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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

GERRY DANIEL, individually and on behalf of
all others similarly situated,

Plaintiff,

vs.

MARS WRIGLEY CONFECTIONERY US,
LLC, a Delaware Limited Liability Company,

Defendant.

CASE NO. CVRI2204632

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

- (1) Failure to Pay Overtime Wages (Cal. Lab. Code §§ 510, 1194; IWC Wage Order No. 7-2001, § 3);
- (2) Failure to Authorize and Permit Paid Rest Breaks, and Pay Missed Break Premium Pay (Cal. Lab. Code § 226.7; IWC Wage Order No. 7-2001, § 12);
- (3) Failure to Provide Off-Duty Meal Breaks, and Pay Missed Break Premium Pay (Cal. Lab. Code §§ 226.7, 512; IWC Wage Order No. 7-2001, § 11);
- (4) Failure to Issue Accurate Itemized Wage Statements (Cal. Lab. Code § 226);
- (5) Failure to Pay Compensation Due Upon Discharge or Separation from Employment (Cal. Lab. Code §§ 201-203);
- (6) Unfair, Unlawful, or Fraudulent Business Practices (Cal. Bus. & Prof. Code §§ 17200 *et seq.*); and
- (7) Civil Penalties Pursuant to Private Attorneys General Act (Cal. Lab. Code §§ 2698 *et seq.*).

DEMAND FOR JURY TRIAL

1 Plaintiff Gerry Daniel (“Plaintiff”), on behalf of himself and all others similarly situated,
2 complains and alleges the following:

3 **INTRODUCTION**

4 1. This is a class action under California Code of Civil Procedure § 382 seeking damages
5 for unpaid overtime wages, unpaid premium pay, statutory penalties, interest, restitution, and attorneys’
6 fees and costs under California Labor Code (“Labor Code”) §§ 201-203, 226, 226.7, 510, 512, 1194,
7 Industrial Welfare Commission Wage Order (“Wage Order”) No. 7-2001, §§ 3, 11, 12, California Civil
8 Procedure Code § 1021.5, and restitution under California’s Unfair Competition Law (“UCL”),
9 Business & Professions Code §§ 17200 *et seq.* on behalf of Plaintiff and all other similarly situated
10 individuals currently and formerly employed by Mars Wrigley Confectionery US, LLC (“Mars” or
11 “Defendant”) in California as Territory Sales Managers (“TSMs” or “Class Members”) from April 30,
12 2018 through to the trial date (“Class Period”). Defendant’s violations of California’s wage-and-hour
13 and unfair competition laws, as described herein, have been ongoing throughout the Class Period.¹

14 2. Plaintiff alleges that he and other TSMs in California (a) were misclassified as exempt
15 from protections of the Labor Code and Wage Order No. 7-2001; (b) were entitled to unpaid overtime
16 wages for work in excess of 8 hours per day or 40 hours per week under Labor Code §§ 510, 1194 and
17 Wage Order No. 7-2001, § 3; (c) were entitled to unpaid rest and meal break premiums under Labor
18 Code §§ 226.7, 512 and Wage Order No. 7-2001, §§ 11, 12; (d) are entitled to statutory damages for
19 failure to provide accurate itemized wage statements under Labor Code § 226; (e) are entitled to waiting
20 time penalties under Labor Code §§ 201-203 for Defendant’s failure to pay all compensation due and
21 owing upon separation or separation from employment; and (f) are entitled to restitution under the UCL
22 Business & Professions Code §§ 17200 *et seq.*, as a result of Defendant’s violations of Labor Code
23 §§ 226.7, 510, 512, 1194.

24 3. Plaintiff also brings this action as a representative action under the California Labor
25 Code’s Private Attorneys General Act (“PAGA”), Labor Code §§ 2698 *et seq.*, for civil penalties on
26

27 ¹ The Class Period and Waiting Time Penalty Subclass Period pleaded herein reflect tolling under the
28 Judicial Council of California’s Emergency Rule 9, under which the statutes of limitations “for civil
causes of action that exceed 180 days [were] tolled from April 6, 2020, until October 1, 2020.”

1 behalf of himself and all other current and former Territory Sales Managers employed by Defendant in
2 California during the PAGA Period (“Aggrieved Employees”), for the Labor Code and Wage Order
3 violations alleged herein, specifically Labor Code §§ 201-203, 226, 226.7, 510, 512, 1194 and Wage
4 Order No. 7-2001, §§ 3, 11, 12.

5 4. The “PAGA Period” is from October 25, 2021 through to the trial date.

6 **PARTIES**

7 5. Plaintiff Daniel currently resides in Grand Terrace, California in San Bernardino County.
8 Mr. Daniel was employed by Defendant as a Territory Sales Manager in California from March 2016 to
9 January 2022. From 2016 until June 2021, Mr. Daniel was a resident of Riverside County. Throughout
10 his employment, Mr. Daniel was subject to Defendant’s unlawful conduct described herein.

11 6. Mars is a Delaware limited liability company. Mars’s current filings with the California
12 Secretary of State state that its principal address is in Chicago, Illinois.

13 **JURISDICTION**

14 7. This Court has jurisdiction over Class Members’ claims for failure to pay overtime
15 wages pursuant to Labor Code §§ 510, 1194 and Wage Order No. 7-2001, § 3.

16 8. This Court has jurisdiction over Class Members’ claims for failure to permit and
17 authorize timely paid off-duty rest breaks and for failure to pay premium pay for missed rest breaks,
18 pursuant to Labor Code § 226.7 and Wage Order No. 7-2001, § 12.

