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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN**

VANESSA RUELAS SIERRA, as an
individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

SPENCER GIFTS LLC, a Delaware
limited liability company; and DOES 1
through 50, inclusive,

Defendants.

Case No.: BCV-23-101673

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

- (1) VIOLATION OF LABOR CODE §§ 510,
558, 1194, 1197, AND 1197.1;**
- (2) VIOLATION OF LABOR CODE §§
226.7 AND 512;**
- (3) VIOLATION OF LABOR CODE §§ 201-
203**
- (4) VIOLATION OF LABOR CODE §
226(a); AND**
- (5) VIOLATION OF BUSINESS AND
PROFESSIONS CODE §17200, *ET SEQ.*;**
- (6) VIOLATION OF LABOR CODE § 2698,
*ET SEQ.***

DEMAND OVER \$25,000.00

1 Plaintiff Vanessa Ruelas Sierra (“Plaintiff”) hereby submits this First Amended Class and
2 Representative Action (“Complaint”) against Defendant Spencer Gifts LLC (“Defendant”) and
3 Does 1 through 50 (collectively, “Defendants”), on behalf of herself and all other similarly situated
4 current and former employees of Defendant for penalties and/or damages under the California
5 Labor Code and restitution for unfair business practices in violation of Business and Professions
6 Code section 17200, *et seq.*, as follows:

7 **INTRODUCTION**

8 1. This class and representative action complaint is within the Court’s jurisdiction
9 under California Labor Code sections 201, 202, 203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1,
10 and 2698, *et seq.*, the applicable Wage Orders of the California Industrial Welfare Commission
11 (“IWC”), and the Unfair Competition Law, codified at Business and Professions Code section
12 17200, *et seq.* (the “UCL”).

13 2. This Complaint challenges systemic illegal employment practices resulting in
14 violations of the California Labor Code and Business and Professions Code against individuals who
15 worked for Defendants.

16 3. Plaintiff is informed and believes, and based thereon alleges, that Defendants, jointly
17 and severally, have acted intentionally and with deliberate indifference and conscious disregard to
18 the rights of all employees by: (a) failing to incorporate all non-discretionary incentive wages in the
19 regular rate of pay used to calculate and pay overtime wages, in violation of Labor Code sections
20 201, 202, 203, 510, 558, 1194, 1197 and 1197.1; (b) failing to incorporate all non-discretionary
21 incentive wages in the regular rate of pay used to calculate and pay meal/rest period premiums, in
22 violation of Labor Code sections 201, 202, 203, 226.7 and 512; (c) failing to incorporate all non-
23 discretionary incentive wages in the regular rate of pay used to calculate and pay sick pay wages, in
24 violation of Labor Code sections 201, 202, 203, and 246; and (d) failing to provide accurate
25 itemized wage statements, in violation of Labor Code section 226.

26 4. Plaintiff is informed and believes, and based thereon alleges, that Defendants have
27 engaged in, among other things a system of willful violations of the California Labor Code,

1 Business and Professions Code, and the applicable IWC Wage Orders, by creating and maintaining
2 policies, practices, and customs that knowingly deny employees the above stated rights and
3 benefits.

4 5. The policies, practices and customs of defendants described above and below have
5 resulted in unjust enrichment of Defendant and an unfair business advantage over businesses that
6 routinely adhere to the strictures of the California Labor Code and the California Business and
7 Professions Code.

8 **JURISDICTION AND VENUE**

9 6. The Court has jurisdiction over the violations of the California Labor Code sections
10 201, 202, 203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2698, *et seq.*, the applicable IWC
11 Wage Orders, and the UCL.

12 7. Venue is proper in Kern County, because Plaintiff worked for Defendant in
13 Bakersfield, California.

14 **PARTIES**

15 8. Plaintiff was employed by Defendant as a Store Manager from approximately
16 October 2019, to on or about April 27, 2023. During her employment with Defendant, Plaintiff
17 worked as a non-exempt employee.

