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Attorneys for Plaintiffs, ANGEL GONZALEZ and COLEMAN WELLS, on behalf of themselves and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

ANGEL GONZALEZ and COLEMAN WELLS, individuals, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

LA TORTILLA FACTORY, INC., a Delaware corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No. 37-2024-00020358-CU-OE-CTL

FIRST AMENDED CLASS ACTION COMPLAINT FOR:

(1) FAILURE TO REIMBURSE EXPENSES [LAB. CODE, § 2802];

(2) UNLAWFUL DEDUCTIONS FROM WAGES [LAB. CODE, § 221-223];

(3) FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS [LAB. CODE, § 226];

(4) FAILURE TO PAY OVERTIME [LAB. CODE, § 510];

(5) FAILURE TO PROVIDE MEAL PERIODS [LAB. CODE, § 226.7];

(6) FAILURE TO PROVIDE REST BREAKS [LAB. CODE, § 226.7];

(7) UNFAIR BUSINESS PRACTICES [BUS. & PROF. CODE, § 17200 ET SEQ.].

(8) ENFORCEMENT OF THE PRIVATE ATTORNEYS GENERAL ACY, CALIFORNIA LABOR CODE §§ 2698 *ET SEQ.*

DEMAND FOR JURY TRIAL

ANGEL GONZALEZ and COLEMAN WELLS ("Plaintiff"), on behalf of himself and all others similarly situated, brings this action against Defendant La Tortilla Factory, Inc., a Delaware corporation ("LTF" or "Defendant"), and DOES 1 through 100, inclusive, and alleged on information and belief as follows:

I. INTRODUCTION

1. Defendant operates a direct store delivery ("DSD") business offering tortillas and other staple Mexican foods to retail customer like grocery stores. LTF offers to deliver and merchandize these products at their retail customers' stores. To carry out the delivery and merchandizing obligations owed to its customers, LTF obtains the services of "Distributors" like Plaintiffs and the putative class who service retail locations in their designated geographic territories. Distributors order the right volume of LTF products for the stores they service, deliver the products, and ensure proper merchandising (*i.e.*, rotating product to ensure shelves are stocked and pulling older, stale product from the stores).

2. Distributors are a core component of LTF's DSD model. They are also heavily controlled by LTF in carrying out their work. Yet, LTF claims they are not employees and instead "independent contractors."

3. By refusing to recognize Distributors as employees, LTF cheats these individuals out of protections provided by California labor laws such as overtime pay and reimbursement of business expenses. LTF's misclassification of Distributors also robs the State of important employee tax revenue and gives LTF an undue advantage over law-abiding competitors who bear the necessary expenses associated with employing similar workers.

4. This Class Action seeks recovery for violations of California's Labor Code and Industrial Welfare Commission Wage Order No. 1 ("Wage Order 1") along with violations of California's Unfair Competition Law predicated upon violations of California's Labor Code and Wage Order 1.

II. JURISDICTION & VENUE

5. This Court has subject matter jurisdiction to hear this case because the damages and penalties sought herein resulting from Defendant's conduct exceeds the jurisdictional minimum of

this Superior Court.

6. Venue is proper pursuant to Code of Civil Procedure, section 395.5, among other sections. The obligation to comply with the Labor Code for the group of workers relevant to this case and the resulting liability for misclassifying and denying Labor Code/Wage Order benefits to those workers arose in this County, among others. Defendants hire many Distributors in San Diego who are misclassified and denied employment benefits.

III. PARTIES

7. Mr. Gonzalez is and at all relevant times was a resident of California. He worked as a Distributor for LTF from January 2022 through mid 2024.

8. Mr. Wells was a former employee delivering LTF products to LTF's customers for years. He was converted to an "independent contractor" in 2022 and remains working in that capacity currently.

9. La Tortilla Factory, Inc. is a Delaware corporation with a principal business address at 3300 Westwind Blvd., Santa Rosa, CA 95403.

