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Attorneys for Plaintiff TOSHI MAGEE

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF MERCED**

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| TOSHI MAGEE, an individual, on behalf of herself, and on behalf of all persons similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California Corporation; and DOES 1 through 50, Inclusive,<br><br>Defendants. | Case No. 21CV-03773<br><br>**DECLARATION OF JACKLAND K HOM, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION TO APPROVE PAGA SETTLEMENT**<br><br>Date: July 30, 2025<br>Time: 8:15 a.m.<br><br>Judge: Hon. Stephanie L. Jamieson<br>Dept: 8 |

I, Jackland K Hom, Esq., declare as follows:

1. I am over eighteen years of age and if called as a witness, I could and would competently testify to the following facts from my own personal knowledge. I am an associate attorney at Zakay Law Group, APLC (hereinafter "Class Counsel"). I am co-counsel of record for Plaintiff Toshi Magee (hereafter "Plaintiff") in this wage and hour class action filed against Defendants Children's Dentistry and Orthodontics a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; Children's Dentistry and Orthodontics of Fresno a Dental Office of Steven O'Hara, DDS, Inc.; Children's Dentistry of Bakersfield a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; Children's Dentistry of Madera a Dental Office Of Stephen O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; Children's Dentistry of Merced a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; Children's Dentistry of Visalia a Dental Office Of Stephen O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; and O'Hara Prieto Evans Kunkel Dental, Inc. (hereinafter "Defendants").

2. This declaration is being submitted in support of Plaintiff's Motion to Approve PAGA Settlement.

## I. EXHIBITS

3. Attached hereto as **Exhibit "1"** is a true and correct copy of the fully executed Joint Stipulation of Settlement of PAGA Action and Release of PAGA Claims ("Agreement" or "Settlement Agreement"). Attached as **Exhibit "A"** to the Agreement is a true and correct copy of the proposed Administrator Notice.

4. Attached hereto as **Exhibit "2"** is a true and correct copy of Plaintiff's September 13, 2021, Notice of Violations filed with the Labor and Workforce Development Agency ("PAGA Notice").

5. Attached hereto as **Exhibit "3"** is a true and correct copy of Plaintiff's December 13, 2024, Amended Notice of Violations filed with the Labor and Workforce Development Agency ("Amended PAGA Notice").

6. Attached hereto as **Exhibit "4"** is a true and correct copy of the proof of filing with the Labor and Workforce Development Agency of the Motion to Approve PAGA Settlement, including a copy of the Settlement Agreement.

7. Attached hereto as **Exhibit "5"** is a true and correct copy of the bid for settlement administration submitted by Apex Class Action Administration, in the amount of $4,125.00.

## II. INTRODUCTION

8. An objective evaluation of the proposed settlement confirms that the relief negotiated on behalf of the Aggrieved Employees and the LWDA is fair, reasonable, and valuable. The Settlement is a product of informed, adversarial, and non-collusive and mediated negotiations between experienced counsel. As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement approval. Accordingly, Plaintiff and PAGA Counsel respectfully request this Court grant approval of the Agreement.

## III. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

9. On September 13, 2021, Plaintiff Toshi Magee, on behalf of herself and on behalf of other Aggrieved Employees, served Defendant Children's Dentistry and Orthodontics a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS and Jeffrey Kunkel, DDS, Inc. and the LWDA with a Notice of Violations ("PAGA Notice") and draft complaint memorializing claims against Defendants for alleged violations of the California Labor Code, including causes of action for failure to provide compliant meal and rest periods; failure to accurately compensate for missed meal and rest periods; failure to pay all minimum, regular, and overtime wages; failure to provide accurate itemized wage statements; and failure to timely pay wages due during, and upon termination of employment. (LWDA Case No. LWDA-CM-844425-21).

10. The 65-day "waiting period" on Plaintiff's right to file a civil action under PAGA, *see* Cal. Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying Plaintiff that it intended to investigate the claims in the PAGA Notice. To date, the LWDA still has not advised Plaintiff of any intent to take action with respect to the claims in the PAGA Notice.

11. On November 17, 2021, Plaintiff filed a class and representative action complaint against Defendants Children's Dentistry and Orthodontics a Dental Office of Steven O'Hara, DDS, Jordan

Prieto, DDS, Jeffrey Evans, DDS and Jeffrey Kunkel, DDS, Inc. in the Superior Court for Merced, Case Number 21CV-03773 (the "Action"). The Action alleged nine (9) causes of action against Defendants for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200*, et seq*.; (2) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code §§ 510, *et seq*.; (3) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (4) Failure to Provide Required Meal Breaks in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Breaks in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226; (7) Failure to Pay Wages When Due in Violation of Cal. Lab. Code §§ 201, 202, and 203; (8) Failure to Pay Sick Pay at the Regular Rate of Pay in Violation of Cal. Lab. Code § 246, *et seq*.; and (9) Violation of the Private Attorneys General Act ("PAGA") [Labor Code §§ 2698 *et seq*.]

12. On March 30, 2022, Plaintiff filed the operative First Amended Complaint, dismissing the class claims and alleging a single cause of action for violations of PAGA.

13. On January 25, 2023, the Court granted, in part, Defendants' Motion to Compel Arbitration of *Individual* PAGA Claims and stayed the Representative PAGA Claims.

14. On November 7, 2024, the Parties participated in an all-day mediation presided over by the Hon. Brian C. Walsh (Ret.), a retired jurist and experienced mediator of wage and hour representative actions. In advance of the mediation, Defendants provided Plaintiff with sufficient information to properly evaluate Defendants' potential liability exposure. Among the data and documents Defendants produced included, but was not limited to, the total number of Aggrieved Employees and pay periods, employee handbooks throughout the PAGA Period, and thousands of unique cells of time and payroll data.

15. The mediation resulted in a settlement and was memorialized in the form of a Memorandum of Understanding ("MOU"). After reaching an agreement in the principle, the Parties drafted and negotiated a long-form settlement, which is the subject of the instant motion. The Settlement was negotiated in light of all known facts and circumstances and the uncertainty associated with litigation – including the risk of Plaintiff not being able to maintain representative claims and establishing manageability, the difficulty of proving Plaintiff's claims in a manageable trial, the merits

of Defendants' potential defenses, and the significant delay and potential appellate issues inherent to litigation – and was reached after extensive arm's length negotiations, with the assistance of Judge Walsh.

16. On December 13, 2024, Plaintiff filed an Amendment to the Complaint to Add Doe Defendants 1-6, for purposes of facilitating the Settlement, which are Defendants Children's Dentistry and Orthodontics of Fresno a Dental Office of Steven O'Hara, DDS, Inc.; Children's Dentistry of Bakersfield a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; Children's Dentistry of Madera a Dental Office Of Stephen O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; Children's Dentistry of Merced a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; Children's Dentistry of Visalia a Dental Office Of Stephen O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.; and O'Hara Prieto Evans Kunkel Dental, Inc.

