be recorded...(5) Total hours worked in the
5 payroll period and applicable rates of pay....”

6 125. Labor Code section 1174 of the California also requires Defendant to maintain
7 and preserve, in a centralized location, among other items, records showing the names and
8 addresses of all employees employed and payroll records showing the hours worked daily by,
9 and the wages paid to, its employees. On information and belief and based thereon, Defendant
10 have knowingly and intentionally failed to comply with Labor Code section 1174, including by
11 implementing the policies and procedures and committing the violations alleged in the preceding
12 causes of action and herein. Defendant’ failure to comply with Labor Code section 1174 is
13 unlawful pursuant to Labor Code section 1175.

14 126. Defendant have failed to record many of the items delineated in applicable
15 Industrial Wage Orders and Labor Code section 226, and required under Labor Code section
16 1174, including by virtue of the fact that each wage statement which failed to accurately
17 compensate Plaintiffs and Class Members for all hours worked or which failed to include
18 compensation for all minimum wages, overtime wages, and sick pay wages, was an inaccurate
19 wage statement.

20 127. On information and belief, Defendant failed to implement and preserve a lawful
21 record-keeping method to record all non-provided meal and rest periods owed to employees or
22 all hours worked, as required for Non-Exempt Employees under California Labor Code section
23 226 and applicable California Wage Orders. In order to determine if they had been paid the
24 correct amount and rate for all hours worked, Plaintiffs and Class Members have been, would
25 have been, and are compelled to try to discover the required information missing from their wage
26 statements and to perform complex calculations in light of the inaccuracies and incompleteness
27 of the wage statements Defendant provided to them.

1 128. As a pattern and practice, in violation of Labor Code section 226(a) and the IWC
2 Wage Orders, Plaintiffs assert the Defendant omitted required information, as the wage
3 statements fail to state total hours worked, failed to accurately include all applicable hourly rates
4 on the wage statements and the corresponding number of hours worked at such rates or hours
5 paid at such rates. In addition, Defendant have failed to provide accurate itemized wage
6 statements as a consequence of the above-specified violations. To be clear, Plaintiffs allege that
7 in addition to the specified violations, Defendant also failed to accurately indicate the inclusive
8 dates of the period for which the employee was paid in connection with the payment of the
9 incentives and bonuses set forth above.

10 129. Moreover, upon information and belief, as a pattern and practice, in violation of
11 Labor Code section 226(a) and the IWC Wage Orders, Defendant did not and do not maintain
12 accurate records pertaining to the total hours worked for Defendant by the members of the Class,
13 including but not limited to, beginning and ending of each work period, meal period and split
14 shift interval, the total daily hours worked, and the total hours worked per pay period and
15 applicable rates of pay.

16 130. Plaintiffs and the members of the Class have suffered injury as a result of
17 Defendant's failure to maintain accurate records for the members of the Class in that the
18 members of the Class were not timely provided written accurate itemized statements showing all
19 requisite information, such that the members of the Class were misled by Defendant as to the
20 correct information regarding various items, including but not limited to total hours worked by
21 the employee, net wages earned and all applicable hourly rates in effect during the pay period
22 and the corresponding number of hours worked at each hourly rate.

23 131. Pursuant to Labor Code section 226, and in light of Defendant's violations
24 addressed above, Plaintiffs and the Class Members are each entitled to recover up to a maximum
25 of \$4,000.00, along with an award of costs and reasonable attorneys' fees.

26 **EIGHTH CAUSE OF ACTION**

27 **VIOLATION OF UNFAIR COMPETITION LAW**

1 (Bus. & Prof. Code, § 17200, et seq.)

2 (By Plaintiffs and Class Members)

3 132. Plaintiffs incorporate by reference each and every allegation contained above, as
4 though fully set forth herein.

5 133. On information and belief, Defendant engaged in unlawful activity set forth above
6 and prohibited by Business and Professions Code §17200 et seq., including, but not limited to
7 Defendant's policy of:

- 8 i. failing to pay minimum wages;
9 ii. failing to accurately pay overtime;
10 iii. failing to pay sick leave at the proper rate;
11 iv. failing to timely pay wages during employment and at separation.
12

13 134. The actions of Defendant as alleged herein constitute false, unlawful, unfair, and
14 deceptive business practices, within the meaning of Business and Professions Code section
15 17200, et. seq.

16 135. As a result of their unlawful acts, Defendant have reaped and continue to reap
17 unfair benefits and unlawful profits at the expense of Plaintiffs, and the Class Members.
18 Defendant should be enjoined from this activity. Plaintiffs are informed and believe, and thereon
19 allege, that Plaintiffs and members of the Plaintiffs' Class are prejudiced by Defendant's unfair
20 trade practices.

