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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

JOSE ERNESTO LUCAS, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

SW INGREDIENTS HOLDINGS, LLC, a Delaware limited liability company; SPICE WORLD INC., a Florida corporation; SPICE WORLD, LLC, a Florida limited liability company; and DOES 1 through 10, inclusive,

Defendants

Lead Case No. 21CECG01943
(Consolidated with cases 21CECG03840, 22CECG00586)

[Assigned to Hon. Jonathan Skiles, Dept. 403]

CONSOLIDATED CLASS AND REPRESENTATIVE ACTION

DECLARATION OF BENNETT S. BERGER IN SUPPORT OF RENEWED MOTION FOR AN ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: February 14, 2024
Time: 3:30 p.m.
Dept. 403
Judge: Jonathan Skiles

JOSE MAGALLAN, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

SW INGREDIENTS HOLDINGS, LLC d/b/a SPICE WORLD, INC., a Delaware Limited Liability Company; and DOES 1 Through 10, inclusive,

Defendants.

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DECLARATION OF BENNETT S. BERGER

I, Bennett S. Berger, declare:

1. I make this declaration in the above-entitled action, in support of plaintiffs' motion for preliminary approval of class action settlement agreement. I am over the age of 18 and have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. I have been retained by plaintiffs' counsel, Moon & Yang as well as Cohelan Khoury & Singer (collectively Moon and CKS), in the above-entitled action as a data analysis expert to analyze a set of time records and pay records to determine the exposure for various claims including unpaid minimum wages, unpaid overtime wages, meal periods, rest periods, reimbursements, and related derivative and PAGA penalties.

Background

3. I received my Bachelors of Art in Business Management Economics from the University of California, Santa Cruz in 2011. During my education I put an emphasis in finance and studied topics including statistical analysis, information systems management and corporate finance.

4. Currently, I am a partner of Berger Consulting Group (BCG). At BCG, I have been engaged in over 2,500 employment and labor law class-action litigation matters to consult on data collection and analysis since 2013. All of the cases I have worked on required extensive use of Excel and data analysis including but not limited to writing formulas and custom equations to determine individual and/or class-wide violation rates. I have experience processing and analyzing electronic time and payroll records in a variety of native formats including XLSX, CSV, Kronos as well as processing PDF records in a way they can be electronically analyzed. I have been hired to determine and analyze claims for rounding, meal breaks, rest breaks, overtime, off-the-clock, regular rate of pay, reimbursement claims, driving time calculations, derivative penalties, and other wage and hour claims. My experience within Excel consists of using standard Excel functions, building custom Visual Basic for applications (VBA) macros, using pivot tables, writing complex conditional formulas, and utilizing other Excel capabilities to analyze class-action cases.

5. I have provided expert analysis and been deposed in the following wage and hour class actions.

- Turner v Charter Communications – AAA Case No. 01-22-0001-5254
- Harper v Charter Communications – AAA Case No. 01-19-0004-5743
- Feltzs v Cox Communications – Case No. 8:19-CV-02002-JVS-JDE
- Domingo v Prime Healthcare Paradise Valley – Case No. 37-2019-00023576-CU-OE-CTL –
- Ward v Sutter Valley Hospitals – Case No. 2:19-CV-00581-KJM-AC
- Sanchez v ARB, Inc. – Case No. 30-2016-00837130-CU-OE-CXC
- Feltzs v Cox Communications – Case No. 8:19-CV-02002-JVS-JDE
- Libreros v LLR, Inc dba Lularoe – Case No. RIC1714426
- Hankey v The Home Depot USA – Case No. 2:19-cv-00413-JAM-CKD
- Mkhitarian v Bank of the West, – Case No. BC691989
- Santos v United Parcel Services, Inc. – Case No. 3:18-cv-03177-EMC
- Cessna v Southern California Edison Company – Case No. BC689081
- Gamboa v PAFCO - Case No. CIVDS1605273
- Fuller v TWC - Case No. 3:17-cv-01513-DMS-AGS
- Avila v Simply Right - Case No. BC538100
- Pineda v Lithographix - Case No. BC612372
- Cacho v Eurostar - Case No. BC558689
- Barajas v WHM - Case No. BC491045

