

FILED
SUPERIOR COURT

2023 JUN -7 PM 1:46

RECEIVED FILED
Donna Edwards
BY DEPUTY

Eric K. Yaeckel [CSB No. 274608]
yaeckel@sullivanlawgroupapc.com
Ryan T. Kuhn [CSB No. 324538]
ryan@sullivanlawgroupapc.com
Karoline D. Kitlowski [CSB No. 347692]
karoline@sullivanlawgroupapc.com
SULLIVAN & YAECKEL LAW GROUP, APC
2330 Third Avenue
San Diego, California 92101
(619) 702-6760 * (619) 702-6761 FAX

Orlando Villalba (SBN 232165)
Orlando.Villalba@capstonelawyers.com
Helga Hakimi (SBN 257381)
Helga.Hakimi@capstonelawyers.com
Roxanna Tabatabaeepour (SBN 260187)
Roxanna.Taba@capstonelawyers.com
CAPSTONE LAW, APC
1875 Century Park East, Suite 1000
Los Angeles, California 90067
310.556.4811 Main | 310.943.0396 Fax

#435
#340524

Attorneys for Plaintiff SEAN SMITH, in a Representative capacity only, and on behalf of other members of the general public similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN JOAQUIN**

STK-CV-110E-2023-5824

SEAN SMITH, in a Representative capacity
only, and on behalf of other members of the
general public similarly situated,

Plaintiff,

v.

TAP PLASTICS, INC., a California
Corporation, and DOES 1-10, inclusive

Defendants

CASE NO.

COMPLAINT FOR:

1. MEAL AND REST PERIOD VIOLATIONS PURSUANT TO LABOR CODE § 2698 *et seq.*
 2. MINIMUM WAGE VIOLATIONS PURSUANT TO LABOR CODE § 2698 *et seq.*
 3. OVERTIME VIOLATIONS PURSUANT TO LABOR CODE § 2698 *et seq.*
 4. WAGE STATEMENT VIOLATIONS PURSUANT TO LABOR CODE § 2698 *et seq.*
 5. FAILURE TO REIMBURSE PURSUANT TO LABOR CODE § 2698 *et seq.*
 6. FAILURE TO PAY WAGES UPON SEPARATION PURSUANT TO LABOR CODE § 2698 *et seq.*
 7. FAILURE TO PROVIDE ADEQUATE SEATING AND RESTING FACILITIES PURSUANT TO LABOR CODE § 2698 *et seq.*
- Demand for Jury Trial

Complaint

FILE BY FAX

COMES NOW Plaintiff SEAN SMITH ("Plaintiff"), in a Representative capacity only, on behalf of all aggrieved employees, and on behalf of other members of the general public similarly situated, and alleges for his complaint as follows:

PARTIES, JURISDICTION, AND VENUE

1. This Court has jurisdiction over this matter in that all parties are residents of, or do business within, the State of California and the amount in controversy exceeds the statutory minimum limit of this Court. The monetary damages and restitution sought by Plaintiff exceed the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. Furthermore, there is no federal question at issue as Wage and Hour protections and remedies related thereto are based solely on California Law and Statutes, including the Labor Code, Civil Code, and IWC Wage Order(s). Also, the Ninth Circuit has recently held that, for purposes of establishing federal diversity jurisdiction, penalties pursuant to the Private Attorneys General Act of 2004 ("PAGA") may not be aggregated. *Urbino v. Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013).
2. Venue before this Court is proper in that certain wrongful acts which gave rise to Plaintiff's injuries occurred in the County of San Joaquin, State of California.
3. Plaintiff is informed and believes and thereon alleges that at all relevant times mentioned herein, Defendant TAP PLASTICS, INC., (Referred to herein as "Defendants" or "TAP"), was and is a Corporation doing business throughout the state, including the County of San Joaquin, State of California.
4. Plaintiff is presently unaware of the true names, capacities and liability of Defendants named herein as DOES 1 through 10, inclusive. Accordingly, Plaintiff will seek leave of court to amend this complaint to allege their true names and capacities after the same have been ascertained.
5. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the wrongs and damages as herein alleged, and in so acting was functioning as the agent, servant, partner, and employee of the co-defendants, and in doing the actions mentioned below, was acting within the course and scope of his or her

1 authority as such agent, servant, partner, and employee with the permission and consent of the
2 co-defendants. Plaintiff's injuries as herein alleged were proximately caused by said
3 defendants. Wherever it is alleged herein that any act or omission was done or committed by
4 any specially named Defendant or Defendants, Plaintiff intends thereby to allege and does
5 allege that the same act or omission was also done and committed by each and every defendant
6 named as a DOE, both separately and in concert with the named Defendant or Defendants.