17. On December 13, 2024, Plaintiff filed an Amended PAGA Notice to include Doe Defendants 1-6, for purposes of facilitating the Settlement.

18. The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted by Plaintiff, on behalf of the LWDA, and the State of California. This is only a Settlement of the PAGA claims for civil penalties and is not a class settlement and does not release the individual claims, if any, of the Aggrieved Employees. This Settlement does not release any claim that is not a PAGA claim.[1] Nor does this Settlement waive Defendants' right to assert *res judicata* or other available defense to any asserted claim or lawsuit.

19. Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion for settlement approval as set forth in the accompanying proof of service. Additionally, Plaintiff will submit to the LWDA a copy of the Court's judgment and order approving the Settlement Agreement within ten (10) days after entry of judgment or order.

[1] As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th 175 at 196: "Nonparty employees are bound by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties."

## IV. TERMS OF THE PAGA SETTLEMENT

20. The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2). The Settlement Agreement negotiated by the Parties provides for a Gross Settlement Amount payment in the amount of One Hundred Seventy-Nine Thousand, Nine Hundred Fifty Dollars and Zero Cents ($179,950.00) to resolve the PAGA claims. From the Gross Settlement Amount, there is a deduction of a PAGA Counsel Award in the amount of Eighty-Four Thousand Nine Hundred Eighty-Three Dollars and Thirty-Three Cents ($84,983.33), comprised of one-third of the Gross Settlement Amount (estimated to be approximately $59,983.33), reimbursement of incurred litigation expenses in an amount not to exceed Twenty-Five Thousand Dollars and Zero Cents ($25,000.00), Service Award to Plaintiff of up to Ten Thousand Dollars and Zero Cents ($10,000.00), and Claims Administration Expenses, which will not exceed Four Thousand One Hundred Twenty-Five Dollars Zero Cents ($4,125.00). Agreement generally at § III(I)(7)-(10). After these deductions, the amount remaining is the "PAGA Payment," is estimated to be $80,841.67.

### A. The Gross Settlement Amount is Fair and Reasonable

21. The Gross Settlement Amount of $179,950.00 is fair and reasonable and, therefore, should be approved. Here, *without stacking* the PAGA penalties, Defendants' *maximum* liability exposure is estimated at a maximum of $719,800 in PAGA penalties. If derivative penalties are included (or "stacked"), Defendants' maximum liability exposure is estimated at approximately $1,572,100.

22. Plaintiff's consultant estimated Defendants' exposure as follows:

| Claim | Penalty Amount[2] | Number of Pay Periods w/ Violation | Violation Rate | Total Penalties |
|---|---|---|---|---|
| ***Wage Statement Violations*** Cal. Labor Code §§ 226 and 226.2 | $100 | 7,198 | 100% of PAGA Pay Periods | $719,800 |
| ***Unpaid Wages Violations*** Cal. Labor Code §§ 201, 202, 203, 204, 246, 1194, 1197, 1997.1, 1198 and 558 | $100 | 3,599 | 50% of PAGA Pay Periods | $359,900 |

[2] In *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144, the court decided that "[u]ntil the employer has been notified that it is violating a Labor Code provision … the employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties." Therefore, Plaintiff used only penalties for initial violations.

| | | | | |
|---|---|---|---|---|
| ***Meal Period Violations*** Cal. Labor Code §§ 226.7 and 512 | $50 | 1,325 | 18.4% of PAGA Pay Periods | $66,250 |
| ***Rest Period Violations*** Cal. Labor Code §§ 226.7 and 512 | $50 | 1,325 | 18.4% of PAGA Pay Periods | $66,250 |
| ***Failure to Reimburse for Mandatory Business Expenses*** Cal. Labor Code § 2802 | $100 | 3,599 | 50% of PAGA Pay Periods | $359,900 |

**i. Estimated Liability for Unpaid Wages**

23. Plaintiff alleges that Defendants failed to pay all wages due to Plaintiff and the Aggrieved Employees. First, Plaintiff alleges that Defendants required their employees to undergo pre-shift COVID-19 screenings. Specifically, Plaintiff alleges that Defendants required their employees to take their own temperature and record their temperature before being allowed to clock in for their shift. Further, Plaintiff alleges that she and other Aggrieved Employees were required to perform pre-shift and post-shift work, such as locking and unlocking the building, putting the chairs up/or down, sterilizing the workplace, turning computers on and/or off, turning lights on and/or off, and emptying bottles. Defendants deny any practice of requiring their employees to take and record their own temperature before clocking in, and Defendants deny any practice of failing to pay employees for work performed off-the-clock. Defendants argued that their written policies strictly prohibited off-the-clock work, and thus, any work performed off-the-clock was in violation of their policies. Defendants argued they neither knew nor should have known about any alleged off-the-clock work. Considering Defendants' defenses, Plaintiff estimates Defendants' exposure for this claim to be approximately $359,000.

**ii. Estimated Penalties for Meal Period Violations**

24. Plaintiff also alleges that Defendants failed to provide compliant meal periods. Specifically, Plaintiff alleges that Defendants violated the law by failing to provide meal breaks, providing late meal periods, providing short meal periods, and interrupting meal periods due to Defendants' understaffing, as Defendants required Plaintiff to assist patients and co-workers during her meal breaks. Accordingly, Plaintiff alleges that she and other Aggrieved Employees are owed meal period premiums for meal period violations that occurred during the PAGA Period.

25. Conversely, Defendants argued that they had a legally compliant written meal period policy and paid meal premiums during those shifts when meal period violations occurred. Further, Defendants argued that Aggrieved Employees were instructed to take timely meal periods before the end of their fifth (5th) hour of work and that those meal periods were to be at least thirty (30) minutes in length. In light of Defendants' defenses, Plaintiff estimated that Defendants' exposure for this claim was approximately $66,250. This was calculated by multiplying the number of total pay periods with a meal period violation by a violation rate of $50. Pursuant to California Labor Code section 558(a)(1), an employer is subject to a penalty of $50 for violations of a Labor Code section regulating hours and days of work, including meal period and rest period violations. Thus, because section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a $50 penalty per violation for the meal and rest break claims.

**iii. Estimated Penalties for Rest Period Violations**

26. Plaintiff also alleges that Defendants failed to provide compliant rest periods. Specifically, Plaintiff alleges that because of their rigorous work schedules, Plaintiff and Aggrieved Employees were not able to take timely and duty-free rest periods. Further, Defendants did not pay a single rest period premium during the PAGA Period. Because rest periods are not recorded, Plaintiff's expert could not identify a violation rate. Plaintiff therefore made the reasonable assumption that rest period violations were committed at a rate similar to that of meal period violations.