<u>Materials Reviewed</u>

6. Moon and CKS provided various files including Master Timecard Detail documents 2020-2022, CA Payroll Register Data Export documents 2018-2022, and a 2017 Payroll Journal. These time punch records cover 284 class members with earliest punches in January of 2020 and latest punches in August of 2022. The payroll records covered 295 employees ranging from July 2017 through August 2022. It is my understanding this is the full dataset that was agreed upon by both plaintiff and defendant in order to assess the damages in this matter.

Class Statistics

7. It is my understanding that Defendant stated there were 20,568 workweeks worked by non-exempt hourly employees from July 2nd, 2017 through July 1st, 2022. I analyzed 11,101 pay periods in the pay data through August 16th, 2022 and extrapolated to 11,480 pay periods through October 12th, 2022 based on the ratio of calendar days in each relevant period. I analyzed 8,601 pay periods in the time punch records resulting in an extrapolation multiplier of 1.335 (11,480 pay periods divided by 8,601 pay periods). I analyzed a total of 81,280 shifts across 16,692 workweeks and extrapolated to 296 employees working 108,487 shifts (81,280 shifts x 1.335 multiplier) across 21,270 workweeks through October 12th, 2022.

Off-The-Clock (OTC)

8. I was asked to calculate exposure assuming 3 minutes per shift of unpaid OTC work at the average hourly rate of $17.72. Applying 3 minutes per shift (0.05 hours) multiplied by the 108,487 shifts worked multiplied by the average hourly rate of $17.72 results in a total unpaid amount of $96,119.

Overtime Wages Owed for Shifts Over Eight Hours in a Day

9. Moon and CKS requested I compare the time punch records with the pay records to determine the amount of unpaid overtime that resulted by Defendant not paying overtime in excess of 8 hours/day or 40 hours/week. I successfully compared time record hours with pay record hours within a close margin for 90.1% of the pay periods. Out of these pay periods with hours matching, I found 3.1% had underpaid overtime for not paying hours in excess of 8 per day or 40 per week resulting in an extrapolated 2,589.1 underpaid overtime premium hours. Applying the average rate of pay in each year results in $22,940 in underpaid overtime premiums (0.5x portion).

Overtime Wages Owed at the Regular Rate of Pay

10. Moon and CKS also requested I analyze the payroll records to determine the amount of underpaid overtime occurred by not including the bonus payments into the regular rate of pay for purposes of paying overtime. The analysis assumes the bonuses were earned over the entire year and therefore I calculated the underpaid overtime by applying these bonus payments to the entire year in which they were earned. I calculated the regular rate of pay on a pay period by pay period

basis and compared the overtime paid amounts with what Defendant should have been paying assuming the bonuses needed to be included in the regular rate of pay. 66.8% of employees analyzed resulted in an underpayment across 70.2% of pay periods totaling $14,406 in underpaid overtime.

<u>Meal Periods</u>

11. I was asked to assess the meal break exposure for shifts worked over 5 hours with one of the following occurrences: a meal break starting after the end of the 5th hour of work (late), a shift without a recorded meal break (missed 1st), a meal break lasting for less than 30 minutes (short), a shift lasting between 10 – 12 hours without a recorded 2nd meal break (missed 2nd), or a shift lasting longer than 12 hours without a recorded 2nd meal break (missed 2nd). The extrapolated results from my meal break analysis are as follows:

a) 13,818 instances had a late meal break out of the 103,392 extrapolated meal breaks, representing 13.4% of all shifts with a recorded meal break.

b) 809 shifts had a missing 1st meal break representing 0.8% of the 104,201 extrapolated shifts over 5 hours.

c) 133 instances of a short meal break representing 0.1% of the 103,392 extrapolated 1st meal breaks.