- 7 6. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them,
8 including DOES 1 through 10, are and at all times herein mentioned were either individuals,
9 sole proprietorships, partnerships, registered professionals, corporations, alter egos or other
10 legal entities which were licensed to do and/or were doing business in the County of San
11 Joaquin, State of California at all times relevant to the subject matter of this action.

12 **FACTUAL BACKGROUND**

- 13 7. On or about September 21, 2021, Plaintiff commenced working for Defendants. Plaintiff's
14 employment with Defendants lasted until October 6, 2022. Throughout his employment with
15 Defendants, Plaintiff has performed his job in a capable and competent manner and has been
16 commended for doing so.
- 17 8. Throughout the term of his employment, Plaintiff and all other aggrieved employees were, and
18 currently are, denied the benefits and protections of the Labor Code due to Defendants'
19 institutionalized pay practices, standard as to all of Defendants' California-based employees.
- 20 9. On March 31, 2023, counsel for Plaintiff prepared and submitted via online filing a letter to
21 the California Labor & Workforce Development Agency ("LWDA"). Plaintiff also mailed a
22 courtesy copy of this letter to the LWDA via USPS Mail. A copy of the letter was mailed to
23 Defendant, via USPS Certified Mail. The letter contained the specific provisions of the
24 California Labor Code and Business and Professions Code violated by Defendants, as well as
25 the facts and theories in support of Plaintiff's claims. (Please see **Exhibit 1**, a true and correct
26 copy of this letter.)
- 27 10. The statutory time period for the LWDA to investigate and/or respond, and for the employer
28 to respond, has concluded.

REPRESENTATIVE ALLEGATIONS

11. As more specifically set forth below, Plaintiff brings this action in a representative capacity on behalf of all current and former aggrieved employees of Defendants who performed work for Defendants in California only. Code Civ. Proc. § 2699; *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 980-981. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were denied the protections and benefits of the Labor Code due to Defendants' standard practices. Throughout their employment, Plaintiff and all other aggrieved employees were and are denied full and accurate compensation, including overtime compensation, in violation of, *inter alia*, Labor Code sections 510, 1194, and 1197. Plaintiff and the other aggrieved employees were and are denied Meal and Rest Periods and Meal and Rest Period payments, in violation of, *inter alia*, Labor Code sections 226.7 and 512. Defendants failed to furnish accurate itemized wage statements in violation of, *inter alia*, Labor Code section 226. Defendants failed to reimburse Plaintiff and other aggrieved employees for necessary business expenditures in violation of, *inter alia*, Labor Code section 2802. Defendants failed to provide all compensation due at termination of employment in violation of, *inter alia*, Labor Code sections 201 through 203.
12. Plaintiff brings this action on the grounds that he and other current and former aggrieved employees of Defendants were and are improperly denied the mandated wages resulting from the above-referenced violations. Code Civ. Proc. § 2699; *Arias*, 46 Cal. 4th at 980-981. The number of current and former aggrieved employees is believed to exceed Two-Hundred (200) members.
13. The approximately Two-Hundred (200) aggrieved employees are comprised of Defendants' current or former California-based employees.
14. The questions of law and fact common to all aggrieved employees arising from Defendants' actions include, among others, the following:
 - a. Whether Defendants failed to pay its employees the proper straight-time, overtime, and double time wages due and owing to them;
 - b. Whether Defendants failed to pay its employees all compensation due and owing at

1 termination of employment;

- 2 c. Whether Defendants failed to provide its employees with statutorily-compliant Meal
3 and/or Rest Periods, in violation of, *inter alia*, California Labor Code section 512 and
4 226.7, in that Defendants' written policies are not compliant with California law, and
5 Defendants do not allow its employees duty-free Meal and/or Rest Periods on occasion;
- 6 d. Whether Defendants failed to properly provide Meal and Rest Period Premiums in
7 accordance with law;
- 8 e. Whether Defendants failed to properly calculate and pay its employees overtime
9 compensation or Meal and Rest Period Premiums in accordance with law by failing to
10 properly calculate, into the Regular Rate of Pay, the value of all employee benefits and
11 other non-discretionary compensation; and
- 12 f. Whether Defendants failed to properly reimburse its employees for necessary business
13 expenditures for; *inter alia*, cell phone costs and other work supplies, in violation of
14 Labor Code section 2802.