27. Based on this assumed violation rate for shifts of at least 3.5 hours, which resulted in 1,325 PAGA Pay Periods containing a violation, Plaintiff contended that her claim for rest period violations was potentially worth approximately $66,250. This was calculated by multiplying the number of total pay periods with a rest period violation by a violation rate of $50. Pursuant to California Labor Code section 558(a)(1), an employer is subject to a penalty of $50 for violations of a Labor Code section regulating hours and days of work, including meal period and rest period violations. Thus, because section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a $50 penalty per violation for the meal and rest break claims.

28. Defendants argued that they had a legally compliant written rest period policy. Defendants also argued that Plaintiff's rest break claim would have mainly relied on the testimony of

Aggrieved Employees, making it a riskier claim. Establishing liability likely would have entailed competing testimony stating either rest breaks were taken, or rest breaks were voluntarily waived. See, e.g., *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices").

**iv. Estimated Liability for Unreimbursed Business Expenses**

29. Plaintiff maintains that Defendants required Plaintiff and other Aggrieved Employees to use their personal cellular phones to communicate with managers, supervisors, and co-workers. Further, Plaintiff alleges that Defendants required her to purchase work uniforms, including, but not limited to, scrubs and lab coats. However, Defendants did not reimburse Plaintiff and other Aggrieved Employees for these expenses. California employers who require employees to incur personal business expenses for work purposes must reimburse the employee for the cost incurred. (*See* Cal. Labor Code § 2802(a), providing that "an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer…").

30. Defendants argued that they instructed their employees not to use their own cellular phones for work purposes and had in place a written business expense reimbursement policy regarding the same. Further, Defendants argued that even if employees did use their cellular phones for work purposes, the number of affected employees was minimal and that such use was voluntary – not mandatory. Lastly, Defendants argued that any necessary businesses expenses were reimbursed.

31. Because expense reimbursements are required on a monthly basis, only half of the pay periods were potentially affected by this alleged violation. Therefore, Plaintiff's expert estimated that Defendants' maximum exposure for this claim was approximately $359,900 in penalties. This was calculated by multiplying a 50% violation rate by the total number of pay periods by a violation rate of $100 per pay period.

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**v. Estimated Penalties for Derivative Violations**

32. Plaintiff further alleges that the Defendants' labor code violations for non-compliant meal and rest breaks and unpaid wages results in derivative liability for penalties resulting from inaccurate wage statements. Plaintiff estimated Defendants' exposure for these claims to be $719,800 for wage statement penalties.

**B. The Gross Settlement Compares Favorably To The Likely Recovery**

33. Considering the above, the Gross Settlement Amount is approximately 11.4% of Defendants' potential PAGA exposure if stacking of penalties is permitted. Without stacking, the Gross Settlement Amount is approximately 25%. The Gross Settlement Amount compares favorably to the likely recovery of PAGA penalties through continued litigation. Defendants' maximum exposure to PAGA penalties is not a realistic outcome of the litigation because it fails to account for the risks of continued litigation including, but not limited to, Defendants' defenses. *See*, *Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14 (C.D. Cal. January 18, 2018). For instance, Defendants argued that it can only be assessed civil penalties for actual violations of the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ["Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant."].) To do this, Plaintiff would need to prove each Aggrieved Employee was subject to the alleged Labor Code violation, which would be difficult to do, since Defendants deny any liability or wrongdoing of any kind associated with the claims alleged in this action.

34. Thus, Defendants contended that Plaintiff would be required to "prove Labor Code violations with respect to each and every individual on whose behalf Plaintiff seek to recover civil penalties under PAGA." *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009). When "determining whether the employer committed Labor Code violations with respect to each employee" is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off. Superstore,* 2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021).

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35. Finally, the maximum penalty figure does not consider that Courts have complete discretion to "award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Cal. Lab. Code § 2699(e)(2)). In fact, Courts routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v. Starbucks Corp*., 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to $5 per pay period; "Although the trial court may have disagreed with Starbucks regarding the issue of liability, it clearly took the circumstances proffered by Starbucks into consideration when it imposed the penalty … only $5 per initial violation"); *Kaanaana v. Barrett Bus. Servs., Inc*., 29 Cal App 5th 778, 788 (2018), review granted on other grounds (noting that the trial court "exercised its discretion to reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average, plaintiffs were deprived of 13 percent of the 30-minute meal period"); *Fleming v. Covidien, Inc*., 2011 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of PAGA civil penalties for plaintiffs' section 226 claims from $2,800,000 to $500,000 because the employees suffered no injuries as a result of the erroneous wage statements and made no complaints about the errors or omissions in the wage statements, thus reducing the maximum penalty by 82%); *see also*, *Gola v. University of San Francisco, 90 Cal. App. 5th 548 (2023), as modified (May 9, 2023), reh'g denied (May 15, 2023), review denied (July 12, 2023), and disapproved of by Naranjo v. Spectrum Sec. Servs., Inc., 15 Cal. 5th 1056, 547 P.3d 980 (2024)* (concluding after a full-blown bench trial that a penalty of 15% of the maximum PAGA penalties was the appropriate penalty). The gross amount obtained by PAGA Counsel is reasonable in light of Defendants' arguments.

36. Given Defendants' defenses to the claimed Labor Code violations at issue, the risks and costs of continued litigation, Plaintiff and PAGA Counsel believe that the Gross Settlement Amount is fair and reasonable. This settlement was negotiated by experienced counsel at arm's length.

37. The LWDA has been provided with notice of this motion and the PAGA settlement, and the decision of LWDA to accept the PAGA settlement and not oppose the motion should be given considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert and protect its own rights.

C. **The Remaining Settlement Terms Are Fair and Reasonable**

38. Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code § 2699(1) does not require that a court approve any other elements of the proposed settlement. Because there are no class allegations for which Plaintiff seeks approval, the approval provisions applicable to class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the Court only needs to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained herein, the settlement terms for attorneys' fees and costs are reasonable.

## V. THE PAGA COUNSEL AWARD IS FAIR AND REASONABLE

39. PAGA Counsel seeks approval of the PAGA Counsel Award, comprised of attorneys' fees in the amount of $59,983.33 (one-third of the Gross Settlement Amount) and reimbursement of litigation costs not to exceed $25,000.[3] PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiff's position is that the payment of attorneys' fees and costs in this Settlement is a matter of contract for a contingent representation. Nevertheless, should this Court review the requested attorneys' fees, the requested fees and costs are reasonable for experience wage and hour counsel.

40. The requested PAGA Counsel Award of $84,983.33, comprised of $59,983.33 for attorneys' fees and reimbursement of litigation expenses of up to $25,000 is fair, reasonable, and justified by the result achieved.