19 9. This Court has jurisdiction over Class Members’ claims for failure to provide timely off-
20 duty meal breaks and for failure to pay premium pay for missed meal breaks, pursuant to Labor Code
21 §§ 512, 226.7 and Wage Order No. 7-2001, § 11.

22 10. This Court has jurisdiction over Wage Statement Subclass Members’ claims for failure to
23 issue accurate itemized wage statements under Labor Code § 226.

24 11. This Court has jurisdiction over Waiting Time Penalty Subclass Members’ claims for
25 waiting time penalties as a result of Defendant’s failure to pay compensation due upon discharge or
26 separation from employment under Labor Code §§ 201-203.

12. This Court has jurisdiction over the claims for restitution arising from Defendant's violations of Labor Code §§ 226.7, 510, 512, 1194, Wage Order No. 7-2001, §§ 3, 11, 12, and under the UCL, Bus. & Prof. Code §§ 17203 and 17204.

13. This Court has jurisdiction over claims for attorneys' fees and costs, including pursuant to Labor Code §§ 226(e), 1194 and Cal. Civ. Proc. Code § 1021.5.

14. This Court has jurisdiction over Plaintiff's claims for civil penalties under Labor Code §§ 2698 *et seq.* On October 25, 2022, Plaintiff provided PAGA Notice pursuant to Labor Code § 2699.3 to the California Labor & Workforce Development Agency ("LWDA") and Defendant. The LWDA has provided no notice to Plaintiff within the period specified in Labor Code § 2699.3 regarding its intention to investigate or not investigate any of the claims alleged in the PAGA Notice. Plaintiff has therefore fully complied with the PAGA procedural requirements and may commence this representative action pursuant to Labor Code §§ 2698 *et seq.*

15. The amount in controversy for Plaintiff, including pro rata share of attorneys' fees, is less than seventy-five thousand dollars (\$75,000).

VENUE

16. Venue is proper in the County of Riverside pursuant to Cal. Civ. Proc. Code §§ 395(a) and 395.5. Defendant is a Delaware Corporation and has not designated a principal place of business in California pursuant to Cal. Corp. Code § 2105(a)(3). Defendant employs Class Members throughout California. The unlawful acts alleged herein had a direct effect on Class Members throughout the State of California, some of whom including Plaintiff incurred unpaid overtime wages, unpaid premium pay, statutory penalties for inaccurate wage statements, and waiting time penalties, while conducting Defendant's business within Riverside County. Venue is therefore proper in Riverside County.

FACTUAL ALLEGATIONS COMMON TO ALL CLASS MEMBERS

A. Defendant's Business and Class Members' Role in Business Operations

17. Mars is a manufacturer of confectionary products. Its brands include, among many others, M&M's, Skittles, Starburst, and Altoids. Mars's parent company, Mars, Inc., is one of the largest privately held companies in the United States.

1 18. Mars employs TSMs throughout California to carry out inventory management and
2 merchandising at retail stores that sell Mars products, such as gas stations and convenience stores. Mars
3 assigns each TSM a geographic region, and TSMs travel to the retail stores located within that region.
4 TSMs' working time consists of in-store visits, travel time, and other administrative tasks performed
5 remotely.

6 19. Mars pays TSMs a salary plus an annual bonus of up to 10% of the salary. The bonus
7 amount is based on the entire Company's performance and on whether the TSM's regional team as a
8 whole meets certain targets, such as visiting a certain percentage of stores. The bonus is not based on
9 either sales metrics or on any metrics individual to the TSM. Mars does not pay TSMs commission.

10 20. The principal job duties of TSMs are to make sure Mars products are neatly organized
11 and displayed at each of the TSM's assigned stores, to set up displays about Mars products, and to
12 provide stores with information about inventory levels in the hope that stores will order more Mars
13 products from whatever third-party suppliers the stores obtain Mars products from. Mars itself does not
14 sell products to the stores at all. Rather, stores buy Mars products either from "cash and carry" stores,
15 such as Costco, or from national distributors, such as Core-Mark International ("Core-Mark") or
16 McLane Company ("McLane"). TSMs do not make sales and have no authority or mechanism to place
17 orders for stores to buy Mars products.

18 21. At the stores, TSMs carry out merchandising of all of Mars's products in the store. They
19 straighten up the Mars products, rearrange boxes to group like products together, and consolidate the
20 products from partly empty boxes. TSMs wipe down or dust dirty shelves or dirty Mars products.
21 Plaintiff carried a feather duster on his route. TSMs also check the store's back-stock to see if any Mars
22 products are waiting to be stocked, and if so, TSMs stock the shelves. The purpose of this work is to
23 make Mars's products look neatly organized and more appealing to shoppers, and to make sure Mars
24 product makes it from the back-stock to the shelf.

25 22. Mars sends TSMs a range of promotional materials to drive out to and place in the stores.
26 These include free samples of certain products Mars wants to promote, point of sale (POS) material,
27 large cardboard countertop or floor displays, suction-racks that can be placed inside coolers to hold cold
28 candy samples, coin dishes to place next to the register, dangling signs to hang from shelves, and other

1 promotional display materials. The volume of these items is so significant that Mars pays for TSMs to
2 have storage spaces where they store these materials. When materials arrive from Mars, TSMs must
3 unpack them, organize them, and make a plan for distributing them to hundreds of stores. At the stores,
4 TSMs offer to the store personnel to set up sample bins and/or cardboard displays promoting the
5 products. TSMs attempt to place the materials near the register or near “secondary hot-spots,” like the
6 beverage fountain drink bar. TSMs are also tasked with “selling in” displays of Mars products, but this
7 does not mean “selling” anything – it means persuading the store owner to allow a free rack of Mars
8 products to be placed near the register. All of the foregoing samples and marketing materials are
9 provided to stores free of charge.