15 15. At all times mentioned herein, Defendants were subject to the Labor Codes and Industrial
16 Welfare Commission Wage Orders of the State of California, including, but not limited to,
17 California Labor Code section 2698 *et seq.*

18 16. At all times mentioned herein, Defendants are and were "employers" as that term is used
19 within the relevant sections of the California Labor Code.

20 17. Plaintiff has exhausted his administrative remedies and pre-filing requirements pursuant to
21 California Labor Code section 2699.3, and has also fulfilled all notice requirements under the
22 statute.

23 18. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were
24 denied the protections and benefits of the Labor Code and IWC Wage Order(s) due to
25 Defendants' standard practices. Said violations are set forth below.

26
27 ///

FIRST CAUSE OF ACTION
Meal and Rest Period Violations Pursuant to Labor Code § 2698 et seq.
Representative Action
(By Plaintiff against Defendants and DOES 1 through 10)

19. Plaintiff hereby incorporates by reference paragraphs 1 through 18 as though fully set forth herein.

20. Labor Code section 1198 states:

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

Defendants violated this section by establishing working conditions below the standard of the applicable Wage Order.

21. Under applicable California law, "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a Meal Period of not less than 30 minutes [...] An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second Meal Period of not less than 30 minutes" Lab. Code § 512(a); see also 8 Cal. Code Regs. § 11070 (11)(A).

22. Unless the employee is relieved of all duty during a thirty (30) minute Meal Period, the Meal Period shall be considered an "on duty" Meal Period and counted as time worked. 8 Cal. Code Regs. § 11070 (11).

23. California law requires employers to provide nonexempt employees with a 10-minute Rest Period for every four hours worked, or "major fraction thereof." 8 Cal. Code Regs. § 11070 (11).

24. An employer who fails to provide Meal or Rest Periods as required by an applicable Wage Order must pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the Meal or Rest Period was not provided. Lab. Code § 226.7(b); 8 Cal. Code Regs. § 11070 (11), (12).

25. Within the operative time period, Defendants failed to possess compliant Meal and Rest Period policies.

- 1 26. For example, Defendants do not possess a legal Meal Period policy or legal Rest Period policy,
2 and makes no attempt to ensure that its employees are either timely or wholly provided Meal
3 Periods or Rest Periods.
- 4 27. Defendants would also pressure employees to either skip, or cut short, Meal Periods and Rest
5 Periods, based on order volume and coverage issues.
- 6 28. In addition, Defendants had notice of Plaintiff working outside of his scheduled and/or
7 reported hours, as well as within his Meal and Rest Periods, but failed to provide any
8 compensation for this work-time.
- 9 29. Defendants willfully failed and refused to pay Plaintiff and all other aggrieved employees one
10 additional hour of pay at their regular rate of pay for all workdays that a Meal or Rest Period
11 was not provided, as required by Labor Code section 226.7 and IWC Wage Order 7 § (11),
12 (12).
- 13 30. Any payments made by Defendants for non-compliant Meal Periods were not paid at the
14 employee's regular rate in violation of Labor Code section 226.7 and the operative IWC Wage
15 Orders. Instead, these payments were made at an employee's base rate and did not include the
16 value of, *inter alia*, all actual compensation owed, and/or all employee benefits such as, for
17 example, non-discretionary compensation and other employee benefits.
- 18 31. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
19 Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be
20 proven at trial.
- 21 32. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
22 behalf of himself and all other aggrieved employees by and through Labor Code section
23 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
24 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
25 Prayer For Relief.
- 26 33. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
27 pursuant to Labor Code sections 2699(a) for each of these employees.
- 28 34. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code

1 section 2699(g)(1).

2 **SECOND CAUSE OF ACTION**
3 **Minimum Wage Violations Pursuant to Labor Code § 2698 et seq.**
4 **Representative Action**
5 **(By Plaintiff against Defendants and DOES 1 through 10)**

6 35. Plaintiff hereby incorporates by reference paragraphs 1 through 34 as though fully set forth
7 herein.

8 36. Defendants failed to pay its employees all compensation due in violation of, among other
9 statutes, Labor Code section 1197. California law holds that the failure to pay for any work
10 time constitutes a violation of minimum wage laws. *Armenta v. Osmose, Inc.*, (2005) 135 Cal.
11 App.4th 314, 323. These violations were caused by and through Defendants' failure to
12 maintain accurate Time Records (as required by California law), to the detriment of the
13 employees. Specifically, although Defendants would receive "to-the-minute" start and end
14 times (from their employees' mandated timekeeping practices), Defendants would thereafter
15 alter - and deduct time from - the Time Records, prior to payment of compensation to the
16 employees. Additionally, the right to receive the proper minimum wage compensation was
17 impacted by Defendants knowingly failing to consider other work performed by the employees,
18 including all time employees were under Defendants' control. These actions, and instructions,
19 caused the employees to lose compensation, including proper minimum wage compensation
20 and overtime compensation. Moreover, Defendants instructed its employees to "self-round"
21 their actual work-times, with a lack of specific instruction as to how to accurately - and
22 neutrally - perform such a function.