41. PAGA Counsel negotiated a recovery of One Hundred Seventy-Nine Thousand Nine Hundred Fifty Dollars and Zero Cents ($179,950.00), and this result justifies the requested fees equal to one third of this recovery. This percentage is within the standard contingent recovery percentage of one-third, and this percentage is what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016). At the time this case was brought, the result was far from certain. Defendants' defenses to the merits of the case created difficulties with proof and complex legal issues for PAGA Counsel to overcome. Here, several defenses asserted by Defendants present serious threats to the claims of Plaintiff and the Aggrieved Employees. Defendants asserted that their employment practices complied with all applicable labor laws. If successful, Defendants' factual and

[3] As detailed *infra,* at the time of filing this motion, Plaintiff's Counsel incurred $19,468.02 litigating this matter. Plaintiff will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

legal defenses would eliminate *any recovery* to the Aggrieved Employees. While Plaintiff believes that these defenses could be overcome, Defendants maintain that these defenses have merit and therefore present a serious risk to recovery. The Settlement was possible because PAGA Counsel was able to persuade Defendants that there was an appreciable risk that Plaintiff would prevail on the factual and legal issues underlying liability and overcome difficulties in proof as to monetary relief.

42. As of the filing of this Motion, Class Counsel worked a total of 144.8 hours successfully litigating this action, resulting in a current lodestar of $104,702.99.

43. Prior to incurring costs for filing of this motion, PAGA Counsel collectively expended $19,468.02 prosecuting this action (JCL Law Firm, APC - $8,650.03 and Zakay Law Group, APLC - $10,817.99)

44. PAGA Counsel's out-of-pocket expenses are the types of expenses normally charged to paying clients including the following: filing fees; copying; postage; mediation fees; and expert costs which were all incurred during, and were necessary for the successful prosecution of, the litigation and, therefore, should be reimbursed.

**VI. PLAINTIFF'S SERVICE AWARD IS FAIR AND REASONABLE**

45. The Settlement provides for a Service Award of $10,000 for Plaintiff. The Service Award payment is fair and reasonable compensation for the Plaintiff's efforts bringing the action, assisting PAGA Counsel with the litigation and settlement, and regularly conferring with PAGA Counsel on the status of her case and the strategies for prosecuting the claims. Plaintiff willingly came forward to protect and advance the rights of the Aggrieved Employees on important legal disputes affecting California employees. By way of example, Plaintiff assumed the serious risk of liability for Defendants' costs and potentially fees if the case was unsuccessful. Nevertheless, Plaintiff knowingly and voluntarily undertook the risk to vindicate the rights of the Aggrieved Employees.

46. Plaintiff's efforts in bringing the lawsuit conferred a monetary benefit to 230 Aggrieved Employees. Accordingly, Plaintiff and PAGA Counsel respectfully request the Court approve the Service Award in accordance with the Settlement Agreement.

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## VI. CLASS COUNSEL'S EXPERIENCE

47. Plaintiff and the Aggrieved Employees are represented by competent and experienced counsel to pursue their claims. The Firm is a boutique plaintiff firm exclusively representing California employees in complex wage and hour class actions and representative actions arising under the California Labor Code Private Attorney General Act. The Firm currently consists of myself, Jackland K Hom, Esq. (Associate Attorney), Shani O. Zakay, Esq. (Partner/Owner), Rachel Newman, Esq. (Associate Attorney), Jennifer Gerstenzang, Esq. (Associate Attorney), Eden Zakay, Esq. (Associate Attorney), Nicole Noursamadi, Esq. (Associate Attorney), Jaclyn Joyce, Esq. (Associate Attorney), Esbeidy Campos (Paralegal), Jamie Sunada (Legal Assistant), Liana Rios (Legal Assistant), and Brenda Yanez (Legal Assistant).

48. I am qualified to represent the Plaintiff, the State of California, and the Aggrieved Employees. I have extensive experience with representative actions like this matter, and employment matters in general. I can, will and have adequately represented the interests of the Plaintiff, the State of California and the Aggrieved Employees throughout this action.

49. I have represented consumers and employees in California class actions exclusively for more than 5 years. I have been in practice as a plaintiffs' civil litigation attorney since November 2019.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 27th day of June, 2025, at San Diego, California.

**ZAKAY LAW GROUP, APLC**

By: ______________________

Jackland K Hom, Esq.
Attorney for Plaintiff

# EXHIBIT 1

**ZAKAY LAW GROUP, APLC**
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Attorneys for Plaintiff TOSHI MAGEE

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|---|---|
| TOSHI MAGEE, an individual, on behalf of herself, and on behalf of all persons similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California Corporation; and DOES 1 through 50, Inclusive;<br><br>Defendants. | Case No. 21CV-03773<br><br>[Action Filed: November 17, 2021]<br><br>**JOINT STIPULATION OF SETTLEMENT OF PAGA ACTION AND RELEASE OF PAGA CLAIMS** |

This Joint Stipulation of Settlement of PAGA Action and Release of PAGA Claims is entered into by and between Plaintiff TOSHI MAGEE ("Plaintiff"), in her representative capacity on behalf of the State of California and fellow Aggrieved Employees, and Defendants CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry"); CHILDREN'S DENTISTRY AND ORTHODONTICS OF FRESNO A DENTAL OFFICE OF STEVEN O'HARA, DDS, INC. ("Defendant Children's Dentistry of Fresno); CHILDREN'S DENTISTRY AND ORTHODONTICS OF BAKERSFIELD A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry of Bakersfield); CHILDREN'S DENTISTRY OF MADERA A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry of Madera"); CHILDREN'S DENTISTRY OF MERCED A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry of Merced"); CHILDREN'S DENTISTRY OF VISALIA A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry of Visalia"); and O'HARA PRIETO EVANS KUNKEL DENTAL, INC. ("Defendant OPEKD, Inc.") (hereinafter collectively referred to as "Defendants"):

## I. <u>DEFINITIONS</u>

A. "Action" shall mean the case of *Toshi Magee v. Children's Dentistry and Orthodontics a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.* filed on November 17, 2021, in Merced County Superior Court, Case No. 21CV-03773.

B. "Aggrieved Employees" shall mean all current and former non-exempt employees who worked for Defendants in California at any time during the PAGA Period.

C. "Agreement" or "Settlement Agreement" means this Joint Stipulation of Settlement of PAGA Action and Release of PAGA Claims.

D. "Claims Administrator" means Apex Class Action LLC, located at 18 Technology Drive, Suite 154, Irvine, CA 92618; Tel: (800) 355-0700. The Claims Administrator establishes, designates, and maintains a QSF under Internal Revenue Code section 468B and Treasury Regulation section 1.468B-1 into which the amount of the Gross Settlement Amount is deposited for the purpose of resolving the claims in the Action on behalf of the LWDA and the Aggrieved Employees. The Claims Administrator shall maintain the funds until distribution in an account(s) segregated from the assets of Defendants and any person related to Defendants. ***All accrued interest shall be paid and distributed to the court approved Cy Pres recipient.***

E. "Claims Administration Costs" means the amount to be paid for the costs of administration of the Settlement from the Gross Settlement Amount in an amount not to exceed $4,125.