10 23. TSMs also check the store’s inventory by scanning the barcode of one of each Mars
11 product the store carries. This syncs with the TSM’s tablet and allows the TSM view the products that
12 Mars offers but that the store does not currently have in stock. TSMs also make a note of products that
13 are low in stock.

14 24. After TSMs take inventory and merchandize, their tablet generates a list of Mars
15 products that the store does not currently have in stock. TSMs then write these items on a hypothetical
16 order form and hand it to the store personnel. For stores that purchase from a national distributor (Core-
17 Mark or McLane), TSMs fill out an order form specific to that distributor. Theoretically, a store owner
18 could use the form to order those products from the distributor. Most stores do not order from a
19 distributor but rather from “cash-and-carries,” such as Costco. For these stores, TSMs fill out a generic
20 “order form” (that cannot actually be used anywhere) with a list of suggested products. In providing the
21 suggested order form to whoever is working in the store, the TSM may also provide basic education
22 about the products, such as which products are new to market and which are selling well. It is then up
23 to the individual store to decide whether to follow through and place an order with whatever third party
24 it buys its products from. TSMs generally would never know what, if anything, the store ordered after
25 the TSM’s visit or where the store purchased those products. The TSM would be back at the store
26 approximately a month down the road, and would simply repeat the process.

27 25. Mars dictates, to the minute, the amount of time TSMs must spend at each store. The
28 amount of time depends on the type or size of the store. Mars monitors TSMs to make sure they comply

1 with this requirement by means of their tablets: TSMs log in via tablet upon arriving at the store and log
2 out upon leaving.

3 26. Mars assesses TSMs' performance based on a set of metrics, none of which involves
4 sales. The metrics include: spending the required amount of time in the store, visiting the required
5 percentage of stores in the region, installing a certain number of POS materials within three feet of the
6 register, putting up a certain number of displays during each store visit, "selling in" free racks of
7 samples, and putting free samples in the store. To track many of these metrics, Mars requires TSMs to
8 answer a series of questions on their tablet when leaving each store – questions about the number and
9 type of POS materials and samples the TSM placed in the store.

10 27. During the Class Period, Core-Mark and McLane employed sales representatives, who
11 would visit some of these same stores that TSMs would visit, and who would actually take orders from
12 the stores for Mars products.

13 28. If a store obtains its Mars products from a "cash and carry" supplier or through McLane,
14 Mars has no way of learning what products the store ordered or where it obtained them. For the
15 minority of stores that use Core-Mark, Mars is able to find out how much Mars product the store has
16 ordered, but this information is not necessarily complete because stores that use Core-Mark often also
17 purchase products from cash-and-carries. The data concerning how much a TSM's stores order from
18 Core-Mark has no impact on how TSMs are paid or evaluated.

19 29. On a typical day, Plaintiff drove to between six and ten stores to perform the above tasks.
20 On a typical day, the process of visiting the stores took about 10-12 hours, five days per week.
21 However, when TSMs take time off work, such as for sick leave, vacation time, or mandatory Mars
22 trainings, TSMs still must maintain their required numbers for store visits (95% of stores in region
23 covered every 2 months). This means that whenever they take time off work, TSMs have to make up
24 for the missed time by increasing the number of stores on their route. If a TSM wanted to take a week
25 off for the holidays to visit family, that TSM might have to visit as many as 15 stores per day during the
26 rest of that 2-month period to make up the missed days.

27 30. In addition to store visits, TSMs are required to perform the following administrative and
28 other tasks: planning their driving route each day to ensure that they eventually visit 95% of the stores

1 in their territory every two months; loading into their tablet the stores they will visit each day;
2 identifying and printing out product-related information from Mars's intranet that they were required to
3 bring to stores; sending and responding to emails from supervisors; participating in Zoom meetings, and
4 other similar house-keeping tasks. Plaintiff spent approximately 8 hours per week on these tasks.

5 31. Additionally, TSMs must travel to and from their Mars-provided storage units. On
6 average, Plaintiff went to his storage unit a couple times per week, which added approximately two
7 hours per week to Plaintiff's typical working time.

8 32. The need to complete administrative tasks and visit his storage route often required
9 Plaintiff to work on the weekend.

10 33. Other than tracking TSMs' time spent in-store by requiring them to log in and out on a
11 tablet, Mars does not track TSMs' hours worked, including for time spent traveling to and from stores
12 and time on the additional work just described.

13 ***B. Class Members Are Non-Exempt Employees***

14 34. Defendant misclassifies TSMs as "non-exempt" employees. Wage Order No. 7-2001,
15 § 1 sets forth the exemptions that, if met, would allow Mars to classify TSMs as exempt from certain
16 wage and hour protections. None of these exemptions applies to TSMs.

17 35. The Wage Order provides that it does not apply to "outside salespersons." Wage Order
18 No. 7-2001, § 1(C). "Outside salesperson" is defined as a person "who customarily and regularly works
19 more than half the working time away from the employer's place of business selling tangible or
20 intangible items or obtaining orders or contracts for products, services or use of facilities." Wage Order
21 No. 7-2001, § 2(J).

