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Assigned for All Purposes
Judge Randall J. Sherman
Dept. CX105

Attorney for Plaintiff MCCALL HENKE

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE COUNTY**

MCCALL HENKE, individually and on
behalf of others similarly situated,

Plaintiff,

vs.

FRANK BERRY DESIGNS, INC.;
FRANK M. BERRY, III, an individual; and
DOES 1-10.

Defendants.

Case No.: 30-2023-01349840-CU-OE-CXC

Assigned for all purposes to Judge Randall J. Sherman

COMPLAINT FOR CLASS ACTION CLAIMS:

1. Failure to provide accurate written itemized wage statements (Lab. Code § 226(a));
2. Failure to pay minimum and overtime wages (Lab. Code §§ 204, 223, 510, 511, 1182.12, 1194, 1194.2, 1197, 1198 & IWC Order 4, §§ 3-5 and § 20);
3. Sick Pay Violations (Lab. Code §§ 246 to 249);
4. Wages pursuant to Lab. Code § 558;
5. Failure to provide compliant meal periods (Lab. Code § 226.7(b) & (c) and § 512);
6. Failure to provide compliant rest breaks (Lab. Code § 226.7 & IWC Order 4-2001, § 12);
7. Failure to pay wages upon separation per Lab. Code § 201 (discharge) and/or § 202 (quit) and waiting time penalties per Lab. Code § 203;
8. Treble Damages For Unfair Business Practices Act Violation (B & P Code §§ 17000-17101);
9. Unfair Competition Law B & P Code § 17200 et. seq. Violation.

AND INDIVIDUAL CLAIM(S):

10. Failure to timely afford inspection of records (§ 226(b)-(c) and (f), and § 1198.5).

[DEMAND FOR A JURY TRIAL]

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1 Plaintiff MCCALL HENKE (HENKE or Plaintiff), on behalf of (a) herself and (b) all others
2 similarly situated, alleges and complains based upon her own knowledge and acts—unless specifically
3 stated based on information and belief—the following against Defendants Frank Berry Designs, Inc.
4 (FBD); Frank M. Berry, III (“BERRY”); and DOES 1-10, all of whom are hereinafter collectively
5 referred to as Defendants:

6 **INTRODUCTION**

7 1. This action arises out of Defendants’ numerous violations of California’s Labor Code and
8 Business and Professions Code, including but not limited to the following:

9 (a) Defendants failed to pay Plaintiff and putative class members all of the wages owed to them
10 due to FBD’s uniform corporation-wide policy, procedure, and/or practice, created and
11 implemented by BERRY, of paying all employees straight time for any recorded time
12 worked even when overtime or double time wages were applicable, for example during “Off
Hour Communication through Text (High Level) or Email (Medium Level)”;

13 (b) Defendants failed to pay premium pay to Plaintiff and putative class members due to FBD’s
14 uniform corporation-wide policy, procedure, and/or practice of not paying its employees
15 premium pay when or even though FBD employees did not have a legitimate opportunity to
16 take compliant meal and/or rest breaks because these employees’ meal and/or rest break(s)
17 were interrupted, missed, or untimely due to, but not limited to, the following mandatory
“Reoccurring Meetings:

18 Weekly Project / Agenda Review with All Project Managers – Thursdays After Lunch

19 Bi- Weekly Review with Frank [BERRY] – Thursdays 11:00AM

20 Monthly Timeline Reviews with Frank [BERRY] – Thursdays 11:00AM

21 Team Meetings – Lunch at End of Each Month

22 Team Bonding – Minimum Each Quarter (To Be Determined at Monthly Meeting)”;

23 (c) Prior to March 2022, Defendants failed to reimburse FBD employees for mileage for
24 business miles driven. On information and belief, after March 2022, Defendants failed to
25 reimburse FBD employees for all work-related miles driven and/or at the applicable rate for
26 business miles driven. Thus, Defendants failed to reimburse Plaintiff and putative class
27 members for all necessary business expenses due to FBD’s uniform corporation-wide policy,
28 procedure, and/or practice of not reimbursing its employees. This is partially proven in an
email from BERRY to Plaintiff. It was not until Friday, March 11, 2022, that in said email

1 that BERRY confirmed mileage reimbursement at an unstated rate would commence for
2 FBD employees and were to be submitted and paid monthly. Moreover, FBD never cured
3 this or any other Labor Code violation. Additionally, Defendants failed to reimburse FBD
4 employees for other necessary business expenses, including but not limited to reimbursing
5 FBD employees for the pro rata basis of the use of their personal cellphones for work-related
6 purposes, as well as failed to reimburse FBD employees for internet usage during the
7 COVID-19 pandemic or other necessary work-related expenses for remote work. On
8 information and belief, FBD still does not fully comply with Labor Code section 2802 to this
9 date.

10 (d) Defendants failed to provide Plaintiff and putative class members with Labor Code § 226
11 compliant accurate itemized statements in writing showing accurate (1) gross wages earned;
12 (2) total hours worked by the employee; ... (4) all deductions, provided that all deductions
13 made on written orders of the employee may be aggregated and shown as one item, (5) net
14 wages earned, ... (8) the...address of the legal entity that is the employer and (9) all
15 applicable hourly rates in effect during the pay period and the corresponding number of hours
16 worked at each hourly rate by the employee, predominantly because Defendants failed to
17 accurately compensate FBD employees by paying FBD employees only straight/regular pay
18 and/or failing to compensate FBD employees traveling time pay and for other off-the-clock
19 work.

20 (e) FBD not only failed to pay sick pay leave, FBD failed to provide such at all, despite such
21 employee right and employer obligation being California law since 2015. Due to FBD's
22 uniform corporation-wide policy, procedure, and/or practice of not complying with
23 California's Labor Code § 246, especially and shockingly during the COVID pandemic, FBD
24 owes Plaintiff and putative class members wages for failing to pay sick pay leave to Plaintiff
25 and putative class members who requested such or otherwise would have utilized such had
26 FBD complied with Labor Code § 246.

27 (f) Defendants knew or should have known of FBD's failures to comply with the various
28 compensation sections of the Labor Code as ignorance of the law is no excuse, especially
when an employer chooses to be woefully ignorant by not having in-house Human
Resources, outsourced Human Resources, outside employment law counsel, use DIR-DLSE
resources, or otherwise learns the obligations of ab employer/a business with regard to

employees. Thus, Defendants willfully failed to compensate FDB employees, including those like Plaintiff who have separated from employment with FDB. In willfully failing to timely pay putative class members all wages when due, Defendants also failed to pay separated employees waiting time penalties pursuant to Labor Code § 203;

(g) Due to these and other violations, FDB unfairly competed and had unfair business practices in violation of California's Business and Professions Code and should be enjoined from violating California's Industrial Wage Order 4-2001 and applicable Labor Code sections.

2. Given the numerous violations of California's applicable statutes, regulations, and/or applicable Industrial Wage Order alleged within this operative complaint, Defendants are liable for to Plaintiff and the putative class for damages including but not limited to unpaid minimum, regular, overtime, possibly double time, and premium wages; sick pay, liquidated damages; unreimbursed necessary business expenses; statutory damages; restitution; costs of suit; interest; attorney(s)' fees; and tax neutralization.

3. Defendants are also liable for civil penalties under California's Private Attorney General Act of 2004 (PAGA), Labor Code § 2698 to § 2699.6. Plaintiff will have standing to bring a representative PAGA suit after she exhausts her administrative remedies with the Labor Workforce Development Agency (LWDA).

4. BERRY is liable under Labor Code § 558.1—effective January 1, 2016—for violating, or causing to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission (in this case IWO 4-2001), and for violating, or causing to be violated, Labor Code §§ 203, 226, 226.7, 1193.6, 1194, and/or 2802 (*infra*). Defendants are also liable under Labor Code § 1197.1 (*infra*).

5. Plaintiff seeks, on both a class and representative action basis, to recover unpaid minimum, regular, overtime, possibly double time, and premium wages; liquidated damages; treble damages in the future if applicable; reimbursement; restitution; civil penalties upon exhausting administrative remedies; statutory damages, costs of suit; attorney(s)'s fees; pre and post judgment interest and tax neutralization to which Plaintiff and the putative Class—as defined below—are entitled to recover under California law. Plaintiff also seeks to enjoin Defendants, as may be necessary, to prevent their use or employment of any practice which constitutes unfair competition and/or unfair business practices in California.