10. Plaintiffs do not know the true names and/or capacities, whether individual, partners, or corporate, of the Defendants sued herein as DOES 1 through 100, inclusive, and for that reason sues said Defendants under fictitious names. Plaintiffs will seek leave to amend this Complaint when the true names and capacities of these Defendants have been ascertained. Plaintiffs are informed and believe and thereon allege that these Defendants are responsible in whole or in part for Plaintiffs' alleged damages.

11. At all times mentioned, Defendants were the agents, alter egos, servants, joint venturers, joint employers, or employees for each other. Defendants acted with the consent of the other Co-Defendants and acted within the course, purpose, and scope of their agency, service, or employment. All conduct was ratified by Defendants, and each of them.

IV. GENERAL ALLEGATIONS

A. LTF Misclassified Distributors as "Independent Contractors" and Not Employees Under California Law

12. Headquartered in Santa Rosa, California, LTF is "one of the leading makers and distributors of premium and better-for-you tortillas and Mexican food products." LTF offers a range of corn, flour, and specialty tortillas, such as Grain-Free Cauliflower, Low Carb, and Protein along with side dishes, sauces, and snacks (generally referred to as "Products"). LTF operates a manufacturing facility in Northern California and distribution facilities in multiple cities on the West Coast.

13. LTF's products can be found throughout California in retail stores like Albertson's, Costco, Ralph's, Walmart, and Target. Upon information and belief, LTF is majority owned, and controlled by, CREO Capital Partners, LLC, a venture capital and private equity firm based in Colorado focused primarily on food and consumer company investments.

14. LTF distributes its products through a Direct Store Delivery ("DSD") network. To get their product to market, LTF utilizes the labor of Distributors (sometimes referred to as Delivery Drivers), who transport LTF's goods from LTF's warehouses or other distribution points to LTF's retail customer shelves. LTF classifies some Distributors as employees, but others as "independent contractors" despite their central role in LTF's business.

B. LTF Controls Distributors Who Carry Out Integral Parts of Their DSD Business

15. As part of LTF's DSD network, LTF assigns distribution territories to Distributors like the named Plaintiffs and the class he seeks to represent. LTF labels these Distributors as "independent contractors." LTF offers these work opportunities to Distributors who in turn distribute LTF's Products as part of LTF's DSD network. In short, these Distributors carry out a central part of LTF's DSD network: the delivery, stocking, and rotating of products to LTF's retail customers. Specifically, Distributors are responsible for:

a. Performing LTF's "minimum service requirements";

b. Maintaining an adequate and fresh supply of Product to all retail customers in their territory;

c. Rotating Products before they become stale;

d. Promptly removing all state Product from retail locations;

e. Cooperating with LTF's marketing programs;

f. Satisfying customer requirements, guidelines, and expectations including service frequency requests, service windows, promotions, merchandising and weekly inventories;

g. Using a handheld device to transact invoice tickets;

h. Taking an on-hand count of all LTF inventories at its customers' locations a minimum of one time per month; and

i. Submitting copies of printed invoices and credit memos to LTF's corporate headquarters on a weekly basis.

16. In turn, LTF can and does review Distributors' performance and enforces these terms and conditions. Failure to appropriately service LTF's customer accounts is a material breach and gives LTF the right to terminate Distributors.

17. Distributors must pick up and deliver LTF's Product to the customers in their territories several days per week; and, even on non-delivery days, Distributors remain obligated to visit customer stores to ensure Products are properly stocked and rotated.

18. Distributors must meet customer requirements which LTF imposes on them. These include delivery window times (*i.e.*, what time to drop off and deliver Product), dress/uniform requirements, and others. Defendant imposes these requirements as "minimum service requirements." A Distributors' failure to meet LTF's minimum service requirements will result in their termination without notice after two written warnings. In general, LTF may terminate Distributors on 30 days' notice without cause.

19. Distributors are also obligated to order sufficient Product to meet the needs of LTF's customers. LTF requires that Distributors make these orders at least seven business days in advance of pickup. Distributors can earn a simple margin or commission on the difference in the price that LTF charges them and the price LTF sets for the customers to pay it for the Products.