22 36. As described in the preceding paragraphs, TSMs do not make sales or obtain orders for
23 Mars products. Rather, their duties are to merchandize, distribute and set up promotional materials, and
24 take inventory that they pass along to the store personnel, after which the stores may purchase Mars
25 products on their own from whatever third parties the store buys products from. Thus, TSMs are non-
26 exempt employees who were entitled to but denied a range of protections under the California Labor
27 Code and Wage Order.
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1 37. During the Class Period, Mars willfully and deliberately misclassified TSMs as exempt
2 employees. Mars was fully aware of the nature of TSMs' duties, and was fully aware that Mars was
3 paying TSMs as if they were exempt employees. Among other things, Mars supervisors engaged in
4 "ride-alongs" with TSMs approximately quarterly.

5 **C. Defendant's Compensation Practices Applicable to Class Members Violated California Laws**
6 **Requiring Overtime Pay, Rest Breaks, and Meal Breaks**

7 38. During the Class Period, as non-exempt employees Class Members were entitled to
8 overtime pay when they worked more than 8 hours per day and/or more than 40 hours per week.
9 Defendant knew or should have known that Class Members worked more than 8 hours per day and/or
10 more than 40 hours per week, yet Defendant failed to pay Class Members overtime wages in violation
11 of Labor Code §§ 510, 1194 and Wage Order No. 7-2001, § 3.

12 39. During the Class Period, as non-exempt employees Class Members were entitled to a 10-
13 minute paid rest break for every 3.5 hours of work and entitled to premium pay for missed rest breaks,
14 pursuant to Labor Code § 226.7 and Wage Order No. 7-2001, § 12.

15 40. Defendant did not maintain a rest break policy applicable to Class Members and did not
16 track their hours in a way that could have been used to ensure compliant rest breaks. Defendant knew or
17 should have known that Class Members worked multiple 3.5 hour stretches each workday. Yet
18 Defendant failed to authorize and permit Class Members to take paid off-duty rest breaks and failed to
19 pay premium pay for missed rest breaks, in violation of Labor Code § 226.7 and Wage Order No. 7-
20 2001, § 12. Class Members do not take rest breaks: they are instructed to spend a specified amount of
21 time at each store, and in order to make it to all of their stores and to minimize the already long duration
22 of their days, TSMs have a strong incentive not to take rest breaks, but rather to continue straight to
23 their next store and keep working. Class Members are also incentivized to continue working without a
24 rest break because a TSM's bonus is based, in part, on the number of stores visited by the TSM's
25 regional team as a whole. Thus, Class Members are entitled to recover 1 hour of pay at their regular rate
26 of compensation for each workday that a rest break was not provided.

27 41. During the Class Period, as non-exempt employees Class Members were entitled to an
28 off-duty meal break of at least 30 minutes at the end of their fifth hour of continuous work and were

1 entitled to premium pay for missed meal breaks, under Labor Code §§ 226.7, 512 and Wage Order No.
2 7-2001, § 11.

3 42. Defendant did not maintain a meal break policy applicable to Class Members and did not
4 track their hours in a way that could have been used to ensure compliant meal breaks. Defendant knew
5 or should have known that Class Members worked more than 5 continuous hours each workday. Yet,
6 Defendant failed to provide Class Members with timely off-duty meal breaks and failed to pay premium
7 pay for missed meal breaks, in violation of Labor Code §§ 226.7, 512 and Wage Order No. 7-2001,
8 § 11. Class Members do not take 30-minute uninterrupted meal breaks: they are instructed to spend a
9 specified amount of time at each store, and in order to make it to all of their stores and to minimize the
10 already long duration of their days, TSMs have a strong incentive not to take a thirty-minute meal break,
11 but rather to continue straight to their next store and keep working, often eating lunch in their cars as
12 they drive. Plaintiff's usual practice was to pack a lunch and eat in his car; otherwise, his 12-hour days
13 would have become 12.5-hour days with no additional pay. Class Members are also incentivized to
14 continue working without a meal break because a TSM's bonus is based, in part, on the number of
15 stores visited by the TSM's regional team as a whole. Thus, Class Members are entitled to recover 1
16 hour of pay at their regular rate of compensation for each workday that a meal break was not provided.

17 ***D. Defendant's Compensation Practices Resulted in Failure to Issue Accurate Itemized Wage***
18 ***Statements***

19 43. This action is also brought on behalf of a subclass comprised of Plaintiff and Class
20 Members who are or have been employed by Defendant during the one year prior to the filing of this
21 Complaint through to the trial date ("Wage Statement Subclass Period") for statutory penalties and
22 reasonable attorneys' fees and costs pursuant to Labor Code § 226(a) and (e) ("Wage Statement
23 Subclass").

24 44. Under Labor Code § 226(a), Defendant was required but failed to furnish Wage
25 Statement Subclass Members with wage statements containing total hours worked by the employee, all
26 applicable hourly rates in effect during the pay period, and the corresponding number of hours worked
27 by the employee at each hourly rate. Rather, TSMs' wage statements state that they worked "40.0000"
28

1 hours, even though Defendant does not track their hours worked and knows that TSMs do not work
2 exactly 40 hours each week.

3 45. Additionally, Defendant issues Wage Statement Subclass Members inaccurate wage
4 statements that do not include an itemized break-down of number of hours worked at each applicable
5 hourly rate in effect during the pay period. Because Mars pays TSMs a salary without tracking their
6 time, Mars does not know TSMs' actual hourly rate, and therefore cannot provide it on their wage
7 statements. Likewise, even though TSMs work overtime, their wage statements do not include an
8 hourly rate for overtime.