23 37. As a result of Defendants' failure to comply with the provisions of the Labor Code, Plaintiff
24 and all other aggrieved employees have been damaged in an amount to be proven at trial.

25 38. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
26 behalf of himself and all other aggrieved employees by and through Labor Code section
27 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
28 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
Prayer For Relief.

1 39. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
2 pursuant to Labor Code sections 2699(a) for each of these employees.

3 40. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code
4 section 2699(g)(1).

5 **THIRD CAUSE OF ACTION**
6 **Overtime Violations Pursuant to Labor Code § 2698 et seq.**
7 **Representative Action**
8 **(By Plaintiff against Defendants and DOES 1 through 10)**

9 41. Plaintiff hereby incorporates by reference paragraphs 1 through 40 as though fully set forth
10 herein.

11 42. Defendants failed to pay Plaintiff and all other aggrieved employees all compensation,
12 including overtime compensation, due in violation of, among other statutes, Labor Code
13 section 510. These violations occurred due to Defendants' illegal policies, referenced above,
14 whereby employees experienced monetary under-compensation. The systematic failure to
15 provide proper overtime compensation is a violation of California law.

16 43. Additionally, Defendants also failed to provide the actual Overtime Rate of Pay by ignoring
17 certain compensation when calculating the Regular Rate of Pay including, but not limited to,
18 shift differentials, various forms of bonus and/or incentive pay, and the value of employee
19 benefits and employee discounts, in violation of Labor Code section 510.

20 44. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
21 Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be
22 proved at trial.

23 45. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
24 behalf of himself and all other aggrieved employees by and through Labor Code section
25 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
26 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
27 Prayer For Relief.

28 46. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
pursuant to Labor Code sections 2699(a) for each of these employees.

1 47. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code
2 section 2699(g)(1).

3 **FOURTH CAUSE OF ACTION**
4 **Wage Statement Violations Pursuant to Labor Code § 2698 et seq.**
5 **Representative Action**
6 **(By Plaintiff against Defendants and DOES 1 through 10)**

7 48. Plaintiff hereby incorporates by reference paragraphs 1 through 47 as though fully set forth
8 herein.

9 49. Defendants failed to provide Plaintiff and all other aggrieved employees with accurate itemized
10 wage statements in violation of, among other statutes, Labor Code section 226. These
11 violations include, but are not limited to, Defendants' failure to accurately identify all
12 applicable regular and overtime (including double-time) rates of pay in violation of section
13 226(a)(9), and providing inaccurate representations of both "gross" and "net wages."
14 Defendants also failed to accurately list "all applicable hourly rates in effect during the pay
15 period and the corresponding number of hours worked at each hourly rate," in violation of
16 226(a)(9). Defendants also failed to provide an accurate showing of the "total hours worked,"
17 in violation of Labor Code section 226(a)(2).

18 50. Further, the Defendants' wage statement listings are confusing and employees cannot readily
19 ascertain their total hours worked, applicable rates, and all gross and net wages. As one
20 example, Defendants are apparently using a time calculating system other than "minutes", but
21 without explanation to the employees within the wage statement.

22 51. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
23 Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be
24 proven at trial.

25 52. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
26 behalf of himself and all other aggrieved employees by and through Labor Code section
27 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
28 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
Prayer For Relief.

1 53. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
2 pursuant to Labor Code sections 2699(a) for each of these employees.

3 54. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code
4 section 2699(g)(1).

5 **FIFTH CAUSE OF ACTION**
6 **Failure to Reimburse Pursuant to Labor Code § 2698 et seq.**
7 **Representative Action**
8 **(By Plaintiff against Defendants and DOES 1 through 10)**

9 55. Plaintiff hereby incorporates by reference paragraphs 1 through 54 as though fully set forth
10 herein.

11 57. Defendants failed to reimburse their employees for all necessary business expenditures
12 incurred in direct consequence of the discharge of their duties in violation of, among other
13 statutes, Labor Code section 2802. These expenditures are the result of, *inter alia*, Defendants'
14 standard policies which require its employees to incur mileage, purchase work supplies, and
15 to use their own cell phones for work-related purposes, without reimbursement.

16 58. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
17 Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be
18 proven at trial.