JURISDICTION & VENUE

6. The Superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action. CCP § 395(a).

1 7. At the commencement of and at all relevant dates relating to this action, FBD conducted/s
2 business in and from the city of Costa Mesa located in Orange County, California. BERRY resides
3 within Orange County, California. On information and belief, so too do DOE Defendants.

4 8. There is no federal question at issue as the claims herein are based solely on California law.

5 9. Also, there is no diversity of citizenship amongst the Parties because at least one defendant is
6 incorporated in or resides within California.

7 10. Thus, jurisdiction and venue are proper in the Superior Court of California, County of Orange.

8 **PARTIES**

9 11. *Plaintiff*, HENKE, worked for FBD in Costa Mesa for over four years, always as an hourly paid
10 employee. HENKE started working for FBD on November 20, 2017, as a paid intern at an hourly wage
11 of \$20.00 per hour according to FBD Gusto Earnings Statements, until May 13, 2018. Also according to
12 FBD Gusto Earnings Statements, from May 14, 2018 to September 30, 2018, HENKE earned \$25.00 per
13 hour. Starting October 1, 2018 to June 9, 2019, HENKE earned \$30.00 per hour according to FBD
14 Gusto Earnings Statements. Also, according to FBD Gusto Earnings Statements, from June 10, 2019 to
15 January 16, 2022, HENKE earned \$40.00 per hour. HENKE earned a final rate of pay of \$50.00 per
16 hour from January 17, 2022 up to and including the final day she worked for FBD, which was late June
17 19, 2022 according to her final paycheck, but in actuality was later because of the work HENKE
18 continued to perform after June 19, 2022. FBD never paid HENKE other than her regular rate of pay
19 even for hours HENKE worked over 8 hours in a workday or 40 hours in a workweek. With respect to
20 class action claims, HENKE is a member of the class who shares with the other putative class members
21 common legal rights and injuries caused by FBD's unlawful uniform policies, procedures and/or
22 practices created, implemented, and/or maintained by Defendants. HENKE seeks to be the class
23 representative for the Class including for the following nine subclasses defined within the operative
24 complaint: (1) Non-Exempt Employees Wages Class, (2) Premium Pay Class, (3) Sick Pay Class, (4)
25 Wage Statement Class, (5) Waiting Time Penalties Class, (6) Reimbursement-Owed Class, (7)
26 Restitution Class, (8) Interest Owed Class, and (9) Tax Neutralization Class (collectively the
27 "Class"). HENKE has the requisite standing to represent this collective group of individual FBD
28 employees, all of whom have causes of action similar to her own against Defendants.

12. Class members, including HENKE, performed work in Orange County, and Defendants' legal
obligations to putative class members under California law arose and were violated in and from the
County of Orange. The members of the Class are identifiable, similarly situated persons who presently

1 work or formerly worked as non-exempt hourly employees for FBD whom FBD failed to (a) pay all
2 wages to including but not limited to overtime, possibly double time, premium wages, and sick pay; (b)
3 provide accurate itemized wage statements; (c) pay waiting time penalties; etc. At this time, HENKE
4 knows of the following 16 class members:

- 5 (1) McCall Henke;
- 6 (2) Adrienne Melchiorre;
- 7 (3) Jenn Bloch;
- 8 (4) Wendy Estreicher;
- 9 (5) Kelli Homeyer;
- 10 (6) Lorraine Carroll;
- 11 (7) Karissa Koch;
- 12 (8) Reilly Grenier;
- 13 (9) Jennifer Allen;
- 14 (10) Celeste Devine;
- 15 (11) Jessica Mitchell;
- 16 (12) Jenna Engstrom;
- 17 (13) Krystal Moore;
- 18 (14) Whitney Welgan;
- 19 (15) Lauren Hogan; and
- 20 (16) Rebecca Brancato.

21 13. Aggrieved PAGA Employees, including HENKE, performed work predominantly from Orange
22 County, California, and Defendants' legal obligations to Aggrieved PAGA Employees under California
23 law arose and were violated in the same county. With respect to PAGA claims, HENKE, acting as proxy
24 for the State of California, will seek relief on behalf of herself and other current or former employees
25 aggrieved by Defendants' numerous violations of California's Labor Code, assuming the LWDA does
26 not investigate the PAGA claims and the requisite amount of time lapses prior to HENKE amending this
27 Complaint to add PAGA claims. These employees are herein after collectively referred to as "Aggrieved
28 PAGA Employees".

14. Per Labor Code § 2699(c), Aggrieved PAGA Employees will include any person who was or is
employed by FBD and against whom one or more of the alleged violations was committed. As explained
within this operative complaint, HENKE is an aggrieved employee under PAGA. Other Aggrieved

1 PAGA Employees include current and/or former employees with the following *non-exhaustive* list of
2 job title(s)/role(s): Assistant, Décor Assistant; Décor Lead Designer, Designer, Intern, Technical
3 Designer; and Technical Lead, as well as those employees FBD misclassified as independent contractors
4 or as salary-exempt.

5 15. *Defendant* Frank Berry Designs, Inc. (FBD): According to its Articles of Incorporation filed with
6 California’s Secretary of State, FBD is a domestic corporation doing business in the State of California
7 with its principal business office located at 3197 Airport Loop Drive, Building E, Costa Mesa, CA
8 92626.

9 16. *Defendant* Frank M. Berry, III (“BERRY”) is the CEO, CFO, Secretary, and FBD’s sole director.
10 BERRY is liable for all causes of actions contained within the operative complaint pursuant to Labor
11 Code § 558.1, § 1197.1, and/or via vicarious liability.

12 17. *DOE Defendant(s)*: DOE Defendants are liable under Labor Code § 558.1, § 1197.1, and/or via
13 vicarious liability. The true names and capacities, whether individual, corporate, subsidiary, partnership,
14 associate or otherwise of DOE Defendant(s) are presently unknown to HENKE, who therefore sues
15 these Defendants by such fictitious names pursuant to CCP § 474. HENKE will seek leave to amend this
16 operative Complaint to allege the true names and capacities of DOE Defendants if/when they are
17 ascertained through discovery.

18 18. Pursuant to Labor Code § 558.1(a) “Any employer or person acting on behalf of [FBD], who
19 violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in
20 any order of the Industrial Welfare Commission, or violates, or causes to be violated, Labor Code §§
21 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.

22 19. Labor Codes section 558.1(b) clearly applies to BERRY, and states “[f]or purposes of this
23 section, the term “other person acting on behalf of the employer is limited to a natural person who is an
24 owner, director, officer, or managing agent of the employer, and the term “managing agent” has the
25 same meaning as in subdivision (b) of Section 3294 of the Civil Code.”

26 20. BERRY and DOE Defendants also meet the requisite casual connection element of Labor Code
27 section 1197.1. Pursuant to § 1197.1(a), “Any employer or other person acting either individually or as
28 an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage
less than the minimum fixed by an applicable state or local law, or by an order of the commission, shall
be subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, and any
applicable penalties imposed pursuant to Section 203...”.

1 21. HENKE is informed and believes, and based upon such information and belief, alleges
2 Defendants are responsible in some manner for one or more of the occurrences that proximately caused,
3 and therefore are liable for, the injuries and damages alleged within this operative complaint HENKE
4 and Class members suffered.

5 **VICARIOUS LIABILITY**

6 22. HENKE incorporates by reference all of the allegations set forth in the paragraphs above as
7 though fully set forth herein.

8 23. Vicarious liability is a form of strict, secondary liability that arises under the common law
9 doctrine of agency, specifically respondeat superior in this case, which means the superior is responsible
10 for the acts of his/her/its/their subordinate(s) or, in a broader sense, responsible for any third party that
11 had the “right, ability or duty to control” the activities of a violator.

12 24. FBD is vicariously liable for BERRY’s actions because BERRY is FBD’s sole officer and
13 Director who controlled the hour, wages, and other work conditions of HENKE and the putative class.
14 FBD is also vicariously liable for DOE Defendant(s)’ actions, as well as the actions of any of its other
15 managing agents, co-conspirators, joint venturers, directors, officers and/or employees of FBD, who
16 acted within the course and scope of said agency, conspiracy, joint venture, and/or employment, with the
17 actual or constructive knowledge and/or consent of FBD.