d) 17,321 shifts had a missing 2nd meal break for shifts between 10-12 hours.

e) 729 shifts had a missing 2nd meal break for shifts over 12 hours.

f) In total, there were 28,264 instances of one or more of the above meal break violations representing a 26.1% meal break violation rate of all shifts extrapolated assuming no meal break waivers.

g) In total, there were 14,396 instances of one or more of the above meal break violations representing a 13.3% meal break violation rate of all shifts extrapolated assuming meal break waivers.

h) Applying a one-hour penalty of $17.72 per each of the 14,396 extrapolated meal break violations assuming meal break waivers results in an exposure of $255,104.

<u>Rest Periods</u>

12. I was advised by Moon and CKS to assume a rest break violation rate of 20%. Assigning a 20% violation rate to the 107,366 shifts greater than or equal to 3.5 hours equates to 21,473 rest break violations. Applying a one-hour penalty of $17.72 per each of the 21,473 extrapolated rest break violations results in an exposure of $380,501.

Reimbursement of Business Expenses

13. I was advised by Moon and CKS to assume $10 per month in unreimbursed business expenses. Assigning a $10 per month multiplied by the estimated 5,555 months over the class period results in an exposure of $55,550.

Waiting Time Penalties

14. Defendant stated there are 183 former employees in the 4-year class period. Reducing this figure to the 3-year statute of limitations results in approximately 161 terminated employees. Waiting Time Penalties assume each of these 161 employees are entitled to penalties and are calculated at 30 days per employee multiplied by $17.72 hourly rate multiplied by 8 hours per day. This results in $684,701 in Waiting Time Penalties.

Wage Statement Penalties

15. Wage Statement Penalties assume each of the 268 employees and 7,128 pay periods in the 1-year statute of limitations have a violation and therefore are entitled to penalties. Wage Statement Penalties are calculated at $50 for the initial penalty and $100 for each subsequent penalty with a maximum of $4,000 per employee. 268 employees multiplied by $50 = $13,400 for initial penalties. The subsequent penalties are 6,860 (7,128 – 268) and multiplied by $100 per pay period = $686,000. The sum of the initial plus subsequent penalties equals to $699,400.

PAGA Penalties

16. I have been asked to assess the potential PAGA penalties assuming a maximum of one violation per pay period for each predicate violation. Unpaid wages assume a $100 penalty amount per each of the 7,128 pay periods results in a maximum PAGA exposure of approximately $712,800. Unpaid overtime assumes a $100 penalty amount per each of the 5,006 pay periods with a regular rate of pay violation and results in a PAGA exposure of approximately $500,600. Meal breaks assume a $50 penalty amount per each of the 3,531 pay periods with a meal break violation

and results in a PAGA exposure of approximately $176,550. Rest breaks assume a $50 penalty amount per each of the 7,119 pay periods with a rest break violation and results in a PAGA exposure of approximately $355,950. Wage Statements assume a $250 penalty amount per each of the 7,128 pay periods with a violation and results in a PAGA exposure of approximately $1,782,000. Reimbursements assume a $100 penalty amount per each of the 7,128 pay periods with a violation and results in a PAGA exposure of approximately $712,800. The total PAGA exposure results in $4,240,700.

17. I may be asked to develop additional analysis, observations, and queries in connection with any data counsel for plaintiff provides after the date this declaration is signed. If requested, I could conduct the same or similar analyses as described in this declaration. At that time, if appropriate, I can prepare a supplement to this declaration.

I declare under penalty of perjury of the laws of United States of America in the state of California that the foregoing is true and correct. Executed on October 17, 2023 in Frisco, Texas.