9 46. Defendant's practice of furnishing Wage Statement Subclass Members incomplete and
10 inaccurate wage statements in violation of Labor Code § 226(a) is not an isolated and unintentional
11 payroll error due to a clerical or inadvertent mistake, but rather is willful and intentional and the result
12 of Defendant's regular pay policies and misclassification of Subclass Members as exempt employees.

13 47. Wage Statement Subclass Members cannot promptly and easily determine from their
14 wage statements alone, without reference to other documents or information, their total hours worked,
15 all applicable hourly rates in effect during the pay period, and corresponding hours worked at each
16 applicable hourly rate. As a result, Wage Statement Subclass Members suffered injury under Labor
17 Code § 226(e).

18 ***E. Defendant's Compensation Practices Resulted in Failure to Pay All Compensation Due Upon***
19 ***Discharge or Separation from Employment***

20 48. This action is brought on behalf of a subclass comprised of Plaintiff and Class Members
21 discharged by or separated from employment with Defendant ("Waiting Time Penalty Subclass
22 Members"). During the "Waiting Time Penalty Subclass Period" – April 30, 2019 through to the trial
23 date – Defendant failed to pay all compensation due and owing to Waiting Time Penalty Subclass
24 Members at the time of their discharge or separation from employment, in violation of Labor Code
25 §§ 201-203, as a further consequence of failing to pay overtime wages and missed break premiums.

26 49. During the Waiting Time Penalty Subclass Period, the Waiting Time Penalty Subclass
27 Members did not receive all compensation due at the time of discharge or separation from employment,
28 nor did they receive this compensation within 30 days of discharge or separation from employment.

1 Thus, Defendant is liable to Waiting Time Penalty Subclass Members for waiting time penalties under
2 Labor Code § 203.

3 ***F. Defendant's Labor Code Violations Were Unfair Business Practices***

4 50. During the Class Period, Defendant has adopted and used unfair and/or unlawful
5 business practices to reduce Class Members' compensation and increase profits. These practices
6 include failing to pay Class Members overtime wages, failing to authorize and permit off-duty paid rest
7 breaks, failing to provide Class Members compliant meal breaks, and failing to pay Class Members
8 premiums for missed rest and meal breaks.

9 **CLASS ACTION ALLEGATIONS**

10 51. Plaintiff brings this class action pursuant to Cal. Civ. Proc. Code § 382 on behalf of the
11 Class, the Wage Statement Subclass, and the Waiting Time Penalty Subclass. Upon information and
12 belief, there are more than thirty Class Members, more than twenty Wage Statement Subclass Members,
13 and more than twenty Waiting Time Penalty Subclass Members. The members of the Class and
14 Subclasses are so numerous that joinder of all members is impractical.

15 52. Plaintiff's claims are typical of the claims of the members of the Class and Subclasses
16 because he was employed by Defendant as a Territory Sales Manager in California, and was (a) not paid
17 overtime wages, (b) not provided compliant rest breaks and not paid premiums for missed rest breaks,
18 (c) not provided compliant meal breaks and not paid premiums for missed meal breaks, (d) subject to
19 Defendant's policy and/or practice of not properly and accurately tracking hours worked, (e) not
20 provided an accurate and itemized wage statement for each pay period, and (f) not paid all
21 compensation due upon discharge or separation from employment.

22 53. Plaintiff will fairly and adequately represent the interests of the Class and Subclasses.
23 Plaintiff has no conflict of interest with any member of the Class or Subclasses. Plaintiff has retained
24 competent counsel experienced in complex class action litigation. Plaintiff's counsel has the expertise
25 and financial resources to adequately represent the interests of the Class and Subclasses.

26 54. Common questions of law and fact exist as to all members of the Class and Subclasses
27 and predominate over any questions solely affecting individual members of the Class and Subclasses.
28

1 Among the questions of law and fact common to Plaintiff, the Class, and the Subclasses are the
2 following:

3 a. Whether Class Members are non-exempt employees under Wage Order No. 7-2001;

4 b. Whether Defendant failed to establish and/or implement policies applicable to Class
5 Members for properly tracking hours worked;

6 c. Whether Defendant violated Labor Code §§ 510, 1194 and Wage Order No. 7-2001, § 3
7 by failing to pay Class Members overtime wages;

8 d. Whether Class Members are entitled to paid off-duty rest breaks under Labor Code
9 § 226.7 and Wage Order No. 7-2001, § 12;

10 e. Whether Defendant violated Labor Code § 226.7 and Wage Order No. 7-2001, § 12 by
11 failing to pay one hour of premium pay to each Class Member for each day that a compliant rest period was
12 not provided;

13 f. Whether Defendant violated Labor Code §§ 226.7, 512 and Wage Order No. 7-2001,
14 § 11 by failing to provide meal breaks to Class Members;

15 g. Whether Defendant violated Labor Code § 226.7 and Wage Order No. 7-2001, § 11 by
16 failing to pay one hour of premium pay to each Class Member for each day that an off-duty meal break was
17 not provided;

18 h. Whether Defendant violated Labor Code § 226(a) by failing to issue accurate itemized
19 wage statements to Wage Statement Subclass Members;

20 i. Whether Defendant's violations of Labor Code § 226(a) was knowing and intentional;

21 j. Whether Wage Statement Subclass Members suffered injury under Labor Code § 226(e);

22 k. Whether Defendant violated Labor Code §§ 201-203 by failing to pay the Waiting Time
23 Penalty Subclass all compensation due upon discharge or separation from employment, including
24 unpaid overtime wages and unpaid premiums for missed rest and meal breaks;

25 l. Whether Waiting Time Penalty Subclass Members are entitled to waiting time penalties
26 in the form of continued compensation up to 30 work days under Labor Code § 203;

27 m. Whether these violations constitute unfair, unlawful, and fraudulent business practices, in
28 violation of the UCL, Bus. & Prof. Code §§ 17200 *et seq.*;

1 n. Whether Class Members are entitled to restitution under Bus. & Prof. Code §§ 17200 *et*
2 *seq.* for unpaid overtime wages and unpaid premiums for missed rest and meal breaks; and

3 o. The proper formula(s) for calculating damages, penalties, interest, and restitution owed to
4 the Class and the Subclasses.