20. LTF employs managerial employees like district and regional managers that oversee the work being done by Distributors. LTF also hires workers to perform the same role as Distributors in some of LTF's territories. In short, LTF owes its retail customers obligations, and it will ensure those obligations are met either through a Distributor or on their own.

21. While Distributors are obligated to fully service the retail accounts in their geographic territory, they are forbidden from selling outside of the territory.

22. LTF reserves the right to control and modify the list of Products that Distributors have the right to sell to retail stores in their territories as well. Distributors may sell only those Products authorized by LTF to their retail stores. They may not, for example, sell competing goods into the retail stores. To this effect, Distributors must agree to a non-compete covenant with LTF. Nor may Distributors offer their products to stores outside of their territory.

23. LTF also controls Distributors' earnings in that they set the "margin" or "spread" – the difference between the price LTF sets for the Distributors and the price LTF sets with its retail customers for the Product. For example, LTF will determine that a category of tortilla Products has a 20% margin which would mean that LTF charges the Distributor $1.60 for a package of tortillas that it charges its customers $2.00. Thus, the Distributor earns 20% of the customer's sale as a commission or piece rate wage.

24. LTF also has the unilateral power to set "stale caps" or the like on the amount of returned product they will accept. Anything exceeding these caps will be charged to the Distributor, which essentially passes the risk of stale, damaged, or lost product to the Distributor.

V. CLASS ALLEGATIONS

25. Pursuant to Code of Civil Procedure, section 382, Plaintiffs bring this lawsuit as a class action on behalf of themselves and all other similarly situated members of the Class, defined below. This action satisfies the ascertainability, numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of class actions.

26. **Class Period.** The Class Period shall be defined as: from four years preceding the date that the first Complaint in this action is filed, until the full resolution of this action, plus any time that may be attributed to equitable or other forms of tolling.

27. Plaintiffs seek to represent the following Class of persons:

a. All individuals during the Class Period who personally operated a La Tortilla Factory territory, *i.e.*, a "Distributor," in California and who were not classified as employees (the "Class").

b. This Class does not include Defendants, their officers, and/or their directors; the Judge to whom this case is assigned; or the Judge's immediate family or staff.

28. Plaintiffs reserve the right to amend the above Class and to add additional classes and subclasses as appropriate based on investigation, discovery, and the specific theories of liability, among other reasons.

29. **Numerosity.** The potential members of the Class as defined are so numerous that joinder of all the members is impracticable. While the precise number of the members of the Class has not been determined, Plaintiffs are informed and believes that there are over one hundred individuals meeting the Class definition. Defendant has data sufficient to identify the members of the Class, namely their list of Distributors maintained internally and used as part of their franchise filings with various states each year.

30. **Adequacy of Representation.** The named Plaintiffs are fully prepared to take all necessary steps to fairly and adequately represent the interests of the Class defined above. Plaintiff's attorneys are ready, willing, and able to fully and adequately represent the Class and Plaintiffs. Plaintiff's attorneys are highly experienced in employment Class action litigation. Plaintiffs intend to prosecute this action vigorously.

31. **Common Questions of Law and Fact.** There are predominant common questions and answers of law and fact and a community of interest amongst Plaintiffs and the claims of the Class as follows:

1. Whether Defendant misclassified Distributors as "independent contractors" instead of employees (e.g., whether LTF can meet its burden to meet each Prong of California's ABC test and/or its Borello test for employment status);

2. Whether Defendant failed to reimburse Distributors for reasonable business expenses;

3. Whether Defendant made illegal deductions from Distributor's earnings;

4. Whether Defendant properly provided meal and rest breaks to Distributors;

5. Whether Defendant paid Distributors all wages when due;

6. Whether Defendant failed to properly pay Distributors overtime; and

7. Whether Defendant engaged in an unlawful, unfair, and/or fraudulent business practice or act in violation of Business and Professions Code, section 17200 *et seq.* as it relates to Distributors.

32. **Typicality.** Plaintiffs' claims are typical of the claims of all members of the Class because Defendant applied and continues to apply its illegal classification, pay, and interest practices to all Distributors.