18 25. HENKE is informed and believes that each Defendant authorized and/or ratified the wrongful
19 activities of each of the remaining Defendants alleged within this Complaint. FBD’s conduct was
20 undertaken by its director(s), officer(s), managing agent(s), especially BERRY and other persons
21 responsible for supervision of employees and for the drafting and implementation of policies and other
22 managerial decisions. The conduct of the officers, managing agents, and other individuals was on behalf
23 of FBD. Furthermore, FBD had knowledge of such conduct of said individuals whose actions and
24 conduct were authorized, approved, ratified, and/or actually or constructively known or performed by
25 FBD’s director(s), officer(s), managing agent(s) and other persons responsible for supervision of
26 employees and for the drafting and implementation of policies and other managerial decisions.

27 **CLASS DEFINITION(S)**

28 26. Plaintiff incorporates by reference all of the allegations set forth above as though fully set forth
herein. Plaintiff brings class action claims on behalf of herself and on behalf of all other similarly
situated persons pursuant to California’s Code of Civil Procedure (CCP) § 382. The members of the
California-Only Putative Class belong to the (1) Non-Exempt Employees Wages Class, (2) Premium

Pay Class, (3) Sick Pay Class, (4) Wage Statement Class, (5) Waiting Time Penalties Class, (6) Reimbursement-Owed Class, (7) Restitution Class, (8) Interest Owed Class, and (9) Tax Neutralization Class (collectively the “Class”) defined as follows:

(a) **Non-Exempt Employees Wages Class:** All persons who—at any time within the applicable statute of limitations before or after the filing of the initial complaint, and as extended to the maximum date permitted by Judicial Council Emergency Rule 9, until the future disposition of this case (class period)—worked for Defendants and were classified as or should have been classified as non-exempt employees, including but not limited to those employees with the following job positions: Assistant, Décor Assistant; Décor Lead Designer, Designer, Intern, Technical Designer; and Technical Lead, as well as those employees FBD misclassified as independent contractors or as salary-exempt, all of whom Defendants failed to compensate applicable overtime and double time wages after these employees worked over eight hours in a workday or over forty hours in a workweek.

(b) **Premium Pay Class:** All persons who—at any time within the applicable statute of limitations before or after the filing of the initial complaint, and as extended to the maximum date permitted by Judicial Council Emergency Rule 9, until the future disposition of this case (class period)—worked for Defendants and were classified as or should have been classified as non-exempt employees, including but not limited to those employees with the following job positions: Assistant, Décor Assistant; Décor Lead Designer, Designer, Intern, Technical Designer; and Technical Lead, as well as those employees FBD misclassified as independent contractors or as salary-exempt, all of who did not have a legitimate opportunity to take Labor Code compliant meal and/or rest breaks because their meal and/or rest break(s) were interrupted, missed, or untimely for any reason that was not their own fault, including but not limit to the workload, client matter, and/or the following mandatory “Reoccurring Meetings:

Weekly Project / Agenda Review with All Project Managers – Thursdays After Lunch

Bi- Weekly Review with Frank [BERRY] – Thursdays 11:00AM

Monthly Timeline Reviews with Frank [BERRY] – Thursdays 11:00AM

Team Meetings – Lunch at End of Each Month

Team Bonding – Minimum Each Quarter (To Be Determined at Monthly Meeting)”.

(c) **Wage Statement Class:** All persons who—at any time within the applicable statute of limitations before or after the filing of the initial complaint, and as extended to the maximum date permitted by Judicial Council Emergency Rule 9, until the future disposition of this case (class period)—worked for Defendants and were classified as or should have been classified as non-exempt employees, including but not limited to those employees with the following job positions: Assistant, Décor Assistant; Décor Lead Designer, Designer, Intern, Technical Designer; and Technical Lead, as well as those employees FBD misclassified as independent contractors or as salary-exempt, all of whom whose itemized

1 wage statements are inaccurate and caused injury to such employee(s) including but not
2 limited to FBD failing to accurately detail all of the gross and net wages earned by
3 employees, and FBD failing to accurately detail the total hours worked by employees due to
unaccounted for off-the-clock work.

4 (d) **Former Employees Class:** All persons who—at any time within the applicable statute of
5 limitations before or after the filing of the initial complaint, and as extended to the
6 maximum date permitted by Judicial Council Emergency Rule 9, until the future
7 disposition of this case (class period)—worked for Defendants and were classified as or
8 should have been classified as non-exempt employees, including but not limited to those
9 employees with the following job positions: Assistant, Décor Assistant; Décor Lead
10 Designer, Designer, Intern, Technical Designer; and Technical Lead, as well as those employees
11 FBD misclassified as independent contractors or as salary-exempt, and whose employment
with FBD ended at any time during the class period and FBD willfully failed to pay all
wages earned upon employment separation due to FBD’s uniform policy, procedure,
and/or practice of paying only straight time for all hours employees worked, and thus
owes waiting time penalties to pursuant to Labor Code section 203.

12 (e) **Reimbursement-Owed Class:** All persons who—at any time within the applicable
13 statute of limitations before or after the filing of the initial complaint, and as extended to
14 the maximum date permitted by Judicial Council Emergency Rule 9, until the future
15 disposition of this case (class period)—worked for Defendants and were classified as or
16 should have been classified as non-exempt employees, including but not limited to those
17 employees with the following job positions: Assistant, Décor Assistant; Décor Lead
18 Designer, Designer, Intern, Technical Designer; and Technical Lead, as well as those employees
19 FBD misclassified as independent contractors or as salary-exempt, and FBD failed to
20 indemnify for all necessary business expenditures or losses incurred by these employees
21 in direct consequence of the discharge of their duties, or of their obedience to the
directions of FBD. This includes but is not necessarily limited to reimbursement for the
following: the pro rata use of employees’ cellphones used to communicate with FBD client’s,
vendors, and other employees for projects or other work-related telephonic communications such
as phone calls, text messages, and emails, as well as whom FBD failed to reimburse mileage to
for the use of their personal vehicles driven for work reasons, such as driving to client project
sites.

22 (f) **Restitution Class:** All persons who—at any time within the applicable statute of
23 limitations before or after the filing of the initial complaint, and as extended to the
24 maximum date permitted by Judicial Council Emergency Rule 9, until the future
25 disposition of this case (class period)—worked for Defendants and were classified as or
26 should have been classified as non-exempt employees, including but not limited to those
27 employees with the following job positions: Assistant, Décor Assistant; Décor Lead
28 Designer, Designer, Intern, Technical Designer; and Technical Lead, as well as those employees
FBD misclassified as independent contractors or as salary-exempt, and are owed restitution
for FBD’s unfair competition due to FBD’s numerous violations of California’s Labor
Code.

1 (g) **Pre and Post Judgment Interest Owed Class:** All persons who—at any time within the
2 applicable statute of limitations before or after the filing of the initial complaint, and as
3 extended to the maximum date permitted by Judicial Council Emergency Rule 9, until
4 the future disposition of this case (class period)—worked for Defendants and were
5 classified as or should have been classified as non-exempt employees, including but not
6 limited to those employees with the following job positions: Assistant, Décor Assistant;
7 Décor Lead Designer, Designer, Intern, Technical Designer; and Technical Lead, as well as
8 those employees FBD misclassified as independent contractors or as salary-exempt, and are
9 owed interest pursuant to Labor Code § 218.6, § 1194(a), § 1194.2, § 2802, and any other
10 applicable provision of law awarding pre and post judgment interest.

11 (h) **Tax Neutralization Class:** All persons who is a member of any subclass listed above, and
12 who would owe additional taxes on damages they would not otherwise owed but for
13 Defendants untimely payment of such damages, especially wages, and who are entitled to an
14 offset of the tax burden they will incur due to Defendants’ violation of California’s Labor
15 Code and Business and Professions Code. *See Economy v. Sutter East Bay Hospitals* (2019) 31
16 Cal.App. 5th 1147, C.C.P. § 1033.5(c)(4); Civil Code § 3333, which states “For the breach of an
17 obligation not arising from contract, the measure of damages, except where otherwise expressly
18 provided by this Code, is the amount which will compensate for all the detriment proximately
19 caused thereby, whether it could have been anticipated or not. This amount is to offset the
20 increased tax burden on HENKE and other punitive class members resulting from a lump sum
21 award of damages as compared to what they would have owed in taxes if the damages, including
22 wages, premiums and penalties, had been received sequentially each year.