18 9. Plaintiff was and is the victim of the policies, practices, and customs of Defendant
19 complained of in this action in ways that have deprived her of the rights guaranteed by California
20 Labor Code sections 201, 202, 203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 2698, *et*
21 *seq.*, the applicable IWC Wage Orders, and the UCL.

22 10. Plaintiff is informed and believes, and based thereon alleges, that Defendant Spencer
23 Gifts LLC maintains operations and does business in the State of California, including in Kern
24 County, California. Plaintiff is informed and believes, and based thereon alleges, that Defendant
25 operates as a retail store.

26 11. Plaintiff is informed and believes, and based thereon alleges, that at all times herein
27 mentioned Does 1 through 50, are and were corporations, business entities, individuals, and

1 partnerships, licensed to do business and actually doing business in the State of California. As such
2 and based upon all the facts and circumstances incident to Defendants' business, Defendants are
3 subject to the California Labor Code, the IWC Wage Orders, and the UCL.

4 12. Plaintiff does not know the true names or capacities, whether individual, partner or
5 corporate, of the defendants sued herein as Does 1 through 50, inclusive, and for that reason, said
6 defendants are sued under such fictitious names, and Plaintiff prays for leave to amend this
7 Complaint when the true names and capacities are known. Plaintiff is informed and believes and
8 based thereon alleges that each of said fictitious defendants was responsible in some way for the
9 matters alleged herein and proximately caused Plaintiff and members of the general public and class
10 to be subject to the illegal employment practices, wrongs and injuries complained of herein.

11 13. At all times herein mentioned, each of said Defendants participated in the doing of
12 the acts hereinafter alleged to have been done by the named Defendant; and furthermore,
13 Defendants, and each of them, were the agents, servants, and employees of each of the other
14 defendants, as well as the agents of all Defendants, and at all times herein mentioned, were acting
15 within the course and scope of said agency and employment.

16 14. Plaintiff is informed and believes, and based thereon alleges, that at all times
17 material hereto, each of the Defendants named herein was the agent, employee, alter ego and/or
18 joint venturer of, or working in concert with each of the other co-Defendants and was acting within
19 the course and scope of such agency, employment, joint venture, or concerted activity. To the extent
20 said acts, conduct, and omissions were perpetrated by certain Defendants, each of the remaining
21 Defendants confirmed and ratified said acts, conduct, and omissions of the acting Defendants.

22 15. At all times herein mentioned, Defendants, and each of them, were members of, and
23 engaged in, a joint venture, partnership, and common enterprise, and acting within the course and
24 scope of, and in pursuance of, said joint venture, partnership, and common enterprise.

25 16. At all times herein mentioned, the acts and omissions of various Defendants, and
26 each of them, concurred and contributed to the various acts and omissions of each and all of the
27 other Defendants in proximately causing the injuries and damages as herein alleged. At all times

herein mentioned, Defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, Defendants, and each of them, aided and abetted the acts and omissions of each and all of the other Defendants in proximately causing the damages as herein alleged.

CLASS ACTION ALLEGATIONS

17. **Definition:** The named individual Plaintiff seeks class certification, pursuant to California Code of Civil Procedure section 382, Plaintiff proposes the following classes (together, the “Class” or “Class Members”):

- a. All current and former non-exempt employees of Defendant in the State of California who worked overtime and earned non-discretionary incentive compensation during the same workweek, at any time from May 30, 2019, to the present (the “Overtime Regular Rate Class”);
- b. All current and former non-exempt employees of Defendant in the State of California who earned a meal/rest period premium and non-discretionary incentive compensation during the same workweek, at any time from May 30, 2019, to the present (the “Meal/Rest Period Regular Rate Class”); and
- c. All former non-exempt employees of Defendant in the State of California who earned non-discretionary incentive compensation and sick pay during the same workweek, and whose employment ended at any time from May 30, 2020 through the present (the “Sick Pay Regular Rate Class”).
- d. All current and former non-exempt employees of Defendant in the State of

18. **Numerosity and Ascertainability:** The members of the Class are so numerous that joinder of all members would be impractical, if not impossible. The identity of the members of the Class is readily ascertainable by review of Defendant’s records, including payroll records.

