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15 Attorneys for Plaintiff Susanne Scherman
16 individually, as a Class Representative and a
17 Private Attorney General, and for Members of the Class,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CENTRAL DIVISION

SUSANNE SCHERMAN, individually, on
behalf of those similarly situated, and as a
Private Attorney General ,

Plaintiff,

v.

BIRD ROCK COFFEE ROASTERS, INC.,
and DOES 1-20, inclusive,

Defendants.

Case No.: 37-2023-00034195-CU-OE-CTL

CLASS ACTION

**PRIVATE ATTORNEY GENERAL
ACTION**

**COMPLAINT FOR DAMAGES,
PENALTIES, AND INJUNCTIVE
RELIEF**

DEMAND FOR JURY TRIAL

1 Plaintiff Susanne Scherman ("Plaintiff" or "Scherman") is a former employee of Bird Rock
2 Coffee Roasters, Inc. ("BRCR"). On behalf of herself, those similarly situated, and as a Private
3 Attorney General, she brings the following claims against BRCR and Does 1-20, inclusive (each a
4 "Defendant" and collectively "Defendants"):

5 **JURISDICTION AND VENUE**

6 1. This class action is brought under California Code of Civil Procedure §382. The
7 monetary damages and restitution sought by Plaintiff exceeds the minimal jurisdiction limits of the
8 California Superior Court and will be established according to proof at trial.

9 2. This is also a private attorney general action for recovery of civil penalties under the
10 California Labor Code Private Attorneys General Act of 2004, California Labor Code § 2698, et seq.
11 ("PAGA"). *See Arias v. Superior Court* 46 Cal. 4th 969 (2009). PAGA permits an "aggrieved
12 employee" to bring a private attorney general action on behalf of herself, other current and former
13 aggrieved employees, and the State of California on a representative basis to address an employer's
14 violations of the California Labor Code. Plaintiff seeks PAGA penalties on behalf of herself,
15 Defendants' other current and former California aggrieved employees, and the State of California.

16 3. This Court has jurisdiction over this action under the California Constitution Article
17 VI §10, which grants the California Superior Court original jurisdiction in all causes except those
18 given by statute to other courts. The statutes under which this action is brought do not give jurisdiction
19 to any other court.

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

24 5. Venue is proper in this Court because, upon information and belief, one or more of the
25 Defendants, reside, transact business, or have offices in this County and the acts or omissions alleged
26 took place in this County.

27 **PARTIES**

28 6. Plaintiff is and, during the times mentioned in this Complaint, was a resident of San

1 Diego County, California who performed work for Defendants in California, and was based in San
2 Diego County.

3 7. Plaintiff is informed and believes, that during the times referenced in this Complaint,
4 BRCR was licensed and qualified to do business in California. On information and belief, Plaintiff
5 alleges that, at all relevant times, BRCR did and continues to transact business throughout California
6 with a principal place of business in San Diego County.

7 8. Whenever reference is made to any act, deed, or conduct of BRCR, the allegation
8 means that BRCR engaged in the act, deed, or conduct by or through one or more of its manager,
9 members, officers, directors, agents, employees, or representatives, who was actively engaged in the
10 management, direction, control, or transaction of the ordinary business and affairs of BRCR.

11 9. Plaintiff is ignorant of the true names and capacities, whether individual, corporate,
12 associate, or otherwise, of the defendants sued as Does 1 through 20, inclusive and therefore sues said
13 defendants (the "Doe Defendants") by such fictitious names. Plaintiff will amend this complaint to
14 insert the true names and capacities of the Doe Defendants at such time as the identities of the Doe
15 Defendants have been ascertained.

16 10. Plaintiff is informed and believes that the Doe Defendants are the partners, agents, or
17 principals and co-conspirators of Defendants, and of each other; that Defendants and the Doe
18 Defendants performed the acts and conduct alleged directly, aided and abetted their performance, or
19 knowingly acquiesced in, ratified, and accepted the benefits of such acts and conduct, and therefore
20 each of the Doe Defendants is liable to the extent of the liability of the Defendants.