F. "Court" means the Superior Court for the State of California, County of Merced presiding over the Action.

G. "Defendants" shall mean CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.; CHILDREN'S DENTISTRY AND ORTHODONTICS OF FRESNO A DENTAL OFFICE OF STEVEN O'HARA, DDS, INC.; CHILDREN'S DENTISTRY AND ORTHODONTICS OF BAKERSFIELD A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.; CHILDREN'S DENTISTRY OF MADERA A

DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.; Defendants CHILDREN'S DENTISTRY OF MERCED A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.; CHILDREN'S DENTISTRY OF VISALIA A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC; and O'HARA PRIETO EVANS KUNKEL DENTAL, INC.

H. "Employee Data" means information regarding the Aggrieved Employees that Defendants will in good faith compile from its records and provide to the Claims Administrator. It shall be formatted in the manner requested by the Claims Administrator and shall include sufficient information to effectuate this settlement, including but not limited to: each Aggrieved Employee's full name; last known address; Social Security Number; and the number of Pay Periods worked during the PAGA Period.

I. "Funding Date" shall mean the date by which Defendants have paid the entire Gross Settlement Amount to the Claims Administrator in accord with the terms of this Agreement. Defendants shall pay the Gross Settlement Amount to the Claims Administrator no later than sixty (60) calendar days after the Court's final approval order.

J. "Gross Settlement Amount" means the One Hundred Seventy-Nine Thousand Nine Hundred Fifty Dollars and Zero Cents ($179,950.00) payment of all claims, which Defendants shall pay into the QSF in connection with this Settlement, inclusive of

Plaintiff's Service Award, Claims Administration Expenses, PAGA Counsel Award, and PAGA Payment.

K. "LWDA" means the California Labor and Workforce Development Agency.

L. "Notice of PAGA Settlement" means the notice to be provided to the Aggrieved Employees by the Claims Administrator in the form set forth as Exhibit A to this Agreement.

M. "PAGA" means the California Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.*

N. "PAGA Counsel" shall mean Jean-Claude Lapuyade, Esq. of JCL Law Firm, APC and Shani O. Zakay, Esq. of Zakay Law Group, APLC.

O. "PAGA Counsel Award" means the award of attorneys' fees and reimbursement of litigation expenses that the Court authorizes to be paid to PAGA Counsel for the services they have rendered to Plaintiff, the State of California, and the Aggrieved Employees consisting of attorneys' fees, payable from, and not to exceed one-third of the Gross Settlement Amount. To the extent that the Court approves less than the PAGA Counsel Award that PAGA Counsel requests, the difference between the requested and awarded amounts will be reallocated to the Gross Settlement Amount. PAGA Counsel's application for the PAGA Counsel Award is subject to Court approval, and a reduction in attorneys' fees or costs awarded by the Court is not a basis for Plaintiff to void, rescind, or terminate this Agreement. Defendants agree not to oppose reasonable Attorneys' Expenses in an amount as documented in PAGA Counsel's billing statement, but not to exceed $25,000, to be paid from the Gross Settlement Amount. PAGA Counsel's award of attorneys' fees shall be divided by

PAGA Counsel as follows: 50% to Zakay Law Group, APLC and 50% to The JCL Law Firm, APC.

P. "PAGA Payment" means the Gross Settlement Amount minus Plaintiff's Service Award, Claims Administration Expenses, PAGA Counsel Award. The PAGA Payment will be allocated so that 75% of the payment will be paid to the Labor & Workforce Development Agency ("LWDA") and 25% will be paid to Aggrieved Employees ("Aggrieved Employee Payment"). The allocation of payment of claims among the Aggrieved Employees shall be paid based on the number of pay periods worked during the PAGA Period. Aggrieved Employees will be issued Form 1099 for the Aggrieved Employee Payments.

Q. "PAGA Payment Ratio" means the respective Pay Periods worked during the PAGA Period for each Aggrieved Employee divided by the total of the Pay Periods for all Aggrieved Employees during the PAGA Period.

R. "PAGA Period" means the period between September 13, 2020, through November 7, 2024.

S. "Parties" means Plaintiff and Defendants, collectively, and "Party" shall mean either Plaintiff or Defendants, individually.

T. "Pay Period" for purposes of calculating the distribution of the Aggrieved Employee Payment, as defined herein, means any semimonthly pay period in which Aggrieved Employees received wages during their employment with Defendants during the PAGA Period.

U. "Plaintiff" or "PAGA Representative" shall mean TOSHI MAGEE.

V. “Qualified Settlement Fund” or “QSF” means the Qualified Settlement Fund established, designated, and maintained by the Claims Administrator to fund the Gross Settlement Amount.

W. “Released PAGA Claims” shall mean all PAGA claims alleged in the operative complaint in the matter entitled *Toshi Magee v. Children’s Dentistry and Orthodontics a Dental Office of Steven O’Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc.,* filed on November 17, 2021, in Merced County Superior Court, Case No. 21CV-0377, and Plaintiff’s PAGA notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers’ compensation, and PAGA claims outside of the PAGA Period.

X. “Released Parties” shall mean Defendants, and its former and present parents, subsidiaries, and affiliates, and their current and former officers, directors, employees, partners, shareholders, and agents, and the predecessors and successors, assigns, and legal representatives of all such entities and individuals.

Y. “Service Award” means an award in the amount of $10,000, or in an amount that the Court authorizes to be paid to the PAGA Representative, in addition to her individual Aggrieved Employee Payment, in recognition of her efforts and risks in assisting with the prosecution of the Action.

Z. “Settlement” means the disposition of the Action pursuant to this Agreement.

## II. RECITALS

A. On September 13, 2021, Plaintiff filed a Notice of Violations with the Labor and Workforce Development Agency (LWDA) and served the same on Defendants.

B. On November 17, 2021, Plaintiff filed a class action complaint against Defendant Children's Dentistry for the following causes of action:

1. Unfair competition in Violation of Cal. Bus & Prof. Code §§ 17200, *et seq*.;

2. Failure to Pay Overtime Wages in Violation of Cal. Lab. Code §§ 510, *et seq*.;

3. Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1;

4. Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order;

5. Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order;

6. Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226;

7. Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201, 202 and 203;

8. Failure to Pay Sick Pay at the Correct Regular Rate of Pay in Violation of Cal. Lab. Code § 246, *et seq*.; and

9. Violation of the Private Attorneys General Act [Lab. Code §§ 2698 *et seq*.]

C. On March 30, 2022, Plaintiff filed the operative First Amended Complaint, dismissing the class claims and moving forward with only the representative PAGA claims.

D. On December 13, 2024, Plaintiff filed a Doe Amendment, for purposes of effectuating the settlement, adding Defendant Children's Dentistry of Fresno, Defendant Children's Dentistry of Bakersfield, Defendant Children's Dentistry of Madera, Defendant Children's Dentistry of Merced, Defendant Children's Dentistry of Visalia, and Defendant OPEKD, Inc. to the Action.

E. On November 7, 2024, the Parties participated in an all-day mediation presided over by the Hon. Brian C. Walsh (Ret.)., a retired jurist and respected mediator of wage and hour representative actions, which led to this Settlement.