33. **Superiority of a Class Action.** A Class action is superior to other available means for the fair and efficient adjudication of this controversy. Individual joinder of all members of the Class is not practicable, and questions of law and fact common to the Class predominate over questions affecting only individual Class members. Each Class member has been damaged and is entitled to recovery due to Defendants' conduct described in this Complaint. A Class action will allow those similarly situated to litigate their claims in the most efficient and economical manner for the parties and the judiciary. Plaintiffs are unaware of any difficulties likely to be encountered in this action that would preclude its maintenance as a Class action.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION
Failure to Reimburse Expenses—
Lab. Code, § 2802 and Applicable IWC Wage Orders

34. Plaintiffs incorporate by reference every allegation contained above.

35. Plaintiffs bring this cause of action as a Class action on behalf of themselves and the Class.

36. Distributors necessarily incur many types of expenses that Defendant does not reimburse. These include but are not limited to obtaining a delivery vehicle and the types of costs incurred with vehicle ownership and use like gas, repairs, maintenance, insurance, and the like. Still further, Distributors must purchase and use a handheld computer. They are required to obtain liability insurance.

37. As alleged above, Plaintiffs and the Class incurred business expenses while performing necessary work for Defendant. They were never reimbursed because they were uniformly misclassified as independent contractors.

38. The California Labor Code, section 2802, and applicable Wage Orders require that employers reimburse employees for business expenses reasonably incurred. Defendant failed to do so.

39. The Class has been damaged by Defendants failures in this respect in an amount to be proven at trial.

40. Plaintiffs and the Class are entitled to recover their damages, penalties, interest, costs, and attorneys' fees based on these violations.

SECOND CAUSE OF ACTION
Unlawful Deductions from Wages—
Lab. Code, §§ 221-223 and Applicable IWC Wage Orders

41. Plaintiffs incorporate by reference every allegation contained above.

42. Plaintiffs bring this cause of action as a Class action on behalf of themselves and the Class.

43. Under Labor Code, section 221 it is unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee. This protection extends to deductions for mistakes in employees' work or other non-malicious conduct. Applicable Wage Orders further provide that the only circumstances under which an employer can make a deduction from an employee's wage are due to cash shortage, breakage, or loss of equipment if the employer can show that the shortage, breakage, or loss was the result of the employee's gross negligence or dishonest or willful act.

44. Despite this, Defendant made and continues to make numerous deductions from the

wages of their misclassified Distributors. Defendant, for example, unlawfully deducts money for stale and missing product (shrink) and handheld computer fees, among other expenses.

45. Plaintiffs and the Class are entitled to recover their damages, penalties, interest, costs, and attorneys' fees based on these violations.

THIRD CAUSE OF ACTION
Failure to Provide Accurate Wage Statements—
Lab. Code, §§ 226 and 226.3 and Applicable IWC Wage Orders

46. Plaintiffs incorporate by reference every allegation contained above.

47. Plaintiffs bring this cause of action as a Class action on behalf of themselves and the Class.

48. The purpose of Labor Code section 226 is to ensure the employees can determine whether they are being paid their wages in accordance with California law. Under Section 226(h), "[a]n employee may also bring an action for injunctive relief to ensure compliance with this section and is entitled to an award of costs and reasonable attorney's fees."

49. Defendant violated the above statute by, among other things, failing to provide accurate gross and net wages earned and hours worked on a paystub to Distributors.

50. Defendant's violations of section 226, and applicable Wage Orders are ongoing and will continue until and unless this Court enters an injunction barring such violations. Therefore, Plaintiffs seek damages and injunctive relief pursuant to Labor Code, section 226, subsections (e) and (g), along with penalties for past violations, including attorneys' fees and costs incurred.

FOURTH CAUSE OF ACTION
Failure to Provide Overtime—
Lab. Code, § 510 and Applicable IWC Wage Orders

51. Plaintiffs incorporate by reference every allegation contained above.

52. Plaintiffs bring this cause of action as a Class action on behalf of themselves and the Class.

53. Labor Code, section 510 and applicable Wage Orders require overtime pay at least 1.5 times an employee's regular rate of pay for all hours worked over 8 in a day or 40 in a week.