23 **PLAINTIFF’S INDIVIDUAL CLAIMS ALLEGATIONS**

24 27. HENKE incorporates by reference all of the allegations set forth above as though fully set forth
25 herein.

26 28. HENKE started working for FBD on November 20, 2017 as a paid intern at an hourly wage of
27 \$20.00 per hour until May 13, 2018. Starting May 14, 2018, HENKE earned \$25.00 per hour until
28 September 30, 2018. From October 1, 2018, up to and including June 9, 2019, HENKE earned \$30.00
per hour. According to Gusto Earnings Statements, HENKE earned \$40.00 per hour from June 10, 2019,
up to and including January 16, 2022. Also, according to Gusto Earnings Statements, from January 17,
2022, up to and including the final day she worked for FBD, HENKE earned \$50.00 per hour. Although
HENKE’s Gusto Earnings Statements make it appear HENKE’s last day working for FBD was June 19,
2023, in reality, Henke performed work after this date for FBD for which FBD failed to compensate her.

29 29. California Labor Code section 510 mandates that overtime pay is required for work in excess of
30 eight hours per day or in excess of 40 hours per week.

31 30. HENKE’s Gusto Earnings Statements clearly demonstrate that from 2018 to 2022 FBD *never*
32 paid HENKE applicable overtime or double time wages even though HENKE’s biweekly Gusto

Earnings Statements clearly prove HENKE typically worked over 8 hours in a workday and/or over 40 hours in a workweek.

2020 Examples

31. According to her biweekly Gusto Earning Statement covering the FDB pay period from January 6, 2020 to January 19, 2020, HENKE worked 93.5 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 13.5 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$270.00, plus interest, costs, and attorney's fees just for this pay period.

32. According to her biweekly Gusto Earning Statement covering the FDB pay period from January 20, 2020 to February 2, 2020, HENKE worked 96.25 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 16.25 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$325.00, plus interest, costs, and attorney's fees just for this pay period.

33. According to her biweekly Gusto Earning Statement covering the FDB pay period from February 17, 2020 to March 1, 2020, HENKE worked 92.5 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 12.5 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$250.00, plus interest, costs, and attorney's fees just for this pay period.

34. According to her biweekly Gusto Earning Statement covering the FDB pay period from March 16, 2020 to March 29, 2020, HENKE worked 81.25 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 1.25 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$25.00, plus interest, costs, and attorney's fees just for this pay period.

35. According to her biweekly Gusto Earning Statement covering the FDB pay period from September 14, 2020 to September 27, 2020, HENKE worked 91.25 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 11.25 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$225.00, plus interest, costs, and attorney's fees just for this pay period.

36. According to her biweekly Gusto Earning Statement covering the FDB pay period from October 12, 2020 to October 25, 2020, HENKE worked 88.25 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 8.25 hours at an overtime rate of \$60.00 per hour. Thus, FBD

owes HENKE at least an additional \$165.00, plus interest, costs, and attorney's fees just for this pay period.

37. According to her biweekly Gusto Earning Statement covering the FDB pay period from November 9, 2020 to November 22, 2020, HENKE worked 89.75 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 9.75 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$195.00, plus interest, costs, and attorney's fees just for this pay period.

38. According to her biweekly Gusto Earning Statement covering the FDB pay period from December 7, 2020 to December 20, 2020, HENKE worked 119 hours. FBD paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 39 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$780.00, plus interest, costs, and attorney's fees just for this pay period. Given this example, FBD may owe HENKE double time wages.

2021 Examples

39. According to her biweekly Gusto Earning Statements covering the FDB pay periods from January 4, 2021 to June 6, 2021, HENKE worked 96 hours, 89.75 hours, 87.5 hours, 104.75 hours, 100.5 hours, 92.5 hours, 86.5 hours, 95.75 hours, 86.75 hours, 97 hours, and 90.5 hours, for which Defendants paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 147.5 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$2,950.00 plus interest, costs, and attorney's fees just for first half of 2021.

40. According to her biweekly Gusto Earning Statements covering the FDB pay periods from June 21, 2021 to September 26, 2021, HENKE worked 113.75 hours, 87.75 hours, 89 hours, 92.25 hours, 111.75 hours, 110 hours, and 116.5 hours, for which Defendants paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 161.00 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$3,220.00 plus interest, costs, and attorney's fees just for this three month period.

2022 Examples

41. According to her biweekly Gusto Earning Statements covering the FDB pay period from January 3, 2022 to January 16, 2022, HENKE worked 88.75 hours, for which Defendants paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 8.75 hours at an overtime rate of \$60.00 per hour. Thus, FBD owes HENKE at least an additional \$175.00 plus interest, costs, and attorney's fees just for this two-week period.

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2 42. According to her biweekly Gusto Earning Statements covering the FDB pay periods from
3 January 17, 2022 to June 19, 2022, HENKE worked 87 hours, 90.25 hours, 92.25 hours, 96.5 hours,
4 100.5 hours, 82 hours, 92 hours, 90.50 hours, 88.75 hours, 86 hours, and 87.75 hours, for which
5 Defendants paid HENKE only straight time at \$50.00 per hour, failing to pay her at least 113.50 hours at
6 an overtime rate of \$75.00 per hour. Thus, FBD owes HENKE at least an additional \$2,837.50 plus
7 interest, costs, and attorney's fees just for this five-month period.

8 **Additional Facts Regarding HENKE's Payroll Records**

9 43. The above examples equal a mere sample out of over 117 itemized wage statements proving
10 Defendants owe HENKE unpaid wages that still remain unpaid to date.

11 44. Furthermore, HENKE's Gusto Earning Statements fail to capture the numerous times HENKE
12 worked off-the-clock, compensable time for which Defendants failed to compensate HENKE.

13 45. HENKE's Gusto Earning Statements also demonstrate FBD has/d a corporation-wide policy,
14 during HENKE's entire tenure with FBD, of not providing its employees with paid sick leave per
15 California's Labor Code §§ 246 to 249, a law-mandated benefit HENKE would have used had she
16 been able to, especially during the COVID-19 pandemic.

17 46. HENKE's Gusto Earning Statements also demonstrate FBD has/d a corporation-wide policy of
18 not paying its employees the premium pay required pursuant to Labor Code § 226.7(b) & (c) and §
19 512) for failing to provide FBD employees with Labor Code compliant meal breaks.

20 47. HENKE's Gusto Earning Statements also demonstrate FBD has/d a corporation-wide policy of
21 not paying its employees the premium pay required pursuant to Labor Code § 226.7 & IWC Order 4-
22 2001, § 12 for failing to provide FBD employees with Labor Code compliant rest breaks.

23 48. Lastly, HENKE's Gusto Earning Statements, or any other FBD document for this matter, also
24 demonstrate FBD has/d a corporation-wide policy of failing to reimburse FBD employees for all
25 necessary business expenses per Labor Code § 2802, including for (a) mileage anytime HENKE and
26 other FBD employee's used their personal vehicle to drive to client sites; and (b) the pro rata basis of
27 their monthly cellphone bills due to HENKE's and other FBD employees' use of their personal
28 cellphones for work-related purposes, especially when HENKE and other FBD employees were
physically present at a client's site. Defendants never provided any employee with a business cellphone,
so it was necessary for employees to use their personal cellphones for FBD phone calls, text messages,
and emails with colleagues and clients while working for FBD.

1 **HENKE's Separation From FBD**

2 49. Fed up with the intolerable work conditions of/at FBD, on Saturday, June 18, 2022, via an email
3 sent a 6:22 AM to BERRY, HENKE "resigned", actually was constructively discharged by FBD, which
4 BERRY acknowledged and accepted that same day via an email reply to HENKE at 11:21 AM.

5 50. However, HENKE's final Gusto Earnings Statement indicates FBD did not pay HENKE until
6 June 23, 2022. Furthermore, although text messages demonstrate that HENKE's likely last day of any
7 work for FBD was Tuesday, June 21, 2022, FBD paid HENKE only through June 19, 2022.

8 **HENKE'S CLASS ACTION STANDING**

9 51. HENKE incorporates by reference all of the allegations set forth in the paragraphs above as
10 though fully set forth herein.