5 55. Class action treatment is superior to any alternative to ensure the fair and efficient
6 adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly
7 situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and
8 without duplication of effort and expense that numerous individual actions would entail. No difficulties
9 are likely to be encountered in the management of this class action that would preclude its maintenance
10 as a class action, and no superior alternative exists for the fair and efficient adjudication of this
11 controversy. Class Members are readily identifiable from Defendant's employee rosters and/or payroll
12 records.

13 56. Defendant's actions are generally applicable to the entire Class. Prosecution of separate
14 actions by individual members of each Class creates the risk of inconsistent or varying adjudications of
15 the issues presented herein, which, in turn, would establish incompatible standards of conduct for
16 Defendant.

17 57. Because joinder of all Class Members is impractical, a class action is superior to other
18 available methods for the fair and efficient adjudication of this controversy. Furthermore, the amounts
19 at stake for many members of each Class, while substantial, may not be sufficient to enable them to
20 maintain separate suits against Defendant.

21 **FIRST CAUSE OF ACTION**

22 **Failure to Pay Overtime Wages**

[Labor Code §§ 510, 1194; Wage Order No. 7-2001, § 3]

23 58. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
24 the preceding paragraphs.

25 59. Labor Code § 510 and Wage Order No. 7-2001, § 3 require that employers compensate
26 all work performed by an employee in excess of 8 hours per day or 40 hours per week, as well as the
27 first 8 hours worked on the seventh consecutive day of work in any week, at a rate of one and one-half
28 times the employee's regular rate of pay.

60. Labor Code § 1194 states that any employee receiving less than the legal overtime compensation is entitled to recover in a civil action the unpaid balance of the full amount of his or her overtime compensation, including interest thereon and reasonable attorneys' fees and costs.

61. As alleged herein, during the Class Period, Class Members worked more than 8 hours in a day and/or more than 40 hours in a week, entitling them to overtime pay. However, Defendant knowingly and willfully failed to pay overtime wages to Class Members, in violation of Labor Code §§ 510, 1194 and Wage Order No. 7-2001, § 3.

62. Plaintiff, on behalf of himself and all other Class Members, requests relief as described below.

SECOND CAUSE OF ACTION

**Failure to Authorize and Permit Paid Rest Breaks, and Failure to Pay Premium Pay
[Labor Code § 226.7; Wage Order No. 7-2001, § 12]**

63. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

64. Wage Order No. 7-2001, § 12(A) provides:

“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 or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.”

65. Labor Code § 226.7(b) provides: “An employer shall not require an employee to work during a . . . rest or recovery period mandated pursuant to an applicable statute . . . or order of the Industrial Welfare Commission”

66. Wage Order No. 7-2001, § 12(B) provides: “If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the rest period is not provided.”

67. Labor Code § 226.7(c) provides: “If an employer fails to provide an employee a . . . rest or recovery period in accordance with . . . an applicable statute . . . or order of the Industrial Welfare

Commission, . . . the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the . . . rest or recovery period is not provided."

68. As set forth above, during the Class Period, Class Members regularly work 3.5 consecutive hours or more in a workday and, as non-exempt employees, are thus entitled to paid rest breaks. However, because Defendant misclassified Class Members as exempt and failed to track Class Members' hours worked to ensure compliant rest breaks, Defendant failed to authorize and permit timely paid rest breaks.

69. As a result, Class Members are entitled to recovery under Labor Code § 226.7(c) and Wage Order No. 7-2001, § 12(B), in the amount of one additional hour of pay at the Class Member's regular rate of compensation for each day in which Defendant failed to provide Class Members with compliant meal breaks.

70. Plaintiff, on behalf of himself and all other Class Members, requests relief as described below.

THIRD CAUSE OF ACTION

Failure to Provide Compliant Meal Breaks and Pay Missed Meal Break Premiums [Labor Code §§ 226.7, 512; Wage Order No. 7-2001, § 11]

71. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

72. Wage Order No. 7-2001, § 11(A) provides: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes"

73. Wage Order No. 7-2001, § 11(B) provides: "An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes"

74. Labor Code § 512(a) provides: "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"

75. Labor Code § 226.7(b) provides: "An employer shall not require an employee to work during a meal . . . period mandated pursuant to an applicable statute . . . or order of the Industrial Welfare Commission"

1 76. Wage Order No. 7-2001, § 11(D) provides: “If an employer fails to provide an employee
2 a meal period in accordance with the applicable provisions of this order, the employer shall pay the
3 employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the
4 meal period is not provided.”

5 77. Labor Code § 226.7(c) provides: “If an employer fails to provide an employee a
6 meal . . . period in accordance with . . . an applicable statute . . . or order of the Industrial Welfare
7 Commission, . . . the employer shall pay the employee one additional hour of pay at the employee’s
8 regular rate of compensation for each workday that the meal . . . period is not provided.”