19. **Adequacy of Representation:** The named Plaintiff is fully prepared to take all necessary steps to represent fairly and adequately the interests of the Class defined above. Plaintiff’s attorneys are ready, willing, and able to fully and adequately represent the Class and the

1 individual Plaintiff. Plaintiff's attorneys have prosecuted and settled wage-and-hour class actions in
2 the past and currently have a number of wage-and-hour class actions pending in California state and
3 federal courts.

4 20. Defendant uniformly administered a corporate policy and practice of: (a) failing to
5 incorporate all non-discretionary incentive wages in the regular rate of pay used to calculate and
6 pay overtime wages, in violation of Labor Code sections 201, 202, 203, 510, 558, 1194, 1197 and
7 1197.1; (b) failing to incorporate all non-discretionary incentive wages in the regular rate of pay
8 used to calculate and pay meal/rest period premiums, in violation of Labor Code sections 201, 202,
9 203, 226.7 and 512; (c) failing to incorporate all non-discretionary incentive wages in the regular
10 rate of pay used to calculate and pay sick pay wages, in violation of Labor Code sections 201, 202,
11 203, and 246; (d) failing to provide accurate itemized wage statements, in violation of Labor Code
12 section 226; and (e) engaging in Unfair Business Practices in violation of the UCL, the California
13 Labor Code and the applicable IWC Wage Orders.

14 21. Plaintiff is informed and believes, and based thereon alleges, that Defendant had a
15 consistent and uniform policy, practice, and procedure of willfully failing to comply with Labor
16 Code sections 201, 202, 203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, the applicable IWC
17 Wage Orders, and the UCL.

18 22. **Common Question of Law and Fact:** There are predominant common questions of
19 law and fact and a community of interest amongst Plaintiff and the claims of the Class concerning
20 Defendant's policy and practice of: (a) failing to incorporate all non-discretionary incentive wages
21 in the regular rate of pay used to calculate and pay overtime wages, in violation of Labor Code
22 sections 201, 202, 203, 510, 558, 1194, 1197 and 1197.1; (b) failing to incorporate all non-
23 discretionary incentive wages in the regular rate of pay used to calculate and pay meal/rest period
24 premiums, in violation of Labor Code sections 201, 202, 203, 226.7 and 512; (c) failing to
25 incorporate all non-discretionary incentive wages in the regular rate of pay used to calculate and
26 pay sick pay wages, in violation of Labor Code sections 201, 202, 203, and 246; (d) failing to
27 provide accurate itemized wage statements, in violation of Labor Code section 226; and (e)

engaging in Unfair Business Practices in violation of the UCL, the California Labor Code and the applicable IWC Wage Orders.

23. **Typicality:** The claims of Plaintiff are typical of the claims of all members of the Class in that Plaintiff has suffered the harms alleged in this Complaint in a similar and typical manner as the Class Members. As with other non-exempt employees of Defendant, Plaintiff earned non-discretionary incentive compensation, including, but not limited to, incentives and awards. As these items are non-discretionary forms of remuneration, they should have been included in the regular rate of pay for the purpose of paying Plaintiff overtime wages, meal and rest period premiums and sick pay. However, during workweeks when Plaintiff earned overtime and non-discretionary incentives, Defendant failed to include the non-discretionary incentives in the calculation of the regular rate for the purposes of paying overtime wages. Rather, Defendant paid the overtime wages at 1.5 times Plaintiff's base rate of pay, instead of the correct, higher regular rate of pay. To date, Plaintiff has yet to receive the full amount of overtime wages owed to her, within the deadlines set forth in Labor Code sections 201, 202 and 203. As such, Plaintiff is owed waiting time penalties.

24. Relatedly, Defendant failed to pay meal and rest period premium compensation at the correct regular rate of pay. During workweeks when Plaintiff earned non-discretionary incentive compensation and meal/rest period premiums, the non-discretionary incentive pay should have been factored into the regular rate of pay. However, Defendant paid the meal and rest period premiums at Plaintiff's base rate of pay. To date, Plaintiff has yet to receive the full amount meal and rest period premiums owed to her, within the deadlines set forth in Labor Code sections 201, 202 and 203. As such, Plaintiff is owed waiting time penalties.