11 52. With respect to class action claims, HENKE is a member of the class who shares with the other
12 class members common legal rights and injuries caused by FBD's unlawful uniform policies,
13 procedures, and/or practices created, implemented, and/or maintained by BERRY for FBD.

14 53. HENKE seeks to be the named representative for the Class including for the following nine
15 subclasses defined within the operative complaint: (1) Non-Exempt Employees Wages Class, (2)
16 Premium Pay Class, (3) Sick Pay Class, (4) Wage Statement Class, (5) Former Employees Entitled
17 To Waiting Time Penalties Class, (6) Reimbursement-Owed Class, (7) Restitution Class, (8)
18 Interest Owed Class, and (9) Tax Neutralization Class (collectively the "Class").

19 54. HENKE has the requisite standing to represent FBD employees who are similarly situated as
20 HENKE, and thus have the causes of action similar to or the same as HENKE's individual claims
21 against Defendants.

22 55. With respect to class action claims, HENKE is a member of the class who shares with the other
23 class members common legal rights and injuries caused by FBD's unlawful uniform policies, procedures
24 and/or practices created, implemented and/or maintained by BERRY for FBD.

25 **HENKE MEETS CLASS CERTIFICATION REQUIREMENTS**

26 56. HENKE incorporates by reference all of the allegations set forth in the paragraphs above as
27 though fully set forth herein.

28 57. The requirements for class certification are met in this case as follows:

(1) Non-Exempt Employees Wages Class

58. Defendants failed to pay HENKE and the other Non-Exempt Employees Wages Class all
minimum, regular, overtime, and possibly double time wages these employees earned for the time

1 FBD's uniform policy, procedure, and/or practice was to pay all of its employees only straight time
2 regular wages for all hours worked over 8 hours in a workday or 40 hours in a workweek, as was the
3 case during HENKE'S entire duration of employment that resulted in Defendants' failure to pay FBD
4 employees overtime, and possibly double time, wages due.

5 **(2) Premium Pay Class**

6 59. FBD also owes HENKE, and other Premium Pay Class members, premium pay because these
7 putative Class members did not have a legitimate opportunity to take Labor Code compliant meal and/or
8 rest breaks because their meal and/or rest break(s) were interrupted, missed, or untimely for any reason
9 that was not their own fault, including but not limit to the workload at FBD, including client projects
10 and/or the following mandatory "Reoccurring Meetings:

11 Weekly Project / Agenda Review with All Project Managers – Thursdays After Lunch

12 Bi- Weekly Review with Frank [BERRY] – Thursdays 11:00AM

13 Monthly Timeline Reviews with Frank [BERRY] – Thursdays 11:00AM

14 Team Meetings – Lunch at End of Each Month

15 Team Bonding – Minimum Each Quarter (To Be Determined at Monthly Meeting)".

16 60. On May 23, 2022, the California Supreme Court held in *Naranjo v. Spectrum Security Services,*
17 *Inc.* (2022) 13 Cal.5th 93, that premium pay are wages that are subject to the same timing and reporting
18 requirements as other compensation for work. This means that HENKE and other similarly situated FBD
19 employees who claim that they have not been paid all premium pay are considered employees who have
20 not been paid all wages and thus, can seek additional penalties and fees under Labor Code sections 203
21 and 226.

22 **(3) Sick Pay Class**

23 61. California's Healthy Workplaces, Healthy Families Act of 2014 (L.C. §§ 245-249) was passed
24 the same year as FBD's incorporation of September 9, 2014, and went into effect on July 1, 2015.
25 Despite over two years lapsing prior to hiring HENKE, who started working for FBD on November 20,
26 2017, FBD never complied with the paid sick leave requirements of Labor Code §§ 246, 246.5, 247,
27 247.5, and 248.5 with regard to any and all FBD employees during HENKE's entire employment by
28 FBD.

29 **(4) Wage Statement Class**

30 62. As a result of Defendants' failure to pay its non-exempt employees, including HENKE, all
wages they earned, including but not limited to minimum wages, overtime wages, double time wages,

1 paid sick leave, and premium wages, FBD uniformly failed to provide HENKE and other Wage
2 Statement Class members with accurate wage statements as required by Labor Code §§ 226 and 246(i),
3 causing the Wage Statement Class injury because (a) FBD failed to accurately detail all of the gross
4 and net wages earned by employees; (b) FBD failed to accurately detail the total hours worked by
5 employees due to unaccounted for off-the-clock work; and (c) FBD failed to withhold and/or pay all
6 taxes, including social security tax that will negatively impact FBD employees who eventually qualify
7 for social security retirement benefits.

8 **(5) Former Employees Entitled To Waiting Time Penalties Class**

9 63. Additionally, FBD uniformly willfully failed to pay former employees, including HENKE, all
10 the wages—including but not limited to minimum wages, regular wages, overtime wages, possibly
11 double time wages, sick leave pay, and premium pay—owed to them upon separation of employment as
12 required by Labor Code § 201 and/or § 202. FBD's willfulness is proven by the fact that FBD did not
13 have in-house or outside Human Resources or employment law counsel until late 2022, after HENKE
14 separated from FBD. Thus, FBD unreasonably failed to fulfill its duty to comply with the Labor Code.

15 64. As a result, Defendants are liable to the Former Employees Class members, including HENKE,
16 for waiting time penalties pursuant to Labor Code § 203 for Defendant's willful failure to pay former
17 employees all the wages owed to them upon separation of employment.

18 **(6) Reimbursement-Owed Class**

19 65. Defendants failed to indemnify the Reimbursement-Owed Class, including HENKE, for all
20 necessary expenditures of losses incurred by these employees in direct consequence of the
21 discharge of their duties, or of their obedience to the directions of FBD/BERRY under Labor
22 Code § 2802, including but not limited to reimbursement for the following: the pro rata use of
23 employees' cellphones used to communicate with FBD client's, vendors, and other employees for
24 projects or other work-related telephonic communications such as phone calls, text messages, and
25 emails, as well as whom Defendants failed to reimburse mileage to for the use of their personal vehicles
26 driven for work reasons, such as driving to client project sites.

27 **(7) Restitution Class**

28 66. Due to FBD's numerous violations of California's Labor Code, FBD unfairly competed by
gaining an unfair advantage over FBD's competition. Therefore, FBD is liable to the Restitution Class
for its unfair competition, owing the Restitution Class a fourth year of damages, with time
extended by Judicial Council Emergency Rule 9.

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(8) Interest Owed Class

67. Due to FBD's numerous violations of California's Labor Code and Business & Professions Code, FBD owes HENKE and other putative Interest Owed Class members pre and post judgment interest pursuant to Labor Code §§ 218.6, 248.5(f), 1194(a), 1194.2, 1197.1, 2802 and any other applicable provision of law awarding interest. The Court shall award interest at the rate of interest specified in Civil Code § 3289 (10% per annum), which shall accrue from the date that the damages, for example the wages, were due and payable.

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(9) Tax Neutralization Class

68. FBD owes HENKE and other putative Tax Neutralization Class members money to who will owe additional taxes on damages they would not otherwise owed but for Defendants' untimely payment of such damages, especially wages, and who are entitled to an offset of the tax burden they will incur due to Defendants' violation of California's Labor Code and Business and Professions Code. *See Economy v. Sutter East Bay Hospitals* (2019) 31 Cal.App. 5th 1147, C.C.P. § 1033.5(c)(4); Civil Code § 3333, which states "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. This amount is to offset the increased tax burden on HENKE and other punitive class members resulting from a lump sum award of damages as compared to what they would have owed in taxes if the damages, including wages, premiums and penalties, had been received sequentially each calendar year.

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CLASS ELEMENTS MET

69. HENKE incorporates by reference all of the allegations set forth in the paragraphs above as though fully set forth herein.

70. **Numerosity:** The class members are so numerous that the individual joinder of all them as named/described by HENKE is impracticable. While the exact number of all CLASS members is unknown to HENKE at this time, HENKE is informed and believes and thereon alleges that there are at least **16** members in most of the nine (9) subclasses already listed.