54. Distributors, including Plaintiffs, work well over 8 hours per day and well over 40 hours per week in line with Defendant's expectations and standards as necessary to complete the

work assigned to them. Despite this, they receive no overtime pay in violation of California law.

55. Defendant is liable to Plaintiffs and the Class for unpaid overtime, interest, reasonable attorneys' fees and costs, and any related statutory penalties.

FIFTH CAUSE OF ACTION
Failure to Provide Meal Periods—
Lab. Code § 226.7 and Applicable IWC Wage Orders

56. Plaintiffs incorporate by reference every allegation contained above.

57. Plaintiffs bring this cause of action as a Class action on behalf of themselves and the Class.

58. Under Labor Code, sections 226.7 and 512, as well as applicable IWC Wage Orders, employers must provide a 30-minute uninterrupted, off-duty meal period for each work shift of more than five hours. Depending on hours worked, a second meal periods may be owed as well. Where adequate meal periods are not provided, employees are entitled to one hour's compensation at their regular rate of pay.

59. Defendant has no meal or rest policies and they do not record when breaks start or stop. Nor does Defendant provide for uninterrupted meal periods for Distributors or make any effort to relieve them of all duties.

60. Defendant does not pay premium wages in lieu of these breaks as required by law. And Distributors have not otherwise waived their entitlement to meal breaks.

61. As a proximate result of Defendant's unlawful conduct, the Class sustained damages and are entitled to recover unpaid wages, liquidated damages, interest, applicable penalties, attorneys' fees, and costs.

SIXTH CAUSE OF ACTION
Failure to Provide Rest Breaks—
Lab. Code, §§ 226.2, 226.7 and Applicable IWC Wage Orders

62. Plaintiffs incorporate by reference every allegation contained above.

63. Plaintiffs bring this cause of action as a Class action on behalf of themselves and the Class.

64. Pursuant to Labor Code, sections 226.2 and 226.7, as well as applicable IWC Wage Orders, employers must provide a 10-minute uninterrupted, off-duty rest break for each work shift

of 3.5 hours or more. Depending on hours worked, a second rest break may be owed. Where workers earn piece rate wages, like earning a flat rate for every product sold at a customer's location, rest breaks must be paid separately from piece rate earnings. During these periods, an employer must relieve the employee of all duties and relinquish all control over how an employee spends his/her time. Where a rest break is not provided or appropriately paid, employees are entitled to one hour's compensation at their regular rate of pay.

65. Defendant failed to provide for rest breaks or separately pay Distributors for rest breaks if taken. Defendant also failed to pay compensation in lieu of these paid breaks.

66. As a proximate result of Defendant's unlawful conduct, the Class sustained damages and are entitled to recover unpaid wages, liquidated damages, interest, applicable penalties, attorneys' fees, and costs.

SEVENTH CAUSE OF ACTION
Unfair Business Practices—
Bus. & Prof. Code, § 17200 et seq.

67. Plaintiffs incorporate by reference every allegation contained above.

68. Defendant knowingly and willfully engaged in the unlawful practices described above, which include but are not limited to:

a. Intentionally misclassifying its employee Distributors as "independent contractors;"

b. Imposing unreimbursed business expenses on and illegally deducting wages from misclassified employees in violation of Labor Code, sections 221 and 2802;

c. Failing to pay overtime to Distributor employees;

d. Failing to pay Distributors for each hour worked;

e. Failing to provide adequate meal and rest breaks to Distributors; and

f. Failing to provide accurate pay statements to Distributors in violation of Labor Code, section 226.

69. Defendant intended to, and did, profit from these illegal acts.

70. As a direct and proximate result of the above, Plaintiffs and the Class have lost money

or property, thereby entitling these individuals to restitution.

71. Pursuant to the Business and Professions Code, Plaintiffs and Class Members are entitled to restitution of money or property acquired by Defendant by means of such unlawful business practices, in amounts not yet known, but to be ascertained at trial.

72. Pursuant to the Business and Professions Code, the Class and the public are also entitled to injunctive relief against Defendant's ongoing continuation of such unlawful business practices, including public injunctive relief. Plaintiffs seek such public injunctive relief here prohibiting Defendant from continuing its illegal practice of misclassifying Distributors, including Plaintiff, and denying them the benefit of important wage laws.