21 11. Plaintiff is further informed and believes that each Defendant was completely
22 dominated and controlled by its co-Defendants and each was the alter ego of the other. Whenever
23 reference is made to any conduct by a Defendant, such references also mean the conduct of each of
24 the Defendants, acting individually, jointly, and severally. Whenever reference is made to individuals
25 who are not named as Defendants in this complaint, but were employees and/or agents of Defendants,
26 such individuals, at all relevant times acted on behalf of Defendants named in this complaint within
27 the scope of their respective employments.

1 **BRCR COLLECTS TIPS LEFT FOR NON-AGENT EMPLOYEES AND DISTRIBUTES**
2 **THEM TO AGENT EMPLOYEES**

3 12. BRCR owns and operates 10 cafés in the greater San Diego Area. During the relevant
4 period, based on information and belief, BRCR employed over 200 employees.

5 13. At each café, BRCR employs a Store Manager (“SM”) and at most cafes BRCR
6 employs an Assistant Store Manager (“ASM”). BRCR also employs District Managers (“DM”) who
7 oversee multiple cafes.

8 14. BRCR provides SMs and DMs with the authority to recruit, hire, promote, transfer,
9 and discharge employees. BRCR provides SMs, DMs, and ASMs the authority to supervise, schedule,
10 discipline, direct, and control the acts of other employees at the cafés. For the purposes of this
11 Complaint, SMs, ASMs, and DMs, are BRCR’s “Agent Employees.”

12 15. At each café, BRCR also employs baristas and other customer service employees of
13 varying seniority who BRCR does not give the authority hire or discharge any employee or to
14 supervise, direct, or control the acts of other employees. For the purposes of this Complaint, these
15 employees are BRCR’s “Non-Agent Employees.” BRCR café customers are provided service by a
16 team of Non-Agent Employees who rotate through jobs each day. These jobs include operating the
17 cash register, making coffee drinks, serving pastries, clearing tables, cleaning bathrooms, washing
18 dishes, and stocking products. Throughout her employment, BRCR employed Scherman as a Non-
19 Agent Employee.

20 16. During Scherman’s employment, BRCR created a mandatory tip pool where it
21 collected tips left by customers for Non-Agent Employees and then distributed a portion of those tips
22 to its Agent Employees. Based on information and belief, BRCR collected and distributed credit card
23 tips and its Agent Employees collected and distributed cash tips.

24 17. During this time, BRCR did not maintain accurate records of all tips it collected. Based
25 on information and belief, BRCR did not keep any records of the cash tips its Agent Employees
26 collected and distributed to themselves and to Non-Agent Employees.

27 18. BRCR did not distribute a written policy describing how tips left for Non-Agent
28 Employees would be distributed. Based on information and belief, BRCR did not keep accurate

1 records of all tips it received for Non-Agent Employees and any records regarding tips were not open
2 to inspection by Non-Agent Employees, including Scherman.

3 19. Non-Agent Employees, including Scherman, were not given an accounting of how tips
4 were distributed, could not determine whether the distribution was fair and equitable, and SMs and
5 ASMs shared in tips left for Non-Agent Employees.

6 20. BRCR used these wrongfully distributed tips to supplement the wages of its Agent
7 Employees, thus paying them below market rates because BRCR distributed portions of tips left for
8 Non-Agent Employees directly to its Agent Employees.

9 **CALIFORNIA LABOR CODE PAGA ACTION ALLEGATIONS**

10 21. Plaintiff repeats and incorporates herein by reference and realleges each and every
11 allegation contained above, as though fully set forth herein.

12 22. PAGA permits an "aggrieved employee" to bring a lawsuit on behalf of herself, other
13 current and former aggrieved employees, and the State of California on a representative basis to
14 address an employer's violations of the California Labor Code. In this case, Defendants violated
15 California Labor Code §§ 213, 351, 353, and 2810.5.

16 23. Plaintiff is an "aggrieved employee" because she was employed by Defendants and
17 had one or more of the alleged violations committed against her.