Bennett S. Berger

EXHIBIT 1

Bennett Berger

6121 Brentway Rd. Frisco, TX 75034 • Phone: 818-635-6613 • E-Mail: BergerBennett@gmail.com

Experience

Partner / Senior Data Analyst - Berger Consulting Group June 2013 – Current

- Analyze small and large data sets for wage and hour class action lawsuits. Review data for patterns; group data using Pivot Tables and other complex equations in Excel to help identify relationships between sets of data.
- Use Excel extensively to write equations and macros to aid in quantitative damage models. Worked on over 2,500 wage and hour cases since 2013 in industries such as retail, healthcare, logistics, finance, hospitality, technology, and manufacturing.
- Perform data conversion using multiple commercial OCR software programs to transform small to large volumes of PDF images into searchable text format.
- Write case analysis summaries, detailed reports and declarations explaining the data and exposure models.
- Provide expert testimony of my findings.

Co-Founder / President – SD3D January 2013 – 2023

- Extensive 3D printing knowledge of mechanics and materials as well as 3D design and 3D scanning. Robust knowledge of 3D printing file preparation software.
- Build Excel spreadsheets for cost analysis of 3D printing versus other manufacturing methods.
- Design the sales and marketing material for the business, along with developing the overall brand and sales strategies.
- Responsible for SD3D's finances, financial projections and investor relations.

Account Executive – Corporate Strategies Inc. December 2011 – January 2013

- Market and analyze employee benefits for small group clients.
- Compose spreadsheets comparing current verses renewal and proposed insurance plans.
- Execute daily HR tasks for groups- enrollments, terminations, coverage changes, order ID cards, etc.
- Communicate to business owners as well as employees about their plan benefits and cost comparisons.
- Prepare proposals for individual health insurance clients.
- Organize current life insurance summaries and formulate new products ideas and changes.

Education

University of California, Santa Cruz September 2007 – March 2011

Bachelors of Arts in Business Management Economics

Computer Skills

-Excel, PowerPoint, Word, Outlook, Omnipage PDF converter, ABBYY FineReader PDF converter, Adobe Acrobat Pro

Expert Testimony

Berger Consulting Group

- Turner v Charter Communications – AAA Case No. 01-22-0001-5254 – Deposition – February 16, 2023
- Harper v Charter Communications – AAA Case No. 01-19-0004-5743 – Deposition – September 28, 2021
- Feltzs v Cox Communications – Case No. 8:19-CV-02002-JVS-JDE – Second Deposition – September 22, 2021
- Domingo v Prime Healthcare Paradise Valley – Case No. 37-2019-00023576-CU-OE-CTL – Trial – August 11, 2021
- Domingo v Prime Healthcare Paradise Valley – Case No. 37-2019-00023576-CU-OE-CTL – Deposition – July 28, 2021
- Ward v Sutter Valley Hospitals – Case No. 2:19-CV-00581-KJM-AC – Deposition – June 16, 2021
- Sanchez v ARB, Inc. – Case No. 30-2016-00837130-CU-OE-CXC – Deposition – March 31, 2021
- Feltzs v Cox Communications – Case No. 8:19-CV-02002-JVS-JDE – Deposition – March 5, 2021
- Libreros v LLR, Inc dba Lularoe – Case No. RIC1714426 – Deposition – January 15, 2021
- Hankey v The Home Depot USA – Case No. 2:19-cv-00413-JAM-CKD – Deposition – November 13, 2020
- Mkhitarian v Bank of the West, – Case No. BC691989 – Deposition – September 17, 2020
- Santos v United Parcel Services, Inc. – Case No. 3:18-cv-03177-EMC – Deposition – September 1, 2020
- Cessna v Southern California Edison Company – Case No. BC689081 – Deposition – July 29, 2020
- Gamboa v PAFCO - Case No. CIVDS1605273 – Deposition - July 18, 2019
- Fuller v TWC - Case No. 3:17-cv-01513-DMS-AGS - Deposition - June 20, 2019
- Avila v Simply Right - Case No. BC538100 - Deposition - October 16, 2018
- Pineda v Lithographix - Case No. BC612372 - Deposition - February 9, 2018
- Cacho v Eurostar - Case No. BC558689 - Deposition - February 17, 2017
- Barajas v WHM - Case No. BC491045 - Deposition - November 28, 2016