71. **Community of Interests:** This action has been brought and may be maintained as a class action pursuant to CCP § 382 because there is a well-defined community of interests among many persons who comprise a readily ascertainable class. Per *Vasquez v. Superior Court* (1971) 4 Cal.3d 800 at 809, the right of each employee to recover is not based on a separate set of facts applicable only to him/her. "The requirement of a community of interest does not depend upon an identical recovery,

1 and the fact that each member of the class must prove his separate claim to a portion of any recovery by
2 the class is only one factor to be considered in determining whether a class action is proper.” *Id.* “The
3 “community of interest” requirement embodies three factors: (1) predominant common questions of law
4 or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives
5 who can adequately represent the class.” *Sav-On Drugs Stores, Inc. v. Superior Court* (2004) 34 Cal.4th
6 319, 326. Courts may also consider whether the class action procedure is “superior” to litigating claims
7 individually.

8 **72. Commonality:** Common questions of law and fact exist as to the members of the Class and
9 predominate over any questions that affect only individual members of the Class. Though “[i]ndividual
10 issues do not render class certification inappropriate so long as such issues may effectively be
11 managed.” *Id.* at p. 33. These common questions of law and fact include, but are not limited to:

12 (i) Did FBD fail to pay earned wages to Class members due to a corporation-wide policy,
13 procedure, and/or practice of pay only regular straight-time wages for all hours worked by FBD
14 employees?

15 (ii) Were FBD employee’s meal and/or rest breaks interrupted, late, and/or missed, and did
16 FBD lack a corporation-wide policy, procedure, and/or practice to pay FBD employees the requisite
17 premium pay?

18 (iii) Did FBD fail to provide sick pay leave Class members due to a lack of a corporation-
19 wide policy, procedure, and/or practice that provided for such?

20 (iv) Are the wage statements of Class members inaccurate and did such inaccuracy cause
21 Class members injury in violation of Labor Code § 226?

22 (v) Did FBD willfully fail to pay Class members who no longer work for FBD all the wages
23 they earned upon separation of employment, and if so, are these Class members entitled to waiting time
24 penalties pursuant to Labor Code § 203?

25 (vi) Did FBD fail to indemnify Class members for all necessary business expenses, and thus
26 owes reimbursement to Class members?

27 (vii) Are Class members owed restitution due to FBD’s unfair competition resulting from
28 FBD’s numerous violations of California’s Labor Code?

(viii) Are Class members owed interest on their damages? and

(ix) Are Class members owed additional monetary damages to neutralize tax they would not
incur but for FBD violations of California’s Labor Code and Business & Professions Code?

1 Even though all Class members may not have suffered a violation of the same laws,
2 essentially the Class members have suffered the same injury. The Class members claims depend upon a
3 common contention that is of such a nature that it is capable of class wide resolution, which means that
4 determination of its truth or falsity will resolve the issues that are central to the validity of each one of
5 the claims in one stroke.

6 73. **Typicality:** HENKE is a member of the (1) Non-Exempt Employees Wages Class, (2) Premium
7 Pay Class, (3) Sick Pay Class, (4) Wage Statement Class, (5) Former Employees Entitled To Waiting
8 Time Penalties Class, (6) Reimbursement-Owed Class, (7) Restitution Class, (8) Interest Owed
9 Class, and (9) Tax Neutralization Class (collectively the “Class”). The claims of HENKE are typical
10 of the claims of the other class members who HENKE seeks to represent. HENKE was formerly
11 employed by FBD and was subjected to the same unlawful policies, procedures, and/or practices as
12 other former and current FBD employees. HENKE and the other putative Class members suffered the
13 same injuries and seek the same relief.

14 74. **Adequacy:** HENKE will adequately and fairly protect the interests of the Class. HENKE has no
15 interest adverse to the interests of absent class members, and HENKE is represented by attorney(s) with
16 adequate experience in civil litigation and employment law.

17 75. **Manageability:** A class action is superior to other available means (if any) for fair and efficient
18 adjudication of the claims of the Class and would be beneficial for the Parties and the court. Class action
19 treatment will allow a large number of similarly situated persons to prosecute their common claims in a
20 single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense
21 that numerous individual actions would require. The monetary amounts due to many individual Class
22 members are likely to be relatively small, and the burden and expense of litigation would make it
23 difficult or impossible for Class members to seek and obtain relief through individual lawsuits. A class
24 action will serve an important public interest by providing Class members with an effective mechanism
25 for redress of violation of their statutory rights. HENKE is presently unaware of any difficulties that are
26 likely to be encountered in the management of this action that would preclude its maintenance as a class
27 action but reserves the right to modify the allegations and/or the class definitions based on further
28 investigation, discovery and/or legal developments. This operative complaint is meant to establish by a
preponderance of the evidence that common issues predominate. Thus, a class action is superior to
alternate means for a fair and efficient adjudication of this litigation.

CAUSES OF ACTION

**FIRST CAUSE OF ACTION
AGAINST DEFENDANTS FBD & BERRY**

(By The Former Employees Class, Including HENKE)

For Lab. Code § 203 Waiting Time Penalties For Violation Of Lab. Code § 201 or § 202

76. HENKE incorporates by reference all of the allegations set forth in the paragraphs above as though fully set forth herein, and pleads the following on behalf of applicable members of the Former Employees Class against Defendants FBD and BERRY pursuant to Labor Code § 558.1(a) which holds liable any employer or other person—who is an owner, director, officer, or managing agent of the employer—acting on behalf of an employer, who violates, or causes to be violated, Labor Code § 203:

Lab. Code §§ 201 & 202

77. Labor Code § 201(a) reads in relevant part “If an employer discharges an employee, the wages^[1] earned and unpaid at the time of discharge are due and payable immediately.”

78. While under Labor Code § 202(a) “If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting...”.

79. Fed up with the intolerable work conditions of/at FBD, on Saturday, June 18, 2022, via an email sent a 6:22 AM to BERRY, HENKE “resigned”, actually was constructively discharged by FBD, which BERRY acknowledged and accepted that same day via an email reply to HENKE at 11:21 AM.

80. However, HENKE’s final Gusto Earnings Statement indicates FBD did not pay HENKE until June 23, 2022. Furthermore, although text messages demonstrate that HENKE’s likely last day of any work for FBD was Tuesday, June 21, 2022, Defendants paid HENKE only through June 19, 2022.

81. Moreover, as explained above, HENKE’s Gusto Earnings Statements clearly prove Defendants paid HENKE only straight regular pay even though she clearly worked over 8 hours in a workday and/or 40 hours per week.

82. Additionally, on information and belief, HENKE alleges FBD had a corporation-wide policy of

¹ According to Labor Code §200(a) “‘Wages’ includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. Under§ 200(b) “Labor” includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.

1 paying FBD employees only straight time for the hours they worked, including when they worked over
2 8 hours in a workday and/or 40 hours per week.

3 83. Finally, Defendants never cured this violation at anytime during HENKE's tenure with FBD,
4 especially not by/at the times mentioned in Labor Code sections 201 and 202. Therefore, Defendants
5 failed to pay separated FBD employees all their wages per Labor Code sections 201 or 202.

6 84. On information and belief, Defendants also failed to pay former FBD employees reporting time
7 pay. Reporting time pay constitutes wages. See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40
8 Cal. 4th 1094. Thus, failure to pay all reporting time pay due at the time of employment termination is a
9 basis for waiting time penalties pursuant to Labor Code § 203.

10 85. Also, FBD failed to immediately pay HENKE and other Former Employees Class members all
11 earned and unpaid premium pay due to these employees because Former Employees Class members did
12 not have a legitimate opportunity to take meal/rest breaks, took such untimely, and/or such meal/rest
13 breaks were interrupted. "...[T]he remedy provided in Labor Code section 226.7 constitutes a wage or
14 premium pay and is governed by a three-year statute of limitations...". See *Murphy v. Kenneth Cole
Productions, Inc.* (2007) 40 Cal. 4th 1094.