18 24. Plaintiff seeks to recover civil penalties under PAGA for Labor Code violations that
19 would otherwise be assessed and collected by the Labor and Workforce Development Agency
20 ("LWDA") or any of its departments, divisions, commissions, boards, agencies, or employees.
21 Plaintiff seeks these PAGA penalties on behalf of herself, Defendants' other current and former
22 aggrieved employees, and the State of California.

23 25. Plaintiff has complied with the requirement to commence a civil action under Labor
24 Code § 2699.3.

25 26. Plaintiff has complied with the exhaustion requirements of PAGA by providing notice
26 on March 16, 2023 via electronic submission to the LWDA and by certified letter to Defendants
27 concerning her PAGA claims. More than sixty-five days have passed since Plaintiff provided the
28 PAGA notice and the LWDA has not taken any action.

1 27. "Current and Former Aggrieved Employees" for the purposes of the PAGA claims
2 include all persons who are or were employed by Defendants in the state of California.

3 28. Labor Code § 212 prohibits an employer from satisfying wage obligations by using
4 anything other than an instrument redeemable in cash. Labor Code § 213 requires an employer to
5 obtain a voluntary authorization to pay earned wages through direct deposit before it may fulfill its
6 obligations under § 212 through direct deposit. During the year immediately preceding June 28, 2022,
7 BRCR did not obtain a voluntary authorization from Plaintiff and other aggrieved employees to pay
8 them via direct deposit before paying them via direct deposit. On behalf of herself, other aggrieved
9 employees, and the State, Scherman seeks civil penalties under Labor Code § 2699(f)(2) for BRCR's
10 violations of Labor Code § 213.

11 29. Labor Code § 351 provides: "No employer or agent shall collect, take, or receive any
12 gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any
13 amount from wages due an employee on account of a gratuity, or require an employee to credit the
14 amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from
15 the employer. Every gratuity is hereby declared to be the sole property of the employee or employees
16 to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit
17 card shall pay the employees the full amount of the gratuity that the patron indicated on the credit
18 card slip, without any deductions for any credit card payment processing fees or costs that may be
19 charged to the employer by the credit card company. Payment of gratuities made by patrons using
20 credit cards shall be made to the employees not later than the next regular payday following the date
21 the patron authorized the credit card payment."

22 30. During the year immediately preceding the filing of Plaintiff's PAGA exhaustion letter
23 through the present, BRCR created a mandatory tip pool where its agents collected tips left by
24 customers for BRCR's Non-Agent Employees, shared in the pool, and BRCR did not maintain
25 accurate records of all tips received. Further, BRCR collected credit card tips from customers left for
26 Non-Agent Employees and distributed a portion of those tips to its Agent Employees including SMs,
27 ASMs, and at times DMs. BRCR's Non-Agent Employees were not given an accounting of how tips
28 were distributed, could not determine whether the distribution was fair and equitable, and BRCR

1 distributed a portion of tips left for Non-Agent Employees to its Agent Employees. Every time BRCR
2 collected tips left for Non-Agent Employees and distributed a portion of these tips to its Agent
3 Employees or did not equitably distribute the pool, BRCR violated Labor Code § 351.

4 31. On behalf of herself, other aggrieved employees, and the State, Scherman seeks civil
5 penalties for BRCR's violations of § 351 under Labor Code § 354. In the alternative, on behalf of
6 herself, other aggrieved employees, and the State, Scherman seeks civil penalties for BRCR's
7 violations of § 351 under Section 2699(f)(2).

8 32. Labor Code § 353 provides: "Every employer shall keep accurate records of all
9 gratuities received by him, whether received directly from the employee or indirectly by means of
10 deductions from the wages of the employee or otherwise."

11 33. During the year immediately preceding the date of this letter, BRCR created a
12 mandatory tip pool where it collected tips left for Non-Agent Employees, shared in the pool, and it
13 did not maintain accurate records of all tips received. Specifically, BRCR collected credit card tips
14 from customers and distributed a portion of those tips to its Agent Employees. BRCR did not provide
15 its Non-Agent Employees with an accounting of how tips were distributed so they could not determine
16 whether the distribution was fair and equitable, and BRCR's Agent Employees wrongfully shared in
17 tips left for Non-Agent Employees. Every time BRCR collected tips for Non-Agent Employees and
18 shared them with its Agent Employees, did not equitably distribute the tip pool, and/or did not keep
19 accurate records of the same, BRCR violated Labor Code § 353.