F. This Agreement replaces and supersedes any other agreements, understandings, or representations between the Parties. This Agreement represents a compromise and settlement of highly disputed claims. Nothing in this Agreement is intended or will be construed as an admission by Defendants that the claims in the Action of Plaintiff or the Aggrieved Employees have merit or that Defendants bears any liability to Plaintiff or the Aggrieved Employees on those claims or any other claims, or as an admission by Plaintiff that Defendants' defenses in the Action have merit.

Based on these Recitals that are a part of this Agreement, the Parties agree as follows:

## III. TERMS OF AGREEMENT

A. Settlement Consideration and Settlement Payments by Defendants.

1. Settlement Consideration. In full and complete settlement of the Action, and in exchange for the releases set forth below, Defendants will pay the Gross Settlement Amount of One Hundred Seventy-Nine Thousand Nine Hundred Fifty Dollars and Zero Cents ($179,950.00). The Parties agree that this is a non-reversionary Settlement and that no portion of the Gross Settlement Amount shall revert to Defendants. Except as provided for in Section III(A)(2), Defendants shall not be required to pay more or less than the Gross Settlement Amount.

2. Number of Aggrieved Employees and Pay Periods. At the time of mediation, Defendants estimated that there are approximately 230 Aggrieved Employees who worked an aggregate total of approximately 7,198 Pay Periods during the PAGA Period. Should the qualifying pay periods increase beyond 10% worked by the Aggrieved Employees during the PAGA Period (i.e. more than 7,917), the Gross Settlement Amount will increase on a pro-rata basis equal to the percentage increase in the number of pay periods worked by the Aggrieved Employees above ten percent (10%). For example, if the total Pay Periods in the PAGA Period are 115% of 7,198, the Gross Settlement Amount shall increase by 5%.

3. Settlement Payment. Defendants will pay the Gross Settlement Amount, which includes Plaintiff's Service Award, the Claims Administration Expenses, PAGA Counsel Award, and the PAGA Payment, to the Claims Administrator within sixty (60) calendar days after the Court's final Settlement approval order.

B. PAGA Release. As of the Funding Date, in exchange for the consideration set forth in this Agreement, Plaintiff, the LWDA, the Aggrieved Employees, PAGA counsel, and the State of California release the Released Parties from the Released PAGA Claims for the PAGA Period.

C. Conditions Precedent: This Settlement will become final and effective only upon (1) the Court entering judgment pursuant to either the Parties' Motion for Settlement Approval or Joint Stipulation re: Settlement Approval, and (2) Defendants fully funding the Gross Settlement Amount.

D. Duty to Cooperate. If the Parties disagree on any aspect of the proposed application or motion for approval of this Settlement and/or the supporting declarations and documents, PAGA Counsel and Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person or by telephone, and in good faith, to resolve the disagreement. If the Court does not grant the motion for approval of this Settlement or conditions its approval on any material change to this Agreement, PAGA Counsel and Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person or by telephone, and in good faith, to modify the Agreement and otherwise satisfy the Court's concerns.

E. Tax Liability. The Parties make no representations as to the tax treatment or legal effect of the payments called for in this Agreement. The Aggrieved Employees are not relying on any statement or representation by the Parties in this regard. Aggrieved Employees understand and agree that they will be responsible for the payment of any taxes and penalties assessed on their respective share of the Aggrieved Employee Payments and will be solely responsible for any penalties or other obligations resulting from their personal tax reporting of the Aggrieved Employees Payments.

F. Circular 230 Disclaimer. Each Party to this Agreement (for purposes of this section, the "acknowledging party" and each Party to this Agreement other than the acknowledging party, an "other party") acknowledges and agrees that: (1) no provision of this Agreement, and no written communication or disclosure between or among the Parties or their attorneys and other advisers, is or was intended to be, nor shall any such communication or disclosure constitute or be construed or be relied upon as, tax advice within the meaning of United States Treasury Department circular 230 (31 CFR part 10, as amended); (2) the acknowledging party (a) has relied exclusively upon his, her or its own, independent legal and tax counsel for advice (including tax advice) in connection with this Agreement, (b) has not entered into this Agreement based upon the recommendation of any other Party or any attorney or advisor to any other Party, and (c) is not entitled to rely upon any communication or disclosure by any attorney or adviser to any other party to avoid any tax penalty that may be imposed on the acknowledging party, and (3) no attorney or adviser to any other Party has imposed any limitation that protects the confidentiality of any such attorney's or adviser's tax strategies (regardless of whether such limitation is legally binding) upon disclosure by the acknowledging party of the tax treatment or tax structure of any transaction, including any transaction contemplated by this Agreement.

G. Claims Administrator. The Claims Administrator shall be responsible for: establishing and administering the QSF; calculating, processing and mailing payments to PAGA Counsel, LWDA, and Aggrieved Employees; printing and mailing the Notice of PAGA Settlement to the Aggrieved Employees as directed by the Court; calculating, and distributing tax forms for the Aggrieved Employee Payments; providing declaration(s) as necessary in support of approval of this Settlement; and other tasks as the Parties mutually agree or the Court orders the Claims Administrator to perform. The Claims Administrator shall keep the Parties timely apprised of the performance of all Claims Administrator responsibilities.

H. Employee Data. One week prior to Plaintiff's deadline to file her Motion for Approval of the Settlement, Defendants shall provide a declaration under penalty of perjury confirming the Employee Data.

I. Funding and Allocation of the Gross Settlement Amount. Defendants shall pay the Gross Settlement Amount to the Claims Administrator on or before the Funding Date.

1. Calculation of Individual Payments to the Aggrieved Employees. Using the Employee Data, the Claims Administrator shall add up the total number of Pay Periods for all Aggrieved Employees during the PAGA Period. The respective Pay Periods for each Aggrieved Employee will be divided by the total Pay Periods for all Aggrieved Employees, resulting in the "PAGA Payment Ratio" for each Aggrieved Employee. Each Aggrieved Employee's PAGA Payment Ratio will then be multiplied by the Aggrieved Employee Payment to calculate each Aggrieved Employee's estimated share of the Aggrieved Employee Payment.

2. Allocation of Individual Aggrieved Employee Payments. For tax purposes, individual Aggrieved Employee Payments shall be allocated and treated 100% as penalties and interest. The individual Aggrieved Employee Payments shall not be subject to wage withholdings and shall be reported on IRS Form 1099.

3. No Credit Toward Benefit Plans. The individual Aggrieved Employee Payments made to the Aggrieved Employees under this Settlement Agreement, as well as any other payments made pursuant to this Settlement Agreement, will not be utilized to calculate any additional benefits under any benefit plans to which any Aggrieved Employee may be eligible, including, but not limited to profit-sharing plans, bonus plans, 401(k) plans, stock purchase plans, vacation plans, sick leave plans, PTO plans, and any other benefit plan. Rather, it is the Parties' intention that this Settlement Agreement will not affect any rights, contributions, or amounts to which any Aggrieved Employee may be entitled under any benefit plans.