19 59. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
20 behalf of himself and all other aggrieved employees by and through Labor Code section
21 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
22 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
23 Prayer For Relief.

24 60. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
25 pursuant to Labor Code sections 2699(a) for each of these employees.

26 61. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code
27 section 2699(g)(1).

28 ///

SIXTH CAUSE OF ACTION
Failure to Pay Wages Upon Separation Pursuant to Labor Code § 2698 et seq.
Representative Action
(By Plaintiff against Defendants and DOES 1 through 10)

62. Plaintiff hereby incorporates by reference paragraphs 1 through 61 as though fully set forth herein.

63. Defendants failed to provide Plaintiff and other aggrieved employees with all wages earned and unpaid at termination in violation of, among other statutes, Labor Code sections 201 through 203. These violations resulted from, among other unlawful actions, Defendants' willful failure to provide accurate and complete compensation to aggrieved employees under Labor Code sections 226.7, 510, 512, 1197, and 2802, as set forth above.

64. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be proven at trial.

65. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on behalf of himself and all other aggrieved employees by and through Labor Code section 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below Prayer For Relief.

66. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants pursuant to Labor Code sections 2699(a) for each of these employees.

67. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code section 2699(g)(1), and interest, pursuant to Labor Code section 218.6.

SEVENTH CAUSE OF ACTION
Failure to Provide Adequate Seating and Resting Facilities Pursuant to
Labor Code § 2698 et seq.
Representative Action
(By Plaintiff against Defendants and DOES 1 through 10)

68. Plaintiff hereby incorporates by reference paragraphs 1 through 67 as though fully set forth herein.

69. Defendants failed to provide suitable seats to all working employees when the nature of the

1 work reasonably permitted the use of seats, in violation of Labor Code section 1198 and
2 California Code of Regulations, title 8, section 11070(14)(A). Plaintiff and other nonexempt
3 employees were required to stand throughout their work periods. Additionally, when TAP
4 employees were not engaged in the active duties of their employment and/or the nature of the
5 work required standing, an adequate number of suitable seats were not placed in reasonable
6 proximity to the work area and/or TAP employees were not permitted to use such seats when
7 it did not interfere with the performance of their duties, in violation of California Code of
8 Regulations, title 8, section 11070(14)(B).

9 70. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
10 Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be
11 proven at trial.

12 71. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
13 behalf of himself and all other aggrieved employees by and through Labor Code section
14 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
15 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
16 Prayer For Relief.

17 72. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
18 pursuant to Labor Code sections 2699(a) for each of these employees.

19 73. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code
20 section 2699(g)(1).

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff, on behalf of all aggrieved employees, prays for judgment as follows:

- 23 1. For an award of attorneys' fees and costs of suit herein pursuant to Labor Code section
24 2699(g)(1);
25 2. For an award of statutory civil penalties pursuant to Labor Code section 2699(f)(2); and
26 3. For such other relief as the Court deems just and proper.
27

28 ///

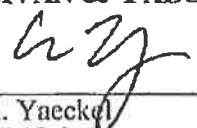
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEMAND FOR JURY TRIAL

Plaintiff hereby requests that this matter be heard and decided by trial by jury.

Dated: June 6, 2023

SULLIVAN & YAECKEL LAW GROUP, APC



Eric K. Yaeckel
Ryan T. Kuhn
Karoline D. Kitlowski
Attorneys for Plaintiff SEAN SMITH, in a
Representative capacity only, and on behalf of other
members of the general public similarly situated

Exhibit 1

SULLIVAN & YAECKEL

LAW GROUP

A PROFESSIONAL CORPORATION

2330 THIRD AVENUE
SAN DIEGO, CALIFORNIA 92101

PHONE 619-702-6760
FACSIMILE 619-702-6761

March 31, 2023

Labor and Workforce Development Agency
Attn. PAGA Administrator

Submitted Via Online Filing

Re: Sean Smith v. TAP Plastics, Inc., A California Corporation
Our File No.: 7340

Dear Administrator:

Please allow this correspondence to serve as "written notice," as required by California Labor Code section 2699.3(a)(1), of the specific provisions of the California Labor Code believed to have been violated by TAP Plastics, Inc., A California Corporation, (hereinafter "TAP"), in the above referenced matter. This "written notice" is filed on behalf of Mr. Smith, and all current and former non-exempt employees employed by TAP. Thank you for your assistance and instruction on this issue.