20 34. On behalf of herself, other aggrieved employees, and the State, Scherman seeks civil
21 penalties for BRCR's violations of § 353 under Labor Code § 354. In the alternative, on behalf of
22 herself, other aggrieved employees, and the State, Scherman seeks civil penalties for BRCR's
23 violations of Labor Code § 353 under Labor Code § 2699(f)(2).

24 35. Labor Code § 2810.5 provides: "(a)(1) At the time of hiring, an employer shall provide
25 to each employee a written notice, [of]: (A) The rate or rates of pay and basis thereof, whether paid
26 by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for
27 overtime, as applicable. (B) Allowances, if any, claimed as part of the minimum wage, including meal
28 or lodging allowances. (C) The regular payday designated by the employer in accordance with the

requirements of this code. (D) The name of the employer, including any “doing business as” names used by the employer. (E) The physical address of the employer’s main office or principal place of business, and a mailing address, if different. (F) The telephone number of the employer. (G) The name, address, and telephone number of the employer’s workers’ compensation insurance carrier. (H) That an employee: may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates. (I) Any other information the Labor Commissioner deems material and necessary.”

36. During the year immediately preceding the filing of Plaintiff's PAGA exhaustion letter through the present, BRCR did not provide Scherman and its other aggrieved employees with proper notice that included all information required by Labor Code § 2810.5. By failing to provide the required notice and information to Scherman and its other aggrieved employees at the time of hire, BRCR violated Labor Code § 2810.5. On behalf of herself, other aggrieved employees, and the State, Scherman seeks civil penalties under Labor Code § 2699(f)(2) for BRCR's violations of Labor Code § 2810.5.

CLASS ALLEGATIONS

37. Plaintiff repeats and incorporates herein by reference and realleges each and every allegation contained above, as though fully set forth herein.

38. Plaintiff brings this action on her own behalf, and on behalf of all other persons similarly situated. She seeks class certification under California Code of Civil Procedure § 382.

39. The proposed Class is defined as:

All persons who are or were Non-Agent Employees of Defendants in the State of California at any time within four (4) years before the filing of the complaint in this lawsuit until resolution of this lawsuit who had any portion of their tips collected by Defendants and distributed to Defendants' Agent Employees (hereinafter collectively referred to as the "Class" or "Class Members").

40. Excluded from the Class are: (1) Defendants, any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, assigns, and successors; and (2) the Judge to whom this case is assigned and the Judge's staff. Plaintiff reserves

1 the right to amend the Class and to add subclasses as appropriate based on her further investigation,
2 discovery, and the specific theories of liability.

3 41. There is a well-defined community of interest in this litigation and Class Members are
4 easily ascertainable as set forth below:

- 5 a. Numerosity: The proposed Class is so numerous that joinder of all Class Members
6 is impracticable. The membership of the entire Class is unknown to Plaintiff at this
7 time. However, the membership of the Class is estimated to be approximately
8 (200) individuals and the identity of such membership is readily ascertainable by
9 inspection of Defendants' employment records.
- 10 b. Typicality: Plaintiff is qualified to, and will fairly and adequately protect the
11 interests of each member of the Class with whom she has a well-defined
12 community of interest. Plaintiff's claims herein alleged are typical of those claims
13 which could be alleged by any member of the Class and the relief sought is typical
14 of the relief which would be sought by each member of the Class in separate
15 actions. All Class Members have been similarly harmed by Defendants' practice
16 of collecting their tips and distributing those tips to Defendants' Agent Employees
17 as well as Defendants' failure to keep accurate records of tips they collected.
18 Further, Defendants benefited from the same type of unfair and/or wrongful acts
19 as to each member of the Class.
- 20 c. Superiority: The nature of this action makes the use of class action adjudication
21 superior to other methods. A class action will achieve economies of time, effort,
22 judicial resources, and expense compared to separate lawsuits. The prosecution of
23 separate actions by individual members of the Class would create a risk of
24 inconsistent and/or varying adjudications with respect to the individual members
25 of the Class, establishing incompatible standards of conduct for the Defendants,
26 and resulting in the impairment of the rights of the members of the Class and the
27 disposition of their interests through actions to which they were not parties.
- 28 d. Public Policy Considerations: Employers in the state of California violate