9 78. As alleged herein, Class Members worked 5 hours or more in a row without being
10 provided an off-duty 30-minute meal break in which they were relieved of all duties, in violation of
11 Labor Code §§ 226.7, 512 and Wage Order No. 7-2001, § 11.

12 79. As a result, Class Members are entitled to recovery under Labor Code § 226.7(c) and
13 Wage Order No. 7-2001, § 11(D), in the amount of one additional hour of pay at the Class Member’s
14 regular rate of compensation for each day in which Defendant failed to provide Class Members with
15 compliant meal breaks.

16 80. Plaintiff, on behalf of himself and all other Class Members, requests relief as described
17 below.

18 **FOURTH CAUSE OF ACTION**
19 **Failure to Issue Accurate Itemized Wage Statements**
20 **[Labor Code § 226]**

21 81. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
22 the preceding paragraphs.

23 82. During the Wage Statement Subclass Period, as a result of misclassifying TSMs as
24 exempt employees and failing to track their hours worked, Defendant failed to provide Wage Statement
25 Subclass Members with accurate itemized wage statements containing total hours worked by the
26 employee, all applicable hourly rates in effect during the pay period, and the corresponding number of
27 hours worked at each applicable hourly rate, in violation of Labor Code § 226(a).

28 83. As a result of Defendant’s failure to provide accurate itemized wage statements, Wage
Statement Subclass Members suffered injury under Labor Code § 226(e)(2)(B) because they could not

promptly and easily determine from the wage statement alone their total hours worked, all applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each applicable hourly rate.

84. Defendant's failure to furnish accurate itemized wage statements to Wage Statement Subclass Members was knowing and intentional under Labor Code § 226(e), and Wage Statement Subclass Members suffered injury because of Defendant's knowing and intentional failure to comply with Labor Code § 226(a).

85. Under Labor Code § 226(e)(1), Wage Statement Subclass Members are entitled to recover \$50 per employee for the initial pay period in which a violation occurred and \$100 per employee for each violation in a subsequent pay period, not to exceed a total penalty of \$4,000 for each Subclass Member, in addition to reasonable attorneys' fees and costs.

86. Plaintiff, on behalf of himself and all other Wage Statement Subclass Members, requests relief as described below.

FIFTH CAUSE OF ACTION

Failure to Pay Compensation Due Upon Discharge or Separation from Employment [Labor Code §§ 201-203]

87. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

88. Labor Code §§ 201 and 202 require employers to pay all compensation due and owing to employees promptly upon their discharge or separation from employment.

89. Labor Code § 203 provides that if an employer willfully fails to pay compensation promptly upon discharge or separation, as required by Labor Code §§ 201 and 202, then the employer is liable for penalties in the form of continued compensation up to 30 workdays.

90. As alleged herein, during the Waiting Time Penalty Subclass Period, Defendant willfully failed to pay Waiting Time Penalty Subclass Members overtime wages and premium pay for missed rest and meal breaks. As a result, Defendant failed to pay all compensation due to Waiting Time Penalty Subclass Members upon their discharge or separation from employment, in violation of Labor Code §§ 201 and 202.

91. Given the clear law entitling non-exempt employees to overtime wages and premium pay

1 for missed rest and meal breaks, and the clear law requiring Defendant to pay all wages promptly upon
2 separation or discharge from employment, Defendant's failure to pay such wages was willful.

3 92. As a result, Defendant is liable to Waiting Time Penalty Subclass Members for waiting
4 time penalties in the form of continued compensation for up to 30 workdays, under Labor Code § 203.

5 93. Plaintiff, on behalf of himself and all other Waiting Time Penalty Subclass Members,
6 requests relief as described below.

7 **SIXTH CAUSE OF ACTION**
8 **Violation of Unfair Competition Laws**
9 **[Cal. Bus. & Prof. Code §§ 17200 *et seq.*]**

10 94. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
11 the preceding paragraphs.

12 95. The UCL prohibits any unlawful, unfair, or fraudulent business practices. Labor Code
13 § 90.5(a) states that it is the public policy of California to vigorously enforce minimum labor standards
14 to ensure employees are not required to work under substandard and unlawful conditions, and to protect
15 employers who comply with the law from those who attempt to gain competitive advantage at the
16 expense of their workers by failing to comply with minimum labor standards. Through its actions
17 alleged herein, Defendant has engaged in unfair competition within the meaning of the UCL because
18 Defendant's conduct has violated state wage and hour laws as herein described.

19 96. During the Class Period, Defendant committed acts of unfair competition, as defined in
20 the UCL by failing to pay overtime wages, failing to authorize and permit off-duty paid rest breaks,
21 failing to provide compliant off-duty meal breaks, and failing to pay premium pay for missed rest and
22 meal breaks, in violation of Labor Code §§ 226.7, 510, 512, 1194 and Wage Order No. 7-2001, §§ 3, 11,
23 12.

24 97. By its actions and omissions, Defendant has substantially injured Plaintiff and Class
25 Members. Defendant's conduct as herein alleged has damaged Plaintiff and Class Members and was
26 substantially injurious to them.

1 ***Rest Break Claims***

2 106. During the PAGA Period, Defendant failed to authorize and permit paid rest breaks and
3 pay premiums for missed rest breaks when Aggrieved Employees worked at least 3.5 hours or more in a
4 row, in violation of Labor Code § 226.7 and Wage Order No. 7-2001, § 12.

5 107. As a result, under Labor Code § 2699(f)(2), Aggrieved Employees are entitled to one
6 hundred dollars (\$100) per employee per pay period for each initial violation and two hundred dollars
7 (\$200) per employee per pay period for each subsequent violation.