21 136. As a direct and proximate result of the unfair business practices of Defendant, and
22 each of them, Plaintiffs, individually and on behalf of all employees similarly situated, are
23 entitled to equitable and injunctive relief.

24 137. Plaintiffs allege that he and the Class Members lack an adequate remedy at law.

25 138. By way of example only, Defendant has contended that Plaintiffs are unable to
26 state a private right of action for failure to pay sick leave at the regular rate under Labor Code
27 section 246; however, Plaintiffs allege that if that is the case, Plaintiffs and the Class Members
28

1 are entitled to restitution in the amount of the underpayment of sick leave wages due to
2 Defendant's failure to pay such sums at the proper rate in the first instance.

3 139. Defendant's unlawful conduct alleged herein is continuing, and there is no
4 indication that Defendant will not continue such activity into the future. Plaintiffs allege that if
5 Defendant are not enjoined from the conduct set forth in this Complaint, they will continue to
6 require employees to work off the clock including during meal periods and will continue to fail
7 to pay and to avoid paying proper wages.

8 140. Plaintiffs further requests that the court issue a preliminary and permanent
9 injunction prohibiting Defendant from requiring Plaintiffs and the Class they seek to represent to
10 reimburse Defendant for the allegations contained herein and which may later be discovered in
11 the course of litigation.

12 NINTH CAUSE OF ACTION

13 **CIVIL PENALTIES UNDER THE PRIVATE ATTORNEY GENERAL ACT (PAGA)**

14 **(By Plaintiffs and Aggrieved Employees)**

15 141. Plaintiffs incorporate by reference each and every allegation contained above, as
16 though fully set forth herein.

17 142. At all relevant times herein, Defendant has been an "employer" as defined by the
18 California Labor Code and subject to its provisions.

19 143. Plaintiffs were at all relevant times herein an "employee" as defined by the
20 California Labor Code and subject to its provisions.

21 144. Plaintiff alleges on behalf of themselves and Aggrieved Employees that
22 Defendant has committed multiple violations of the California Labor Code, including Labor
23 Code Sections 201, 202, 203, 204, 210, 216, 221-224, 225.5, 226, 226(a), 226.3, 226.7, 245-249,
24 510, 512, 558, 1174, 1174(d), 1174.5, 1175, 1182.2, 1194, 1194.2, 1195, 1197, 1197.1, 1198, the
25 applicable IWC Wage Order, and the California Code of Regulations, Title 8, § 11090.
26
27
28

1 145. Plaintiff, on behalf of themselves and other aggrieved employees, provided
2 written notice to the Labor and Workforce Development Agency (LWDA) and Defendant of the
3 specific provisions of the Labor Code alleged to have been violated, along with the facts and
4 theories to support the alleged violation.

5 146. More than 65 days have passed since the notice was sent and the LWDA has not
6 responded with notice of its intent to investigate the alleged violations, nor has the LWDA issued
7 any citations against Defendant for the alleged violations. Therefore, Plaintiffs and Aggrieved
8 Employees are entitled to seek civil penalties through this action under PAGA.

9 147. Pursuant to Labor Code § 2699, et seq., Plaintiffs seek an award of civil penalties
10 for Defendant's Labor Code violations, including but not limited to penalties for each aggrieved
11 employee per pay period for each initial and subsequent violation in accordance with the
12 provisions of the Labor Code.

13 148. Defendant's actions as set forth herein were willful and intentional, and done with
14 reckless disregard of the rights of Plaintiffs and other aggrieved employees.

15 149. WHEREFORE, Plaintiffs and the Class he seeks to represent request relief as
16 described herein and below.

17
18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs pray judgment against Defendant, as follows:

20 **Class Certification**

- 21 1. That this action be certified as a class action;
22 2. That Plaintiffs be appointed as the representative of the Class and Subclasses; and
23 3. That counsel for Plaintiffs be appointed as counsel for the Class;

24 **On the First Cause of Action**

25 **(Failure to pay minimum wages)**

- 26 1. For the unpaid balance of the full amount of any minimum wages, and regular
27 wages owed, as well as interest thereon,
28

2. Penalties according to statute,
3. Liquidated damages,
4. Reasonable attorneys' fees, and costs of suit;
5. For interest and
6. For such other and further relief as the Court deems proper.

On the Second Cause of Action

(Failure to pay overtime)

1. For the unpaid balance of the full amount of any overtime wages owed, as well as interest thereon,

2. Penalties according to statute,
3. Liquidated damages,
4. Reasonable attorneys' fees, and costs of suit;
5. For interest and
6. For such other and further relief as the Court deems proper.