1 employment and labor laws every day. Current employees are often afraid to assert
2 their rights out of fear of direct or indirect retaliation. Former employees are fearful
3 of bringing actions because they believe their former employers may damage their
4 future endeavors through negative references and/or other means. The nature of
5 this action allows for the protection of current and former employees' rights
6 without fear of retaliation or damage.

7 e. Commonality: The issues of law and fact in this class action predominate over any
8 questions affecting individual Class Members. Among the questions of law and
9 fact common to the Class are:

- 10 f. Whether Defendants collected tips left for Class Members;
- 11 g. Whether Defendants distributed any portion of the collected tips left
12 for Class Members to its Agent Employees;
- 13 h. Whether Defendants kept accurate records of all tips Defendants
14 collected on behalf of Class Members;
- 15 i. For tips left by credit card, whether Defendants paid Class Members
16 the full amount of the tip that the patron indicated on the credit card
17 slip, without any deductions for any credit card payment processing
18 fees or costs that may be charged to Defendants by their credit card
19 payment processing company;
- 20 j. Whether Defendants engaged in unfair competition in violation of Cal.
21 Bus. & Prof. Code § 17200 et seq.; and
- 22 k. The appropriate measure of damages, restitution, and/or monetary
23 penalties resulting from Defendants' violations of California law.

24 **FIRST CAUSE OF ACTION**

25 **CONVERSION**

26 42. Plaintiff repeats and incorporates herein by reference and realleges each and every
27 allegation contained above, as though fully set forth herein.

28 43. Plaintiff and Class Members, as Non-Agent Employees and participants in

1 Defendants' tip-pool, owned possessed, and were entitled to immediate possession at the time of
2 conversion to tips that were left by customers in a sum capable of identification.

3 44. Defendants took possession of, transferred, and prevented Plaintiff and Class Members
4 from accessing their tips.

5 45. Plaintiff and Class Members did not consent to the Defendants' actions.

6 46. Because of the Defendants' conversion, Plaintiff and Class Members have suffered
7 damage in a sum capable of identification in an amount according to proof.

8 47. Plaintiff and Class Members are entitled to recover the value of the property at the
9 time of the conversion, with the interest from that time, or an amount sufficient to indemnify Plaintiff
10 and Class Members for the loss which is the natural, reasonable and proximate result of the wrongful
11 act complained of and which a proper degree of prudence on Plaintiff's and Class Members' part
12 would not have averted.

13 48. Additionally, Plaintiff and Class Members are entitled to recover fair compensation
14 for the time and money properly expended in pursuit of their wrongfully converted property.

15 49. Defendants' conduct was a substantial factor in causing Plaintiff's and Class
16 Members' harm. They intended to deprive Plaintiff and Class Members of their property and legal
17 rights, and otherwise cause injury. Defendants' conduct was despicable and subjected Plaintiff and
18 Class Members to cruel and unjust hardship and oppression in conscious disregard of their rights, to
19 justify an award of exemplary and punitive damages. That value is within the minimum jurisdiction
20 of this Court.

21 **SECOND CAUSE OF ACTION**

22 **UNFAIR COMPETITION**

23 50. Plaintiff repeats and incorporates herein by reference and realleges each and every
24 allegation contained above, as though fully set forth herein.

25 51. A violation of California Business and Professions Code §§ 17200, *et seq.* may be
26 predicated on the violation of any state or federal law. Here, Defendants' conduct constitutes unlawful
27 business acts or practices because Defendants violated California Labor Code §§ 351 and 353.