25. Defendant also failed to pay sick pay wages at the correct regular rate of pay. During workweeks when Plaintiff earned non-discretionary incentive compensation and sick pay wages, the non-discretionary incentive pay should have been factored into the regular rate of pay. However, Defendant paid the sick pay wages at Plaintiff's base rate of pay. To date, Plaintiff has yet to receive the full amount of sick pay wages owed to her, within the deadlines set forth in Labor

Code sections 201, 202 and 203. As such, Plaintiff is owed waiting time penalties.

26. As a result of the underpayment of wages alleged above, the wage statements issued to Plaintiff violated Labor Code section 226. More specifically, the wage statements displayed inaccurate rates of pay and net/gross wages earned. Therefore, Plaintiff is a member of the Class and has suffered the alleged violations of Labor Code sections 201, 202, 203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, the applicable IWC Wage Orders, and the UCL.

27. The California Labor Code upon which Plaintiff bases these claims are broadly remedial in nature. These laws and labor standards serve an important public interest in establishing minimum working conditions and standards in California. These laws and labor standards protect the average working employee from exploitation by employers who may seek to take advantage of superior economic and bargaining power in setting onerous terms and conditions of employment.

28. The nature of this action and the format of laws available to Plaintiff and members of the Class identified herein make the class action format a particularly efficient and appropriate procedure to redress the wrongs alleged herein. If each employee were required to file an individual lawsuit, the corporate defendants would necessarily gain an unconscionable advantage since it would be able to exploit and overwhelm the limited resources of each individual plaintiff with their vastly superior financial and legal resources. Requiring each class member to pursue an individual remedy would also discourage the assertion of lawful claims by employees who would be disinclined to file an action against their former and/or current employer for real and justifiable fear of retaliation and permanent damage to their careers at subsequent employment.

29. The prosecution of separate actions by the individual class members, even if possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect to individual class members against the Defendants and which would establish potentially incompatible standards of conduct for the Defendants, and/or (b) adjudications with respect to individual class members which would, as a practical matter, be dispositive of the interest of the other class members not parties to the adjudications or which would substantially impair or impede the ability of the class members to protect their interests. Further, the claims of the individual

members of the class are not sufficiently large to warrant vigorous individual prosecution considering all of the concomitant costs and expenses.

30. Such a pattern, practice, and uniform administration of corporate policy regarding illegal employee compensation described herein is unlawful and creates an entitlement to recovery by Plaintiff and the Class identified herein, in a civil action, for unpaid wages, including interest thereon, applicable penalties, reasonable attorneys' fees, and costs of suit according to the mandate of California Labor Code sections 218.5, 226, 558, 1194, and Code of Civil Procedure section 1021.5.

31. Proof of a common business practice or factual pattern, which the named Plaintiff experienced and is representative of, will establish the right of each of the members of the Class to recovery on the causes of action alleged herein.

32. The Class is commonly entitled to a specific fund with respect to the compensation illegally and unfairly retained by Defendants. The Class is commonly entitled to restitution of those funds being improperly withheld by Defendants. This action is brought for the benefit of the entire Class and will result in the creation of a common fund.

FIRST CAUSE OF ACTION

VIOLATION OF LABOR CODE §§ 510, 558, 1194, 1197, and 1197.1

(BY PLAINTIFF AND THE OVERTIME REGULAR RATE CLASS AGAINST ALL DEFENDANTS)

33. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as though fully set forth herein.

34. This cause of action is brought pursuant to Labor Code sections 510, 558, 1194, 1197 and 1197.1, which require an employer to pay employees overtime at a rate of one and one-half the employee's regular rate of pay for any work in excess of eight hours in a workday or 40 hours in a workweek.