4. Mailing. Individual Aggrieved Employee Payments shall be mailed to the Aggrieved Employees' last known mailing address by regular First-Class U.S. Mail no later than five (5) calendar days after the Funding Date. Upon receipt of the Employee Data, the Claims Administrator will perform a search based on the National Change of Address Database to update and correct any known or identifiable address changes. No later than fourteen (14) calendar days after receiving the Employee Data from Defendants, the Claims Administrator shall mail Individual Aggrieved Employee Payments to all Aggrieved Employees via regular First-Class U.S. Mail. The Claims Administrator shall exercise its best judgment to determine the current mailing address for each Aggrieved Employee. The address identified by the Claims Administrator as the current mailing address shall be presumed to be the best mailing address for each Aggrieved Employee.

5. Undeliverable Aggrieved Employee Payments. Any Individual Aggrieved Employee Payments returned to the Claims Administrator as non-delivered on or before the check cashing expiration deadline shall be re-mailed to any forwarding address provided within seven (7) days of receiving the returned notice. If no forwarding address is provided, the Claims Administrator shall promptly attempt to determine a correct address by lawful use of skip-tracing, or other search using the name, address and/or Social Security number of the Aggrieved Employee involved, and shall then perform a re-mailing, if the Claims Administrator identifies another mailing address. In addition, if any Individual Aggrieved Employee Payment, which is addressed to any Aggrieved Employee who is currently employed by Defendants, is returned

to the Claims Administrator as non-delivered and no forwarding address is provided, the Claims Administrator shall notify Defendants. Defendants will request that the currently employed Aggrieved Employee provide a corrected address and transmit to the Administrator any corrected address provided by the Aggrieved Employee. Aggrieved Employees who received a re-mailed Individual Aggrieved Employee Payment shall have their check expiration deadline extended fifteen (15) days from the original check expiration deadline.

6. Check Expiration Deadline. All checks mailed to the Aggrieved Employees that are not cashed within 180 days of the date payment is mailed shall be paid to the Community Law Project, a Cy Pres, in accordance with CCP § 384 and subject to court approval. Any checks issued to Aggrieved Employees shall remain valid and negotiable for one hundred and eighty (180) days from the date of their issuance. If an Aggrieved Employee does not cash his or her settlement check within ninety (90) days, the Claims Administrator will send a letter to such persons, advising that the check will expire after the 180th day, and invite that Aggrieved Employee to request reissuance in the event the check was destroyed, lost, or misplaced. In the event Aggrieved Employee Payment checks have not been cashed within one hundred and eighty (180) days, such funds will be transferred to the Community Law Project. The Parties agree that this disposition results in no "unpaid residue" under California Code of Civil Procedures section 384 as the use of any unclaimed funds will be distributed in a manner designed to further the purposes of the underlying Action.

7. Service Award. In addition to her individual share of the Aggrieved Employee Payment, Plaintiff will apply to the Court for an award of not more than $10,000.00 as the Service Award. Defendants will not oppose a Service Award of not more than $10,000.00 for the Plaintiff. The Claims Administrator shall pay the Service Award, either in the amount stated herein if approved by the Court or some other amount as approved by the Court, to Plaintiff from the Gross Settlement Amount no later than fourteen (14) calendar days after the Funding Date. Any portion of the requested Service Award that is not awarded to the PAGA Representatives shall be part of the Net Settlement Amount and shall be distributed to the Aggrieved Employees as provided in this Agreement. The Claims Administrator shall issue an IRS Form 1099 — MISC to Plaintiff for her Service Award. Plaintiff shall be solely and legally responsible to pay any and all applicable taxes on her Service Award and shall hold harmless the Released Parties from any claim or liability for taxes, penalties, or interest arising as a result of the Service Awards. Approval of this Settlement shall not be conditioned on Court approval of the requested amount of the Service Award. If the Court reduces or does not approve the requested Service Award, Plaintiff shall not have the right to revoke the Settlement, and it will remain binding.

8. LWDA Payment. The Claims Administrator shall transmit the LWDA Payment to the LWDA as one lump sum payment, if by check, certified mail return receipt requested to PAGA Counsel, within fifteen (15) calendar days of the Gross Settlement Amount being funded in full.

9. PAGA Counsel Award. Defendants understand and do not oppose a request by PAGA Counsel for attorneys' fees not to exceed one-third of the Gross Settlement Amount (currently estimated to be $59,983.33) plus costs and expenses supported by declaration not to exceed Twenty-Five Thousand Dollars (25,000.00), from the Gross Settlement Amount will be made. Any portion of the requested PAGA Counsel Award that is not awarded to PAGA Counsel shall be part of the PAGA Payment and shall be distributed to the LWDA and the Aggrieved Employees as provided in this Agreement. The Claims Administrator shall distribute and pay the PAGA Counsel Award to PAGA Counsel from the Gross Settlement Amount no later than fifteen (15) calendar days after the Gross Settlement Amount being funded in full. PAGA Counsel shall be solely and legally responsible to pay all applicable taxes on the payment made pursuant to this paragraph. The Claims Administrator shall issue an IRS Form 1099 — MISC to PAGA Counsel for the payments made pursuant to this paragraph. In the event that the Court reduces or does not approve the requested PAGA Counsel Award, Plaintiff and PAGA Counsel shall not have the right to revoke the Settlement, or to appeal such order, and the Settlement will remain binding.

10. Claims Administration Costs. The Claims Administration Costs shall be paid from the Gross Settlement Amount to the Claims Administrator for the costs of administration of the Settlement. The estimate of the Claims Administration Costs is $4,125. The Claims Administrator shall be paid the Claims Administration Costs no later than fifteen (15) calendar days after the Gross Settlement Amount has been funded in full.

J. Approval Motion. PAGA Counsel and Plaintiff shall use best efforts to file with the Court a Motion for Settlement Approval and Entering Judgment Approving the Settlement, within seventy-five (75) days following the execution of this Agreement.

K. Notice of Settlement to LWDA. In connection with the Motion for Approval of PAGA Settlement and/or Joint Stipulation re: Settlement Approval, PAGA Counsel shall submit this Agreement to the LWDA pursuant to California Labor Code section 2699(l)(2). PAGA Counsel shall, within ten (10) days after the entry of the judgment or order approving this Settlement, submit the final order approving the Settlement to the LWDA pursuant to California Labor Code section 2699(l)(3).

N. Review of Motion for Settlement Approval. PAGA Counsel will provide an opportunity for Defense Counsel to review the Motion for Settlement Approval, including the Order Granting Approval of the Settlement, and Judgment Approving the Settlement three (3) business days before filing with the Court. The Parties and their counsel will cooperate with each other and use their best efforts to affect the Court's approval of the Motion for Approval of the Settlement, and entry of Judgment.

O. Cooperation. The Parties and their counsel will cooperate with each other and use their best efforts to implement the Settlement.