73. If Defendant is not enjoined from engaging in the unlawful business practices described above, Plaintiffs, Class members, and the public will be irreparably injured. The exact extent, nature, and amount of such injury is difficult to ascertain now.

74. The Class, including Plaintiffs, have no plain, speedy, and adequate remedy at law.

75. Defendant will continue to engage in the unlawful business practices described above in violation of the Business and Professions Code, in derogation of the rights of Plaintiffs, the Class, and of the public, if not enjoined by this Court.

76. The success of Plaintiffs in this action will result in the enforcement of important rights affecting the public interest by conferring a significant benefit upon the public.

77. Private enforcement of these rights is necessary as no public agency has pursued enforcement. There is a financial burden incurred in pursuing this action, and it would be against the interests of justice to require the payment of attorneys' fees from any recovery in this action. Plaintiffs are therefore entitled to an award of attorneys' fees and costs of suit under the "common fund," "substantial benefit," and other important doctrines.

SEVENTH CAUSE OF ACTION

Violation of PAGA, Labor Code §§ 2698 et seq.; Enforcement of PAGA

78. Plaintiff Gonzalez brings this representative PAGA action on behalf of himself and other aggrieved Distributor employees.

79. PAGA permits aggrieved employees, like Plaintiff, to recover civil penalties for

violations of numerous Labor Code sections. (See Labor Code § 2699.5.)

80. LTF's conduct, as alleged above, violates numerous sections of the California Labor Code, including, but not limited to, the following:

a. Labor Code Sections 201, 202, 203, 204, and 223 for failure to timely pay Plaintiffs and other aggrieved employees all earned wages;

b. Labor Code Sections 223, 1194, 1197, and 1199 for failure to pay Plaintiffs and other aggrieved employees all mandatory minimum wages;

c. Labor Code Sections 510 and 1198, for failure to compensate Plaintiffs and other aggrieved employees with all required overtime pay;

d. Labor Code Sections 221, and 223, for collecting or receiving from an employee any part of wages theretofore paid by said employer to said employee;

e. Labor Code Sections 226 and 226.3, for failure to provide accurate wage statements to Plaintiffs and other aggrieved employees;

f. Labor Code Sections 226.2, 226.7, and 512, for failure to provide meal periods and rest periods to Plaintiffs and other aggrieved employees;

g. Labor Code Section 1174, for failure to maintain accurate employment records related to Plaintiffs and other aggrieved employees' work.

h. Labor Code Section 2802, for failure to reimburse employees for business expenses reasonably incurred.

i. Labor Code Section 226.8 for willful misclassification.

81. Plaintiff has complied with all administrative requirements and pre-conditions contained with California Labor Code Section 2699.3. Plaintiff notified the California Labor Workforce Development Agency ("LWDA") on November 27, 2019 and waited the prescribed period. Plaintiff has not received any response from the LWDA.

82. Pursuant to PAGA and California Labor Code Sections 2699, 2699.3, and 2699.5, Plaintiff is entitled to and hereby seeks civil penalties against Cornwell, in addition to reasonable attorney fees and costs, on behalf of himself and all others similarly-aggrieved current and former

employees for violations of the Labor Code sections referred to in this Complaint.

VII. PRAYER FOR RELIEF

Plaintiffs pray for judgment against Defendant, as follows:

1. For an order certifying the Class as described herein, appointing Plaintiff as class representative, and his counsel as class counsel;
2. For damages according to proof;
3. For enhanced damages, liquidated damages, and penalties as permitted under prevailing law;
4. For pre-judgment and post-judgment interest where allowable;
5. For costs of suit;
6. For injunctive relief, including public injunctive relief, as described herein;
7. For restitution as described herein;
8. For reasonable attorneys' fees and costs; and
9. For such other and further relief as this Court may deem just and proper.

VIII. DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues so triable.

Respectfully submitted:

Dated: December 12, 2024

NICHOLAS & TOMASEVIC, LLP

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