35. As a pattern and practice, Defendant paid Plaintiff and Overtime Regular Rate Class Members overtime wages based on the incorrect regular rate of pay. During workweeks when

1 employees worked overtime and earned non-discretionary incentive pay, including without
2 limitation, incentives and awards, Defendant failed to properly calculate the regular rate of pay for
3 purposes of paying overtime. Specifically, Defendant failed to incorporate the non-discretionary
4 incentives into the calculation of the regular rate of pay. As a result of such policy and practice,
5 Defendant underpaid overtime wages to Plaintiff and Overtime Regular Rate Class Members and
6 thus owe additional overtime wages.

7 36. Plaintiff is informed and believes and based thereon alleges that Defendant willfully
8 failed to pay Plaintiff and the Overtime Regular Rate Class wages due and owing to them.
9 Defendant's willful and intentional failure to provide wages due and owing to separated Overtime
10 Regular Rate Class Members resulted in continued payment of wages up to thirty (30) days from
11 the time the wages are due. Therefore, all members of the Overtime Regular Rate Class who have
12 separated from employment are entitled to compensation as per Labor Code section 203.

13 37. Such a pattern, practice, and uniform administration of corporate policy regarding
14 illegal employee compensation as described herein is unlawful and creates an entitlement to
15 recovery by Plaintiff and the Overtime Regular Rate Class in a civil action, for the unpaid balance
16 of the full amount of damages owed, including interest thereon, penalties, attorneys' fees, and costs
17 of suit according to the mandate of California Labor Code sections 201, 202, 203, 510, 558, 1194,
18 1197, and 1197.1.

19 **SECOND CAUSE OF ACTION**

20 **VIOLATION OF LABOR CODE § 226.7 AND 512**

21 **(BY PLAINTIFF AND THE MEAL/REST PERIOD REGULAR RATE CLASS AGAINST 22 ALL DEFENDANTS)**

23 38. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as though
24 fully set forth herein.

25 39. At all relevant times, Defendant failed in its affirmative obligation to ensure that
26 Plaintiff and Meal/Rest Period Regular Rate Class Members had the opportunity to take and were
27 provided with off-duty meal and rest periods in accordance with the mandates of the California
Labor Code and the applicable IWC Wage Order.

1 40. Pursuant to Labor Code section 226.7, for each workday that a meal or rest period is
2 not provided, employees are entitled to one additional hour of pay at the employee's regular rate of
3 pay. Defendant, however, paid meal and rest period premium wages at an employee's base hourly
4 rate of pay, which did not include non-discretionary incentive pay, including without limitation,
5 incentives and awards. As such, Plaintiff and the Meal/Rest Period Regular Rate Class are owed
6 additional meal and rest period premiums based on the correct, higher regular rate of pay.

7 41. Plaintiff is informed and believes and based thereon alleges that Defendant willfully
8 failed to pay Plaintiff and the Meal/Rest Period Regular Rate Class wages due and owing to them.
9 Defendant's willful and intentional failure to provide wages due and owing to separated Meal/Rest
10 Period Regular Rate Class Members resulted in continued payment of wages up to thirty (30) days
11 from the time the wages are due. Therefore, all members of the Meal/Rest Period Regular Rate
12 Class who have separated from employment are entitled to compensation as per Labor Code section
13 203.

14 42. Such a pattern, practice, and uniform administration of corporate policy as described
15 herein is unlawful and creates an entitlement to recovery by Plaintiff and Meal/Rest Period Regular
16 Rate Class Members, in a civil action, for the unpaid balance of the premium compensation
17 pursuant to Labor Code section 226.7, and the applicable IWC Wage Order, including interest
18 thereon, penalties, including penalties pursuant to Labor Code sections 201-203, 226.7, and 512,
19 reasonable attorneys' fees, and costs of suit.

20 **THIRD CAUSE OF ACTION**

21 **VIOLATION OF LABOR CODE §§ 201-203**

22 **(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)**

23 43. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as though
24 fully set forth herein.

25 44. Labor Code section 203 provides that if an employer willfully fails to pay wages
26 owed in accordance with Labor Code sections 201 and 202, then the wages of the employee shall
27 continue as a penalty from the due date, and at the same rate until paid, but the wages shall not
continue for more than thirty (30) days.