The specific provisions alleged to have been violated by TAP are as follows:

CALIFORNIA LABOR CODE SECTIONS 201-203, 226, 226(a), 226.7, 510, 512, 1194, 1197.1, 1198.5 and 2802, as well as IWC Wage Order 7, and any other applicable wage orders, codified as Title 8, California Code of Regulations, section 11070 *et seq.*

Facts and theories supporting the allegations: Mr. Smith has been employed as a non-exempt employee for TAP from approximately September 21, 2021, through October 6, 2022.

///

///

///

Throughout the term of Mr. Smith's employment, TAP required Mr. Smith and all other non-exempt employees to experience actions illegal under the California Labor Code, including the following:

Minimum Wage and Overtime Violations

- TAP failed to provide all compensation, including minimum wage and overtime compensation, as well as compensation for work performed inside of Meal and Rest Periods, to its employees in violation of, *inter alia*, Labor Code sections 1194, 510, IWC Wage Order 7, and any other applicable wage orders. This illegal action is due, in part, to TAP's policies of (1) failing to properly retain accurate Time Records, in violation of California law, and (2) failing to provide compensation (including both minimum and overtime compensation) for all time worked by the employees, or in control of the employer. For instance, TAP would instruct Mr. Smith to report scheduled (as opposed to *actual*) work hours, resulting in a loss of compensation. Additionally, TAP would often require Mr. Smith to work extended hours (beyond scheduled hours), without compensation. Further, TAP would regularly contact Mr. Smith outside of normal work hours (*i.e.*, "after hours" or during lunch) without compensation.
- Additionally, among other issues, TAP has notice of Mr. Smith, and others, working outside of their scheduled and/or reported hours, as well as *within* Meal and Rest Periods, but fails to provide any compensation for this work-time. Mr. Smith was frequently scheduled to be "On Call" outside of when his work shifts ended, but was never compensated for this time. Further, TAP failed to properly calculate and pay overtime at the actual overtime rate of pay, as TAP ignores certain compensation (including bonuses) when calculating the Regular Rate of Pay.

Failure to Provide Compliant Meal Periods

- TAP failed to provide compliant Meal Periods or requisite Meal Period penalty payments, in violation of, *inter alia*, Labor Code sections 226.7, 512, and IWC Wage Order 7, or any other applicable wage orders. For example, TAP does not possess a legal Meal Period policy and makes no attempt to ensure that its employees are either timely or wholly provided Meal Periods. The employees would often either miss a Meal Period entirely, or be provided a short or untimely Meal Period. Mr. Smith will testify on occasion TAP required that he take a Meal Period after the fifth hour of his shift in order to complete work projects. Whether or not an employee was provided a Meal Period was often contingent upon the how busy or understaffed the employees were on a given day.
- TAP would pressure its employees to either skip, or cut short, a Meal Period as employees were expected to respond to supervisors at all times. TAP has never

provided a compliant Meal Period penalty payment to any employee as to the above referenced issues. Finally, on the rare occasions when employees *were* paid Meal Period penalties (*i.e.* California Meal Period Premiums), such payments do not “cure” the stated Labor Code violation under section 226.7. The California Supreme Court held that “An employer’s failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer’s provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of section 226.7.” (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256, *italics added.*). Even more recently, a 2020 California Supreme Court ruling stated that, “The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself. For example, employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy ‘does not excuse a section 226.7 violation.’” *Kim v. Reins International California, Inc.*, (2020) 9 Cal.5th 73. To be clear, payment of a Meal Period penalty to employees does not rectify the violation, it is in fact an admission of a Labor Code violation. Finally, TAP failed to pay Meal Period Premiums at the proper rate, as TAP fails to either (1) pay a full hours worth of pay, or (2) properly calculate the regular rate of pay for purposes of determining the premium rate owed. *Ferra v. Loews Hollywood Hotel, LLC*, (2021) 11 Cal.5th 858.

TAP required its employees to constantly monitor their cell phones and be “on-call” at all times, specifically during Meal Periods. On occasion, TAP would interrupt, or cut short, its employees’ Meal Periods and require them to return to work. TAP was frequently understaffed; this would result in Mr. Smith being required to respond to supervisors about work related matters during his Meal Periods.

TAP illegally retained control over its employees during Meal Periods. For example, TAP required its employees to “remain on the premises,” and to remain “On Call” (*i.e.* monitor their phones) at all times, including during Meal Periods.