28 52. Defendants' conduct has been, and continues to be, unfair, unlawful, and harmful to

1 Plaintiff, Class Members, Defendants' competitors, and the general public. Plaintiff seeks to enforce
2 important rights affecting the public interest within the meaning of the California Code of Civil
3 Procedure §1021.5.

4 53. Plaintiff and Class Members were personally aggrieved by Defendants' unlawful and
5 unfair business acts and practices alleged herein by the loss of money and property.

6 54. Under California Business and Professions Code §§ 17200, *et seq.*, Plaintiff and Class
7 Members are entitled to declaratory and injunctive relief for Defendants' unlawful conduct, restitution
8 of tips Defendants distributed to their Agent Employees during a period that commences four years
9 prior to the filing of the original complaint in this action, interest, an award of attorneys' fees under
10 California Code of Civil Procedure § 1021.5, and an award of costs.

11 **THIRD CAUSE OF ACTION**

12 **(Violation of California Labor Code §§ 213, 351, 353, and 2810.5., Brought Under The** 13 **California Private Attorneys General Act of 2004)**

14 55. Plaintiff incorporates by reference and realleges each and every allegation contained
15 above, except those allegations pertaining specifically to class action procedure, as though fully set
16 forth herein.

17 56. Plaintiff seeks civil penalties for Defendants' violations of the California Labor Code
18 under § 2699(a) for sections of the Labor Code that provide their own civil penalties and under Labor
19 Code § 2699(f) for Labor Code sections that do not contain their own civil penalties.

20 57. Because Labor Code § 212 and 2810.5 do not provide their own civil penalties, and
21 BRCR is an employer that currently employs one or more employees in California, the civil penalties
22 set forth in Labor Code § 2699(f)(2) apply to BRCR'S violations of these provisions.

23 58. In addition, Plaintiff seeks civil penalties specifically assigned to violations of Labor
24 Code §§ 351, and 353. In the alternative, if any of the above sections are found not to provide for an
25 applicable civil penalty, Plaintiff seeks penalties under Labor Code § 2699(f) for all such violations.
26 All the civil penalties are sought on behalf of Plaintiff, other aggrieved employees, and the State of
27 California.
28

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays judgment against Defendants as follows:

3 **Class Certification**

- 4 A. That this action be certified as a class action;
- 5 B. That Plaintiffs be appointed as the representatives of the Class;
- 6 C. That Plaintiffs be appointed as the representatives of the Waiting Time Subclass and
- 7 Paystub Subclass; and
- 8 D. That counsel for Plaintiffs be appointed as counsel for the Class and Subclasses.

9 **Damages on First and Second Causes of Action on a Class Basis**

- 10 A. For compensatory damages, according to proof;
- 11 B. For special damages in an amount according to proof;
- 12 C. For punitive damages;
- 13 D. For civil and statutory penalties;
- 14 E. For costs of suit, including attorney fees as permitted by law, including those
- 15 available under California Code of Civil Procedure §1021.5;
- 16 F. That Defendants, jointly and/or severally, pay restitution of tips Defendants
- 17 distributed to their Agent Employees during a period that commences four years
- 18 prior to the filing of the original complaint in this action in an amount according to
- 19 proof;
- 20 G. For an award of interest, including prejudgment interest, at the legal rate as permitted
- 21 by law;
- 22 H. For such other and further relief as the Court deems proper and just under all the
- 23 circumstances.

24 **California Private Attorneys General Act of 2004**

- 25 I. For statutory penalties according to proof;
- 26 J. For reasonable attorneys' fees and costs; and
- 27 K. For such other and further relief as the Court deems proper.
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Demand for Jury Trial

Plaintiff and Class Members demand a jury trial on all issues that can properly be adjudicated by a jury.

DATED: July 14, 2023

MESERVY LAW, P.C.
MORELLO LAW, P.C.

By: /s/ Justin A. Morello
JUSTIN A. MORELLO (SB# 239250)

Attorneys for Plaintiff Susanne Scherman
individually, as a Class Representative and a
Private Attorney General, and for Members of
the Class