1 45. Labor Code section 201 provides if an employer discharges an employee, the wages
2 earned and unpaid at the time of discharge are due and payable immediately. Labor Code section
3 202 provides that an employee is entitled to receive all unpaid wages no later than 72 hours after an
4 employee quits his or her employment, unless the employee has given seventy-two (72) hours
5 previous notice of his or her intention to quit, in which case the employee is entitled to his or her
6 wages at the time of quitting.

7 46. Labor Code section 246 provides that an employee is entitled to receive sick time
8 pay. The employer shall calculate paid sick leave by using one of two calculations: (1) "Paid sick
9 time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for
10 the workweek in which the employee uses paid sick time, whether or not the employee actually
11 works overtime in that workweek;" or (2) "Paid sick time for nonexempt employees shall be
12 calculated by dividing the employee's total wages, not including overtime premium pay, by the
13 employee's total hours worked in the full pay periods of the prior 90 days of employment."

14 47. Whenever Defendant paid Plaintiff and Sick Pay Regular Rate Class Members sick
15 pay pursuant to California Labor Code section 246, Defendant did so at the incorrect rate of pay.
16 Plaintiff and Sick Pay Regular Rate Class Members earned non-discretionary incentive
17 remuneration, including without limitation, incentives and awards, thereby increasing their regular
18 rates of pay to amounts that were higher than their base rates of pay. However, whenever sick pay
19 was paid to Plaintiff and Sick Pay Regular Rate Class Members, it was paid only at their base rates
20 of pay, rather than the higher regular rates of pay, as required under Labor Code section 246.

21 48. Plaintiff is informed and believes and based thereon alleges that Defendant willfully
22 failed to pay Plaintiff and the Sick Pay Regular Rate Class wages due and owing to them.
23 Defendant's willful and intentional failure to provide wages due and owing to Sick Pay Regular
24 Rate Class Members resulted in continued payment of wages up to thirty (30) days from the time
25 the wages are due. Therefore, Sick Pay Regular Rate Class Members are entitled to compensation
26 as per Labor Code section 203.

27 49. Defendant willfully failed to pay Plaintiff, Sick Pay Regular Rate Class Members,
separated Overtime Regular Rate Class Members, and separated Meal/Rest Period Regular Rate

1 Class Members all their wages due, as alleged hereinabove and hereinafter, upon the termination of
2 their employment within the times prescribed by Labor Code sections 201 and 202 and are
3 therefore subject to a waiting time penalty. Plaintiff, Sick Pay Regular Rate Class Members,
4 separated Overtime Regular Rate Class Members, and separated Meal/Rest Period Regular Rate
5 Class Members are entitled to recover from Defendant the statutory penalty for each day they were
6 not paid at their regular hourly rate of pay, up to a thirty (30) day maximum pursuant to California
7 Labor Code section 203.

8 **FOURTH CAUSE OF ACTION**

9 **VIOLATION OF LABOR CODE § 226(a)**

10 **(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)**

11 50. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as though
12 fully set forth herein.

13 51. Defendant, as a matter of policy and practice, did not provide accurate wage
14 statements to Plaintiff and the Class, in violation of Labor Code section 226(a).

15 52. As a result of Defendant's failure to pay proper wages and meal/rest break
16 premiums, as identified above, the wage statements issued to Plaintiff and Class Members failed to
17 identify the correct gross wages earned, net wages earned, and correct hourly rates of pay, in
18 violation of Labor Code section 226(a).

19 53. Such a pattern, practice and uniform administration of corporate policy as described
20 herein is unlawful and creates an entitlement to recovery by the Plaintiff and the Class identified
21 herein, in a civil action, for all damages or penalties pursuant to Labor Code section 226, including
22 interest thereon, attorneys' fees, and costs of suit according to the mandate of California Labor
23 Code section 226.

24 **FIFTH CAUSE OF ACTION**

25 **VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17200, *ET SEQ.***

26 **(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)**

27 54. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as though
fully set forth herein.