15 86. Also, FBD's policy, procedure, and/or practice of off-the-clock work is memorialized in a March
16 6, 2022 email to HENKE from BERRY, and demonstrates the following "Off Hour Communication":

17 "High Level – Text

18 Medium Level – Email

19 Low Level – Discussed Following Business Day

20 Personal Check-Ins if Concerning Manners Arise"

21 This resulted in FBD's failure to compensate members of the putative Former Employees Class properly
22 for all the time they actually worked. Off-the-clock work is not "consistent with the core statutory and
23 regulatory purpose that employees be paid for all time worked...In light of the wage order's remedial
24 purpose requiring a liberal construction, its directive to compensate employees for all time worked, the
25 evident priority it accorded that mandate notwithstanding customary employment arrangements, and its
26 concern with small amounts of time, the de minimis doctrine has no application under the circumstances
27 presented here." *Troester v. Starbucks Corp.* at 847. FBD is an employer that requires its employees to
28 work minutes off the clock on a regular basis or as a regular feature of the job. FBD may not evade the
obligation to compensate its employees for that time by invoking the de minimis doctrine. "...[A] few
extra minutes of work each day can add up." *Id.* Thus, FBD's "Off Hour Communication" policy,

1 procedure, and practice resulted in FBD not complying with Labor Code §§ 201, 202, and 203 because
2 FBD failed to compensate former FBD employees who are members of the Non-Exempt Employees
3 Wages Class, for the minutes of work each day that added up.

4 87. Thus, FBD failed to immediately pay, upon separation of employment, all wages earned by
5 members of the Former Employees Class who FBD discharged. Consequently, FBD violated Labor
6 Code § 201. FBD also failed to comply with Labor Code § 202(a) because FBD failed to timely pay
7 Former Employees Class members who quit all earned and unpaid.

8 **Lab. Code § 203**

9 88. Furthermore, Defendants are liable for statutory waiting time penalties to the Former Employees
10 Class under § 203.

11 89. California's public policy favors the full and prompt payment of wages due an employee. To
12 ensure that employers comply with the laws governing the payment of wages when an employment
13 relationship ends, California's Legislature enacted Labor Code § 203 to provide for the assessment of a
14 statutory penalty against the employer when there is a willful failure to pay wages due the employee at
15 conclusion of the employment relationship.

16 90. Labor Code § 203(a) states in pertinent part, "If an employer willfully fails to pay, without
17 abatement or reduction, in accordance with sections 201, 201.3, 201.5, 201.9, 202, and 205.5, any wages
18 of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty
19 from the due date thereof at the same rate until paid or until an action therefor is commenced; but the
20 wages shall not continue for more than 30 days."

21 91. According to Labor Code § 203(b), "Suit may be filed for these penalties at any time before the
22 expiration of the statute of limitations on an action for the wages from which the penalties arise, which
23 is three (3) years. All compensation is considered in determining if all wages due were paid as
24 prescribed by law, including the following wages/pay DEFENDANTS failed to pay HENKE and the
25 Non-Exempt Employees Wage Class (1) minimum, regular, overtime, and/or possible double time
26 wages; (2) all accrued, but unused, vacation or vacation that should have accrued but remained unused;
27 (3) reporting time pay in violation of the Industrial Wage Order applicable to FBD, and (4) failing to pay
28 premium pay per Labor Code § 226.7.

92. HENKE knows for herself, and believes in good faith for the Former Employees Class, that
DEFENDANTS willfully failed to timely pay them all of their earned wages upon separation of
employment.

1 93. “The settled meaning of “willful,” as used in section 203, is that an employer has intentionally
2 failed or refused to perform an act which was required to be done. (*Barnhill v. Robert Saunders & Co.*
3 (1981) 125 Cal.App.3d 1, 7-8; *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274) “[T]he employer’s
4 refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the
5 employer knows to be due.” (*Barnhill, supra*, 125 Cal.App.3d at p. 7; see *Davis v. Morris, supra*, 37
6 Cal.App.2d at p. 274.)” *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1201. “[T]o be at fault
7 within the meaning of [section 203], the employer’s refusal to pay need not be based on a deliberate evil
8 purpose to defraud workmen of wages which the employer knows to be due. As used in section 203,
9 ‘willful’ merely means that the employer intentionally failed or refused to perform an act which was
10 required to be done.” *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54. “In civil
11 cases the word ‘willful’ as ordinarily used in courts of law, does not necessarily imply anything
12 blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but
13 merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to
14 nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a
free agent.” *Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891.

15 94. In the aforementioned March 6, 2022 email from BERRY to HENKE, it is clear that FBD,
16 through BERRY, was supposed to “[e]stablish HR and Company Policies”. It is also clear from
17 HENKE’s Gusto Earnings Statements as a sample, that Defendants intentionally paid FBD employees
only regular straight time for FBD’s employees’ time tracked via Harvest Time Tracking.

18 95. Therefore, Defendants utter disregard of California’s wage and hour laws via a corporation-wide
19 policy, procedure and/or practice implemented and carried out by BERRY, is sufficient evidence
20 Defendants willfully failed to pay, without abatement or reduction, in accordance with Labor Code §§
21 201 and 202 any wages of members of the Former Employees Class. On information and belief, to this
22 date, BERRY has yet to order the payment of all of HENKE’s earned wages. HENKE believes in good
23 faith this be true for other Former Employees Class members.

24 96. Therefore HENKE’s wages continue as a penalty from the due date thereof at the same
25 rate until paid or until an action therefor is commenced; but the wages do not continue for more than 30
26 days. Given HENKE’s last day of work was in Summer of 2022, clearly 30 days have elapsed.

27 97. HENKE may file suit “for these [statutory] penalties at any time before the expiration
28 of the statute of limitations on an action for the wages from which the penalties arise”, i.e. three (3)
years. HENKE timely filed this action well within the 3-years statute of limitations.

1 98. In calculating the rate of pay for purposes of computing the penalty, overtime and double time
2 wages are considered if they were regularly scheduled or worked each week, as is/was the case for
3 HENKE during HENKE's employment with FBD. The penalty is measured at the employee's daily rate
4 of pay and is calculated by multiplying the daily wage by the number of days that the employee was not
5 paid, up to a maximum of 30 days. The 30-day period is calendar days and includes weekends and
6 holidays and any other days that the employee would not normally work.

7 99. Thus, DEFENDANTS owe HENKE a minimum of \$12,000.00 as a waiting time penalty,
8 which is based only on HENKE's pay for regular hours worked (\$50.00 X 8 hours X 30 days) but does
9 not yet include HENKE's average overtime pay to calculate HENKE's regular rate of pay, a higher
10 dollar figure which HENKE will have the ability to accurately calculate through the discovery phase of
11 litigation.

12 100. With regard to waiting time penalties for the Former Employees Class which includes
13 HENKE, FBD not only owes waiting time penalties to HENKE, but also to the Former Employees
14 Class.

15 101. Due to the actual time HENKE worked compared to HENKE's inaccurate payroll
16 records, on information and belief, other Former Employees Class members experienced the same
17 unlawful conduct perpetrated upon them by DEFENDANTS.

18 102. Also, on information and belief, the estimated Labor Code § 203 penalty for the Former
19 Employees Class is, on average, likely similar to HENKE's monetary statutory penalty.

20 103. Summarily, DEFENDANTS continue to willfully fail to pay HENKE, the Non-Exempt
21 Employees Wage Class, and the Former Employees Class all of their earned and yet unpaid wages
22 without abatement or reduction due upon separation of employment, including but not necessarily
23 limited to minimum, regular, overtime, double time and/or premium wages as well as reporting time,
24 requested sick leave, and/or vacation pay due to FBD's corporation-wide policies, procedures, and/or
25 practices.

26 **SECOND CAUSE OF ACTION**
27 **AGAINST DEFENDANTS FBD & BERRY**
28 **(By The Wage Statement Class, Including HENKE)**
Labor Code § 226(a) Violation and § 226(e) Remedy

104. HENKE incorporates by reference all of the allegations set forth in the paragraphs above
as though fully set forth herein, and pleads the following on behalf of applicable members of the Wage

Statement Class against Defendants FBD and BERRY pursuant to Labor Code § 558.1(a) which holds liable any employer or other person—who is an owner, director, officer, or managing agent of the employer—acting on behalf of an employer, who violates, or causes to be violated, Labor Code § 226:

Labor Code § 226(a) Violation

105. Under Labor Code § 226(a) “Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee...(4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer...(9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and ...The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, “copy” includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.”