Failure to Provide Compliant Rest Periods

TAP failed to provide compliant Rest Periods or requisite Rest Period penalty payments, in violation of, *inter alia*, Labor Code sections 226.7, 512, and IWC Wage Order 7, and any other applicable wage orders. For example, TAP does not possess a legal Rest Period policy, as its Rest Period policy lacks required language under California law. TAP makes no attempt to ensure that its employees are either timely or wholly provided Rest Periods. The employees would often either miss a Rest Period entirely, be provided a short or untimely Rest Period, or be provided only one Rest Period, even when they were working in excess of 6.5 hours a day. TAP would pressure its employees to either skip, or cut short, a Rest Period as employees were

expected to respond to clients and supervisors at all times. Mr. Smith will testify he was often required to work during Rest Periods in order to complete his daily duties before he ended his shift for the day. TAP has never provided a compliant Rest Period penalty payment to any employee as to the above referenced issues. Finally, on the rare occasions in which TAP would provide a Rest Period penalty, it would pay said penalty at an improper (and *lesser*) rate, due to the failure to properly calculate the Regular Rate of Pay.

- TAP required its employees to constantly monitor their cell phones and be "on-call" at all times, specifically during Rest Periods. On occasion, TAP would interrupt, or cut short, its employees' Rest Periods and require them to return to work. When Mr. Smith was able to take a Rest Period, his Rest Periods were often interrupted by supervisors and work related matters.
- Finally, TAP illegally retained control over its employees during Rest Periods. For example, TAP required its employees to "remain on the premises," and to remain "On Call" (*i.e.* monitor their phones) at all times, including during Rest Periods.

Wage Statement Violations

- TAP violated Labor Code section 226(a)(2) by failing to furnish an accurate showing of all hours worked at each hourly rate by the employee. Mr. Smith, and other employees were not compensated for all hours worked (due in part to TAP's requirement that employees list only *scheduled* work-times, not actual work-times.)
- TAP violated Labor Code section 226(a)(5) by failing to furnish an accurate showing of the net wages earned by its employees. For example, TAP (a) would not provide compensation for all hours and minutes worked, (b) would use an improper (and lesser) Overtime Rate of Pay, and (c) would fail to pay Meal and/or Rest Period penalties when due. TAP failed to properly calculate and pay overtime at the actual overtime rate of pay, as TAP ignores certain compensation (including bonuses) when calculating the Regular Rate of Pay. (Please See **Exhibit A and B.**) Further, on the rare occasions in which TAP would provide a Meal or Rest Period penalty, it would pay said penalty at an improper (and lesser) rate, due to the failure to properly calculate the Regular Rate of Pay.
- TAP violated Labor Code section 226(a)(9) by failing to furnish an accurate showing of all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Mr. Smith, and the other employees were not compensated for all hours worked (due in part to TAP requiring employees to list only *scheduled* work-times, not actual work-times to include "on-call" hours). TAP does not explain how its' system describes "time

worked" on the "Earnings Statement" itself. Additionally, TAP does not use "minutes," to describe the amount of time worked, on the "Earnings Statement. As an example, for the pay period ending July 1, 2022, TAP states that it paid Mr. Smith for "3.92" hours of "Hourly" Pay. (Please see **Exhibit A**). However, Mr. Smith cannot "readily ascertain" what 3.92 means without "reference to other documents or information." Additionally, TAP does not use "minutes," to describe the amount of time worked, on the "Earnings Statement." As an example, .92 is not an accurate representation of minutes worked, but an altered representation of those minutes. (i.e., 25 minutes of work could be represented as .25, and 50 minutes of work could be represented as .50, however .92 minutes of work cannot be represented as .92 as there are not 92 minutes within one hour.) This is because TAP is apparently using a time-calculating system other than "minutes," but without explanation to the employees within the wage statement. As minutes are measured on a scale of 1 through 60, it is not apparent what these figures are meant to represent. Without an explanation for how these figures were arrived at, employees cannot "readily ascertain" their total hours worked. Therefore, TAP failed to provide an accurate showing of the "total hours worked" by its employees pursuant to section 226(a)(2), due to all the aforesaid reasons.

Failure to Provide Compliant Expense Reimbursement Payments

TAP failed to provide compliant expense reimbursement payments in violation of, *inter alia*, Labor Code section 2802, by failing to provide payments for expenses incurred by Mr. Smith, and other non-exempt employees, including expenses for cell-phone costs, necessary work supplies, and mileage. Mr. Smith was required to purchase protective boots at a cost of \$124.99, however TAP failed to fully reimburse him for the full amount of the cost. (Please see **Exhibit B**.)

Failure to Provide Adequate Seating and Resting Facilities

TAP failed to provide suitable seats to all working employees when the nature of the work reasonably permitted the use of seats, in violation of Labor Code section 1198 and California Code of Regulations, title 8, section 11070(14)(A). Mr. Smith and other nonexempt employees were required to stand throughout their work periods. Additionally, when TAP employees were not engaged in the active duties of their employment and/or the nature of the work required standing, an adequate number of suitable seats were not placed in reasonable proximity to the work area and/or TAP employees were not permitted to use such seats when it did not interfere with the performance of their duties, in violation of California Code of Regulations, title 8, section 11070(14)(B).