1 55. Defendant has engaged and continue to engage in unfair and unlawful business
2 practices in California by practicing, employing, and utilizing the employment practices outlined
3 above, including by: (a) failing to incorporate all non-discretionary incentive wages in the regular
4 rate of pay used to calculate and pay overtime wages, in violation of Labor Code sections 201, 202,
5 203, 510, 558, 1194, 1197 and 1197.1; (b) failing to incorporate all non-discretionary incentive
6 wages in the regular rate of pay used to calculate and pay meal/rest period premiums, in violation of
7 Labor Code sections 201, 202, 203, 226.7 and 512; and (c) failing to incorporate all non-
8 discretionary incentive wages in the regular rate of pay used to calculate and pay sick pay wages, in
9 violation of Labor Code sections 201, 202, 203, and 246.

10 56. Defendant's utilization of such unfair and unlawful business practices constitutes
11 unfair and unlawful competition and provides an unfair advantage over Defendant's competitors.

12 57. Plaintiff seeks, individually and on behalf of other members of the Class similarly
13 situated, full restitution of monies, as necessary and according to proof, to restore any and all
14 monies withheld, acquired and/or converted by the Defendant by means of the unfair practices
15 complained of herein.

16 58. Plaintiff is informed and believes, and based thereon alleges, that at all times herein
17 mentioned Defendant has engaged in unlawful, deceptive and unfair business practices, as
18 proscribed by California Business & Professions Code section 17200, *et seq.*, including those set
19 forth herein above thereby depriving Plaintiff and other Class Members the minimum working
20 standards and conditions due to them under the California laws as specifically described therein.

21 **SIXTH CAUSE OF ACTION**

22 **VIOLATION OF LABOR CODE § 2698, *ET SEQ.***

23 **(BY PLAINTIFF, ON BEHALF OF THE STATE OF CALIFORNIA AND AGGRIEVED**
24 **EMPLOYEES, AGAINST ALL DEFENDANTS)**

25 59. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as though
26 fully set forth herein.

27 60. Plaintiff brings this cause of action as a proxy for the State of California and in this
capacity, seeks penalties on behalf of all Aggrieved Employees from May 22, 2022, through the

present, for Defendant's violations of Labor Code §§ 201, 202, 203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and the applicable IWC Wage Order, arising from Defendant's policy and practice of: (a) failing to incorporate all non-discretionary incentive wages in the regular rate of pay used to calculate and pay overtime wages, in violation of Labor Code sections 201, 202, 203, 510, 558, 1194, 1197 and 1197.1; (b) failing to incorporate all non-discretionary incentive wages in the regular rate of pay used to calculate and pay meal/rest period premiums, in violation of Labor Code sections 201, 202, 203, 226.7 and 512; (c) failing to incorporate all non-discretionary incentive wages in the regular rate of pay used to calculate and pay sick pay wages, in violation of Labor Code sections 201, 202, 203, and 246; and (d) failing to provide accurate itemized wage statements, in violation of Labor Code section 226.

61. 35. As a pattern and practice, Defendant paid Plaintiff and other Aggrieved Employees overtime wages based on the incorrect regular rate of pay. During workweeks when employees worked overtime and earned non-discretionary incentive pay, including without limitation, incentives and awards, Defendant failed to properly calculate the regular rate of pay for purposes of paying overtime. Specifically, Defendant failed to incorporate the non-discretionary incentives into the calculation of the regular rate of pay. As a result of such policy and practice, Defendant underpaid overtime wages to Plaintiff and other Aggrieved Employees and thus owe additional overtime wages.

62. Relatedly, as a pattern and practice, Defendant paid Plaintiff and other Aggrieved Employees meal and rest period premium compensation based on the incorrect regular rate of pay. Pursuant to Labor Code section 226.7, for each workday that a meal or rest period is not provided, employees are entitled to one additional hour of pay at the employee's regular rate of pay. Defendant, however, paid meal and rest period premium wages at an employee's base hourly rate of pay, which did not include non-discretionary incentive pay, including without limitation, incentives and awards. As such, Plaintiff and other Aggrieved Employees are owed additional meal and rest period premiums based on the correct, higher regular rate of pay.