106. HENKE’S and, on information and belief, the Wage Statement Class’ pay records reconciled against their Harvest Time Tracking time records, plus interrupted, late, and/or missed meal and rest breaks, as well as off-the-clock work for “Off Hour Communication” resulted in DEFENDANTS’ failure to compensate HENKE and the Non-Exempt Employees Wages Class properly for all the time they actually worked and prove DEFENDANTS failed to provide HENKE and the Wage Statement Class with accurately written itemized statements showing “(1) gross wages earned, (2) total hours worked by the employee...(5) net wages earned, ...[and] (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee” because DEFENDANTS failed to accurately pay HENKE, the Non-Exempt Employees Wages Class, and the Wage Statement Class all earned and unpaid wages, including but not necessarily

1 limited to minimum, regular, overtime, and/or double time wages; premium wages; reporting time pay;
2 sick leave pay; and/or unpaid accrued or should have been accrued vacation pay.

3 **Labor Code § 226(e) Remedy**

4 107. As a result, DEFENDANTS are liable to HENKE and the Wage Statement Class
5 under Labor Code § 226(e)(1) which states, “An employee suffering injury as a result of a knowing and
6 intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all
7 actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one
8 hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an
9 aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable
10 attorney’s fees.”

11 **Labor Code § 226(e)(2)(B) Injury**

12 108. According to Labor Code § 226(e)(2)(B) “An employee is deemed to suffer injury for
13 purposes of this subdivision if the employer fails to provide accurate and complete information as
14 required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot
15 promptly and easily determine from the wage statement alone one or more of the following: (i) The
16 amount of the gross wages or net wages paid to the employee during the pay period or any of the other
17 information required to be provided on the itemized wage statement pursuant to items (2) to (4),
18 inclusive, (6), and (9) of subdivision (a). (ii) Which deductions the employer made from gross wages to
19 determine the net wages paid to the employee during the pay period...(iii) The name and address of the
20 employer...(iv) The name of the employee and only the last four digits of his or her social security
21 number or an employee identification number other than a social security number.

22 109. Per Labor Code § 226(e)(2)(C) “For purposes of this paragraph, “promptly and easily
23 determine” means a reasonable person would be able to readily ascertain the information without
24 reference to other documents or information.”

25 110. HENKE and the Wage Statement Class have suffered injury pursuant to § 226(e)(2)(B)
26 because, per § 226(e)(2)(B)(i), FBD failed “to provide accurate and complete information as required by
27 any one or more of items (1) to (9), inclusive, of” § 226(a) (*supra*), and HENKE and the Wage
28 Statement Class cannot promptly and easily determine from the wage statement alone the amount of the
gross wages and/or net wages paid or what should have been paid to them to them during the pay period
or any of the other information required to be provided on the itemized wage statement pursuant §
226(a), specifically “(1) gross wages earned, (2) total hours worked by the employee...(5) net wages

1 earned, ...[and] (9) all applicable hourly rates in effect during the pay period and the corresponding
2 number of hours worked at each hourly rate by the employee.”

3 111. HENKE and other Wage Statement Class members must refer to other documents and
4 information to reconstruct the time they worked to account for their unpaid work—including but not
5 necessarily limited to their inaccurate time (clock-in and clock-out) records due to FBD’s “Off Hour
6 Communication[s]”—and other wages/pay due.

7 112. Therefore, HENKE and the Wage Statement Class are entitled to the appropriate
8 remedy from DEFENDANTS under Labor Code § 226(e)(1), up to \$4,000 per FBD employee.

9 **THIRD CAUSE OF ACTION**

10 **AGAINST DEFENDANTS FBD & BERRY**

11 **(By The Premium Pay Class, Including HENKE)**

12 **Labor Code § 226.7(b) Violation and § 226.7(c) Premium Pay**

13 113. HENKE incorporates by reference all of the allegations set forth in the paragraphs above
14 as though fully set forth herein, and pleads the following on behalf of applicable members of the Former
15 Employees Class against Defendants FBD and BERRY pursuant to Labor Code § 558.1(a) which holds
16 liable any employer or other person—who is an owner, director, officer, or managing agent of the
17 employer—acting on behalf of an employer, who violates, or causes to be violated, Labor Code § 226.7:

18 114. According to Labor Code § 226.7(b), “An employer shall not require an employee to
19 work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable
20 regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health
21 Standards Board, or the Division of Occupational Safety and Health.”

22 115. Under Labor Code § 226.7(c) “If an employer fails to provide an employee a meal or rest
23 or recovery period in accordance with a state law, including, but not limited to, an applicable statute or
24 applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety
25 and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay
26 the employee one additional hour of pay at the employee’s regular rate of compensation for each
27 workday that the meal or rest or recovery period is not provided.”

28 116. Under Labor Code § 226.7(d), “A rest or recovery period mandated pursuant to a state
law, including, but not limited to, an applicable statute, or applicable regulation, standard, or order of the
Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of

Occupational Safety and Health, shall be counted as hours worked, for which there shall be no deduction from wages. This subdivision is declaratory of existing law.

117. Under Labor Code § 226.7(e), “This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.

118. As explained above, FBD failed to provide HENKE and other Premium Pay Class members with legitimate opportunities to take Labor Code compliant meal (§ 512) and rest (IWO 4-2001 § 12) breaks each workday because meal and rest breaks were interrupted, late, and/or missed.

119. As a result, DEFENDANTS are liable to the Premium Pay Class, including HENKE, for for “one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period [was/]is not provided.” This includes Class members who are part of the Premium Pay Class who worked part-time and were entitled to meal and/or Labor Code compliant meal and/or rest breaks but did not received from FBD a legitimate opportunity to take such. Additionally, this includes Class members who are part of the Premium Pay Class who worked over eight hours in a workday prior to the date FBD implemented the results from its September 15, 2022 alternative workweek election pursuant to Labor Code § 511 and did not have a legitimate opportunity to take a single meal period of net 30-minutes and/or two 10-minutes net rest breaks timely and uninterrupted. This also includes Class members who are part of the Premium Pay Class who work/ed no more than 10 hours in a workday after FBD implemented an alternative workweek schedule consisting of four days, ten hours per day, and did not have a legitimate opportunity to take a single meal period of net 30-minutes and/or two 10-minutes net rest breaks timely and uninterrupted. Lastly, this also includes Class members who are part of the Premium Pay Class who work/ed over 10 hours in a workday after FBD implemented an alternative workweek schedule consisting of four days, ten hours per day, and did not have a legitimate opportunity to take a two meal periods of net 30-minutes unless a valid meal period waiver exists and/or three 10-minutes net rest breaks timely and uninterrupted.

JURY TRIAL DEMAND

120. HENKE, on behalf of herself and the CLASS, demands a jury trial on all issues so triable.

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2 **PRAYER**

3 **Seeking damages for the enumerated claims as follows:**

- 4 1. Statutory Damages;
5 2. Restitution and Injunction(s) (B&P § 17203);
6 3. Pre and Post Judgment Interest (§ 218.6); and
7 4. Costs & Attorney's Fees (Lab. Code §§ 218.5,
8 5. 226(e)(1), 226(h), 1194, 1198.5(l), 2699(g), and 2802(c); CCP § 1021.5; any other

applicable statutes

9 WHEREFORE HENKE prays for the following:

- 10 1. Judgment in her and the Class's favor against DEFENDANTS for any and all causes of actions
11 enumerated above for which each defendant is personally liable;
12 2. Compensatory damages according to proof for a minimum of \$10 million;
13 3. Civil penalties under California's Private Attorney General Act of 2004 (PAGA);
14 4. Injunctive relief and restitution pursuant to California's UCL, enjoining DEFENDANTS from
15 violating California's Labor Code;
16 5. An award of attorneys' fees incurred in the investigation, filing and prosecution of this action
17 pursuant to CCP § 1021.5; Lab. Code §§ 218.5, 226(e)(1), 226(h), 1194, 1198.5(l), 2699(g),
18 2802(c), and any other applicable provision of law awarding attorneys' fees;
19 6. Costs of suit incurred per C.C.P. §§ 1032(b), 1033.5, 1034 and applicable Lab. Code sections;
20 7. Interest pursuant to Labor Code §§ 218.6, 248.5(f), 1194(a), 1194.2, 1197.1, 2802 and any other
21 applicable provision of law awarding interest; and
22 8. For such other and further relief as this Court may deem just and proper.

23 THE Legal Advocate

24 By: Michelle L. Reynolds
Michelle L. Reynolds, Esq.

25 Attorney for MCCALL HENKE, on behalf of all others similarly
26 situated and other Aggrieved Employees
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