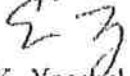
Willful Failure to Provide All Compensation to Ex-Employees

TAP failed to provide all compensation upon termination of employment in violation of Labor Code sections 201-203, due, in part, to the fact that TAP failed to provide proper compensation for all hours worked, and failed to pay full Meal or Rest Period penalties, as discussed above.

To confirm, TAP is a "person" as defined within California Labor Code section 18.

Again, thank you for your assistance and instruction throughout this matter. Should you have any questions or comments, please do not hesitate to contact the undersigned.

Very Truly Yours,


Eric K. Yaeckel, Esq.

cc: Via Certified U.S. Mail

David F. Freeberg
Agent for Service of Process for
TAP PLASTICS, INC., A CALIFORNIA CORPORATION
3011 Alvarado St. Ste A
San Leandro, CA 94577

Exhibit A

TAP PLASTICS INC
3011 Alvarado St Suite A
San Leandro CA 94577

1603-1688
ORG1:46 Web
EE ID: 3521

DD

SEAN H SMITH
1296 SPRUCE LANE #19
MANTECA CA 95336

PERSONAL AND CHECK INFORMATION			EARNINGS	BASIS OF DESCRIPTION	HRS/UNIT'S	RATE THIS PERIOD (\$)	YTD HOURS	YTD (\$)
Sean H Smith				PAY				
1296 Spruce Lane #19				Hourly	70.08	16.5000	1255.32	16058.20
Manteca, CA 95336				Hourly	3.92	18.0000	70.56	
Soc Sec #: xxx-xx-xxxx Employee ID: 3521				Overtime	2.80	24.7500	69.30	165.09
Home Department: 46 Web				Holiday				40.00
Pay Period: 06/18/22 to 07/01/22				Sick				28.00
Check Date: 07/08/22 Check #: 72823				Vacation				42.00
NET PAY ALLOCATIONS				Total Hours	82.80		1085.56	593.00
DESCRIPTION THIS PERIOD (\$) YTD (\$)				Gross Earnings		1395.18		18038.29
Check Amount 0.00 0.00				Total Hrs Worked	82.80			
Chkg 770 1087.57 14130.43			WITHHOLDIN	DESCRIPTION	FILING STATUS	THIS PERIOD (\$)		YTD (\$)
NET PAY 1087.57 14130.43			GS	Social Security		81.48		1050.84
				Medicare		19.05		245.76
				Fed Income Tax	SMS	90.03		1090.07
				CA Income Tax	SMI2 0 1	21.58		245.49
				CA Disability		14.46		106.45
				TOTAL		226.60		2018.61
			DEDUCTION	DESCRIPTION		THIS PERIOD (\$)		YTD (\$)
				TO-PIA DEN EE		7.63		53.41
				TO-PIA MED EE		70.00		978.00
				TO-PIA VIS EE P		3.38		57.84
				TOTAL		81.01		1089.25
NET PAY						THIS PERIOD (\$)		YTD (\$)
						1087.57		14130.43

Exhibit B

BOOT BARN[®]

Manteca
285 Commerce Avenue
Manteca, CA 95336-506
.2096247799

SURVEY

15 of your next purchase of \$25 or more!
Tell us about today's experience
BootBarnVisit.smg.com
Esta encuesta está disponible en español.
The Validation Code is

30702-0001420-210921-0547

Offer expires 30 days after
date printed on receipt.

One coupon per visit.

Please rate

Jessica
Highly satisfied!

Salesperson: Jessica No. 4224
400000723341 76033034214 61n BRN \$124.99
1 @ \$124.99
Subtotal \$124.99
Sales Tax 8.250% \$10.31
Total \$135.30
Cash \$200.00
Cash Change \$64.70

Store: 00307 Reg: 02 Tran: 001420
Date: 9/21/2021 5:47:03 PM Assoc: 046591

Item(s) Sold: 1
Item(s) Returned: 0

Thank you for shopping at
Manteca
Kianna served you today.

RETURN POLICY
REFUNDS/EXCHANGES ON UNWORN/UNWASHED
MERCHANDISE, TAGS ATTACHED, WITHIN
30 DAYS OF PURCHASE WITH ORIGINAL RECEIPT.
20 DAY HOLD ON CHECKS OVER \$50

Stay Connected - Text us to receive
Special Offers and Alerts

TAP000062