On the Third Cause of Action

(Failure to Provide Lawful Meal Periods)

1. For one (1) hour of premium pay for each day in which a required meal period was not lawfully provided;
2. For reasonable attorneys' fees and costs pursuant to statute; and
3. For such other and further relief as the Court deems proper.

On the Fourth Cause of Action

(Failure to Authorize and Permit Lawful Rest Periods)

1. For one (1) hour of premium pay for each day in which a required rest period was not lawfully authorized and permitted; and
2. For reasonable attorneys' fees and costs pursuant to statute; and
3. For such other and further relief as the Court deems proper.

1 **On the Fifth Cause of Action**

2 **(Failure to Timely Pay Wages Due and Payable During Employment)**

- 3 1. For unpaid wages;
- 4 2. For penalties pursuant to Labor Code § 210 and 25% of the amount of wages
- 5 unlawfully withheld;
- 6 3. For interest;
- 7 4. For reasonable attorneys' fees and costs pursuant to statute; and
- 8 5. For such other and further relief as the Court deems proper.

9 **On the Sixth Cause of Action**

10 **(Failure to Timely Pay Wages At Separation)**

- 11 1. For unpaid wages;
- 12 2. For penalties pursuant to Labor Code § 203;
- 13 3. For interest;
- 14 4. For reasonable attorneys' fees and costs pursuant to statute; and
- 15 5. For such other and further relief as the Court deems proper.

16 **On the Seventh Cause of Action**

17 **(Failure to Provide Accurate Itemized Wage Statements**

- 18 1. For statutory penalties, including penalties pursuant to Labor Code section 226;
- 19 2. For reasonable attorneys' fees and costs; and
- 20 3. For such other and further relief as the Court deems proper;

21 **On the Eighth Cause of Action**

22 **(Violation of the Unfair Competition Law)**

- 23 1. For Restitution;
- 24 2. For pre-judgment interest on any unpaid wages due from the day that such amounts
- 25 were due;
- 26 3. For reasonable attorneys' fees;
- 27
- 28

4. For costs of suit incurred;
5. For such other and further relief as the Court deems proper.

On the Ninth Cause of Action

(PAGA Penalties)

1. For civil penalties as allowed under the PAGA;
2. For costs of suit;
3. For attorney's fees as allowed by law;
4. For such other legal and equitable relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs, on behalf of the Class and Subclasses, respectfully demand a jury trial in this matter to the fullest extent available under the law.

Dated: April 30, 2024

JAMES HAWKINS APLC

/s/ Mitchell J. Murray

James Hawkins

Christina Lucio

Mitchell J. Murray

Attorneys for Plaintiffs DENNIS TONY DUTRA

1 **PROOF OF SERVICE**

2 I am a resident of the State of California, County of Orange. I am over the age of eighteen
3 years and not a party to the within action. My business address is 9880 Research Drive., Suite
4 200, Irvine, California 92618. On May 7, 2024, I served true and correct copies of the following
document(s) described as:

5 • **THIRD AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT**

6 on *interested parties*,
7 [XX] by placing [] the original [XX] a true copy thereof attached to electronic submission
8 addressed as follows:

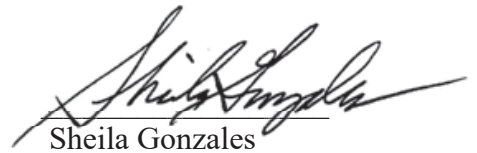
9 Michael J. Nader, Esq.
10 Alexandra M. Asterlin, Esq.
11 Paul M. Smith, Esq.
12 OGLETREE, DEAKINS, NASH, SMOAK &
13 STEWART, P.C.
14 500 Capitol Mall, Suite 2500
15 Sacramento, CA 95814
16 Tel: 916-840-3151
17 Fax: 916-628-8738
18 michael.nader@ogletree.com
19 alexandra.asterlin@ogletree.com
20 paul.smith@ogletree.com
21 maria.davis@ogletree.com
22 douglas.grabowski@ogletree.com
23 noreen.witt@ogletree.com

24 *Attorneys for Defendant*
25 J.R.SIMPLOT COMPANY

26 [XX] BY ELECTRONIC SERVICE: Based on a court Order or an agreement by the parties to
27 accept service by e-mail or electronic transmission, I caused the document(s) to be sent
28 from the email address sheila@jameshawkinsaplc.com to the persons at the e-mail
addresses listed in the Service List. I did not receive, within a reasonable time after
transmission, any electronic message or other indication that the transmission was
unsuccessful.

[XX] STATE: I declare under penalty of perjury, under the laws of the State of
California, that the above is true and correct.

Executed on May 7, 2024, at Irvine, California


Sheila Gonzales