63. Additionally, whenever Defendant paid Plaintiff and other Aggrieved Employees

1 sick pay pursuant to California Labor Code section 246, Defendant did so at the incorrect rate of
2 pay. Plaintiff and other Aggrieved Employees earned non-discretionary incentive remuneration,
3 including without limitation, incentives and awards, thereby increasing their regular rates of pay to
4 amounts that were higher than their base rates of pay. However, whenever sick pay was paid to
5 Plaintiff and other Aggrieved Employees, it was paid only at their base rates of pay, rather than the
6 higher regular rates of pay, as required under Labor Code section 246.

7 64. As a result of Defendant's failure to pay proper wages and meal/rest break
8 premiums, as identified above, the wage statements issued to Plaintiff and other Aggrieved
9 Employees failed to identify the correct gross wages earned, net wages earned, and correct hourly
10 rates of pay, in violation of Labor Code section 226(a).

11 65. On or about May 22, 2023, Plaintiff sent written notice to the California Labor &
12 Workforce Development Agency ("LWDA") of Defendant's violations of Labor Code sections 201,
13 202, 203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and the applicable IWC Wage Order,
14 pursuant to Labor Code section 2698, *et seq.*, the Private Attorneys General Act ("PAGA"). To
15 date, the LWDA has not responded to Plaintiff's written notice.

16 66. As such, pursuant to Labor Code section 2699(a), Plaintiff seeks recovery of any and
17 all applicable civil penalties for Defendant's violation of Labor Code sections 201, 202, 203, 226,
18 226.7, 510, 512, 558, 1194, 1197, 1197.1, and the applicable IWC Wage Order for the time period
19 described above, on behalf of himself and other Aggrieved Employees.

20 **PRAYER FOR RELIEF**

21 1. WHEREFORE, Plaintiff prays for judgment for himself and all others on whose
22 behalf this suit is brought against Defendants, jointly and severally, as follows:

23 2. For an order certifying the proposed class;

24 3. For an order appointing Plaintiff as the class representative as described herein;

25 4. For an order appointing Counsel for Plaintiff as Class Counsel;

26 5. Upon the First Cause of Action, for damages and/or penalties pursuant to California
27 Labor Code sections 510, 558, 1194, 1197, and 1197.1, and for costs and attorneys' fees;

1 6. Upon the Second Cause of Action, for damages and/or penalties pursuant to
2 California Labor Code sections 226.7 and 512, and for costs and attorneys' fees;

3 7. Upon the Third Cause of Action, for damages and/or penalties pursuant to California
4 Labor Code sections 201, 202, 203, and for costs and attorneys' fees;

5 8. Upon the Fourth Cause of Action, for damages and/or penalties pursuant to
6 California Labor Code section 226, and for costs and attorneys' fees;

7 9. Upon the Fifth Cause of Action, for restitution to Plaintiff and other similarly
8 affected members of the general public of all funds unlawfully acquired by Defendant by means of
9 any acts or practices declared by this Court to be in violation of Business & Professions Code
10 section 17200, *et seq.*, and for costs and attorneys' fees;

11 10. Upon the Sixth Cause of Action, for civil penalties and/or damages pursuant to
12 California Labor Code section 2698, *et seq.*, and for interest, costs and attorneys' fees; and

13 11. On all causes of action, for attorneys' fees and costs as provided by California Labor
14 Code sections 218.5, 226, 1194 and 2699, and Code of Civil Procedure section 1021.5; and

15 12. For such other and further relief the Court may deem just and proper.
16

17 DATED: July 26, 2023

DIVERSITY LAW GROUP, P.C.

18
19 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class
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PROOF OF SERVICE

(Code of Civil Procedure Sections 1013a, 2015.5)

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250, Los Angeles, California 90071.

On July 26, 2023, I served the following document(s) described as: **FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT** on the interested parties in this action as follows:

Adam Y. Siegel
Adam.Siegel@jacksonlewis.com
Sean Choi
Sean.Choi@jacksonlewis.com
JACKSON LEWIS P.C.
725 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5408
Attorneys for Defendant
SPENCER GIFTS LLC

 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the filing receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 26, 2023, at Los Angeles, California.



Erika Mejia