8 ***Meal Break Claims***

9 108. During the PAGA Period, Defendant failed to provide compliant meal breaks and pay
10 premiums for missed meal breaks when Aggrieved Employees worked at least 5 hours or more in a row,
11 in violation of Labor Code § 512 and Wage Order No. 7-2001, § 11.

12 109. As a result, under Labor Code § 2699(f)(2), Aggrieved Employees are entitled to one
13 hundred dollars (\$100) per employee per pay period for each initial violation and two hundred dollars
14 (\$200) per employee per pay period for each subsequent violation.

15 ***Failure to Issue Accurate Itemized Wage Statements***

16 110. During the PAGA Period, Defendant was required but failed to furnish Aggrieved
17 Employees with wage statements containing total hours worked by the employee, all applicable hourly
18 rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate,
19 in violation of Labor Code § 226(a).

20 111. As a result, under Labor Code § 2699(a), (f), Aggrieved Employees are entitled to two
21 hundred fifty dollars (\$250) per employee per initial violation and one thousand dollars (\$1,000) per
22 employee per subsequent violation, in accordance with Labor Code § 226.3.

23 112. Alternatively, Aggrieved Employees are entitled to the default PAGA penalty under
24 Labor Code § 2699(f)(2) of one hundred dollars (\$100) per employee per pay period for each initial
25 violation and two hundred dollars (\$200) per employee per pay period for each subsequent violation.

26 ***Failure to Pay Compensation Due Upon Discharge or Separation from Employment***

27 113. During the PAGA Period, as a further consequence of Defendant's failure to pay
28 overtime wages and missed rest and meal break premiums, Aggrieved Employees did not receive all

1 compensation due and owing to them at the time of their discharge or separation from employment, in
2 violation of Labor Code §§ 201-202.

3 114. As a result, under Labor Code § 2699(f)(2), Aggrieved Employees are entitled to one
4 hundred dollars (\$100) per employee per pay period for each initial violation and two hundred dollars
5 (\$200) per employee per pay period for each subsequent violation.

6 **PRAYER FOR RELIEF**

7 **WHEREFORE**, Plaintiff, on behalf of himself and the Class, prays for the following relief:

8 A. An Order that this action may proceed and be maintained as a class action, with the Class
9 and Subclasses as designated and defined in this Complaint, and that Plaintiff and his counsel be
10 certified as representative and counsel for the Class and Subclasses.

11 B. On the First Cause of Action: That the Court find and declare that Defendant violated
12 Labor Code §§ 510, 1194 and Wage Order No. 7-2001, § 3 by failing to pay Class Members overtime
13 compensation, and award Class Members the amount of their unpaid overtime wages.

14 C. On the Second Cause of Action: That the Court find and declare that Defendant violated
15 Labor Code § 226.7 and Wage Order No. 7-2001, § 12 by failing to authorize and permit timely off-
16 duty paid rest breaks, and award Class Members unpaid premium pay for each workday a rest period
17 was not provided.

18 D. On the Third Cause of Action: That the Court find and declare that Defendant violated
19 Labor Code §§ 226.7, 512 and Wage Order No. 7-2001, § 11 by failing to provide compliant meal
20 breaks, and award Class Members unpaid premium pay for each workday a meal break was not
21 provided.

22 E. On the Fourth Cause of Action: That the Court find and declare that Defendant violated
23 Labor Code § 226(a), (e); award Wage Statement Subclass Members statutory penalties under Labor
24 Code § 226(e); and award reasonable attorneys' fees and costs under Labor Code § 226(e).

25 F. On the Fifth Cause of Action: That the Court find and declare that Defendant violated
26 Labor Code §§ 201-203, and award Waiting Time Penalty Subclass Members waiting time penalties in
27 the form of continued compensation for up to 30 workdays.
28

1 G. On the Sixth Cause of Action: That the Court find and declare that Defendant violated
2 the UCL by failing to pay overtime wages, failing to authorize and permit compliant rest breaks, failing
3 to provide compliant meal breaks, and failing to pay premiums for missed rest and meal breaks; and
4 award restitution to Class Members in the amount of unpaid overtime wages and unpaid premium pay.

5 H. On the Seventh Cause of Action: That the Court award PAGA civil penalties, as well as
6 attorneys' fees and costs, as provided under Labor Code § 2699.

7 I. That the Court award attorneys' fees and costs of suit to the extent permitted by law,
8 including, but not limited to, Labor Code §§ 226(e), 1194 and Cal. Civ. Proc. Code § 1021.5.

9 J. All other relief as this Court deems proper.

10 Dated: December 30, 2022

11 Respectfully submitted,

12 THE JHAVERI-WEEKS FIRM, P.C.

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14 

15 William Jhaveri-Weeks

16 Ally Girouard

17 Sarah Abraham

18 *Attorneys for Plaintiff and the Putative Class*
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Dated: December 30, 2022

THE JHAVERI-WEEKS FIRM, P.C.

William Jhaveri-Weeks

Sarah Abraham

FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT – CASE No. CVRI2204632

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FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT

on the Defendant or its attorneys in this action by causing a true copy thereof to be distributed to the individuals identified below, using the following means of service:

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused the document to be sent to the persons at the e-mail addresses listed above, pursuant to the electronic service agreement between the Parties and pursuant to California Rules of Court, Rule 2.251 and California Code of Civil Procedure section 1010.6.

Executed on January 5, 2023 at San Francisco, CA.


Ally N. Girouard