P. Disputes. Any dispute between the Parties as to the remaining terms of the Settlement Agreement shall be presented to the mediator, the Hon. Brian C. Walsh (Ret.), for resolution.

Q. Interim Stay of Proceedings. The Parties agree to stay all proceedings in the Action, except such proceedings necessary to implement and complete the Settlement.

R. Amendment or Modification. This Agreement may be amended or modified only by a written instrument signed by the Parties and counsel for all Parties or their successors-in-interest.

S. Entire Agreement. Except for Plaintiff's individual settlement agreement with Defendants, which resolve Plaintiff's individual claims and shall not affect this Agreement in any way, this Agreement and any attached Exhibit constitute the entire Agreement among these Parties, and no oral or written representations, warranties or inducements have been made to any Party concerning this Agreement or its Exhibit other than the representations, warranties and covenants contained and memorialized in this Agreement and its Exhibit.

T. Authorization to Enter into Settlement Agreement. PAGA Counsel and Defense Counsel separately warrant and represent that they are authorized by Plaintiff and Defendants, respectively, to take all appropriate action required or permitted to be taken by such Parties pursuant to this Agreement to effectuate its terms, and to execute any other documents reasonably required to effectuate the terms of this Agreement including any amendments to this Agreement. The person signing this Agreement on behalf of Defendants represents and warrants that he/she is authorized to sign this Agreement on behalf of Defendants. Plaintiff represents and warrants that she is authorized to sign this Agreement and that she has not assigned any claim, or part of a claim, covered by this Settlement to a third-party.

U. No Public Comment: The Parties and their counsel agree that they will not issue any press releases, initiate any contact with the press, respond to any press inquiry, or have any communication with the press about the fact, amount, or terms of the Settlement Agreement. PAGA Counsel further agrees not to use the Settlement Agreement or any of its terms for any marketing or promotional purposes. Nothing herein will restrict PAGA Counsel from including publicly available information regarding this settlement in future judicial submissions regarding PAGA Counsel's qualifications and experience. Further, PAGA Counsel will not include, reference, or use the Settlement Agreement for any marketing or promotional purposes, either before or after the Motion for Settlement Approval is filed.

V. Binding on Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the successors or assigns of the Parties, as previously defined.

W. California Law Governs. All terms of this Agreement and the Exhibit and any disputes shall be governed by and interpreted according to the laws of the State of California.

X. Counterparts. This Agreement may be executed in one or more counterparts by facsimile, electronic signature, or email which for purposes of this Agreement shall be accepted as an original. All executed counterparts and each of them shall be deemed to be one and the same instrument. Any executed counterpart will be admissible in evidence to prove the existence and contents of this Agreement.

Y. This Settlement Is Fair, Adequate and Reasonable. The Parties believe this Settlement is a fair, adequate, and reasonable settlement of this Action and have arrived at this Settlement after extensive arms-length negotiations, taking into account all relevant factors, present and potential.

Z. Court Filings. The Parties agree not to object to any Court filings consistent with this Agreement.

AA. Jurisdiction of the Court. The Parties agree that the Court shall retain jurisdiction with respect to the interpretation, implementation, and enforcement of the terms of this Agreement and all orders and judgments entered in connection therewith, and the

Parties and their counsel submit to the jurisdiction of the Court for purposes of interpreting, implementing, and enforcing the settlement and all orders and judgments entered in connection with this Agreement.

BB. Invalidity of Any Provision. Before declaring any provision of this Agreement invalid, the Court shall first attempt to construe the provisions valid to the fullest extent possible consistent with applicable precedents so as to define all provisions of this Agreement valid and enforceable.

CC. No Admissions by the Parties. Plaintiff has claimed and continues to claim that the Released PAGA Claims have merit and give rise to liability on the part of Defendants. Defendants contend that the Released PAGA Claims have no merit and do not give rise to liability. This Agreement is a compromise of disputed claims. Nothing contained in this Agreement and no documents referred to and no action taken to carry out this Agreement may be construed or used as an admission by or against the Defendants or Plaintiff or PAGA Counsel as to the merits or lack thereof of the claims asserted. Other than as may be specifically set forth herein, each Party shall be responsible for and shall bear its/his own attorney's fees and costs.

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IT IS SO AGREED, FORM AND CONTENT, BY PLAINTIFF:

DATED: 02/18/2025

Toshi Magee (Feb 18, 2025 10:51 PST)

TOSHI MAGEE

IT IS SO AGREED, FORM AND CONTENT, BY DEFENDANTS:

DATED: 3/5/2025

CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.

Jeff Evans
Name

Secretary
Title

DATED: 3/5/2025

CHILDREN'S DENTISTRY AND ORTHODONTICS OF FRESNO A DENTAL OFFICE OF STEVEN O'HARA, DDS, INC.

Jeff Evans
Name

Secretary
Title

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DATED: 3/5/2025

CHILDREN'S DENTISTRY AND ORTHODONTICS OF BAKERSFIELD A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.

Jeff Evans
Name

Secretary
Title

DATED: 3/5/2025

CHILDREN'S DENTISTRY OF MADERA A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.

Jeff Evans
Name

Secretary
Title

DATED: 3/5/2025

CHILDREN'S DENTISTRY OF MERCED A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.

Jeff Evans
Name

Secretary
Title

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DATED: 3/5/2025

CHILDREN'S DENTISTRY OF VISALIA A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.

Jeff Evans
Name

Secretary
Title

DATED: 3/5/2025

O'HARA PRIETO EVANS KUNKEL DENTAL, INC.

Jeff Evans
Name

Secretary
Title

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IT IS SO AGREED AS TO FORM BY COUNSEL:

DATED: February 19, 2025

JCL LAW FIRM, APC

By: ______________________

Jean-Claude Lapuyade
Attorneys for the Plaintiff and the Aggrieved Employees

DATED: February 19, 2025

ZAKAY LAW GROUP, APLC

By: ______________________

Shani O. Zakay
Attorneys for the Plaintiff and the Aggrieved Employees

DATED: 3/10/2025

LARSEN, FISHMAN & CALLISTER

By: ______________________

Doug M. Larsen, Esq.
Michael W. Green, Esq.
Attorneys for Defendant

# EXHIBIT A

[Administrator Notice]

You are receiving this payment because of a lawsuit brought by a former California employee against Children's Dentistry and Orthodontics a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc., Children's Dentistry and Orthodontics of Fresno a Dental Office of Steven O'Hara, DDS, Inc., Children's Dentistry of Bakersfield a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc., Children's Dentistry of Madera a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc., Children's Dentistry of Merced a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc., Children's Dentistry of Visalia a Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc., and O'Hara Prieto Evans Kunkel Dental, Inc. ("Defendants") for civil penalties pursuant to the Private Attorneys General Act, Labor Code § 2698 et seq. ("PAGA"). Plaintiff Toshi Magee ("Plaintiff") claimed that she, and other employees, were not provided legally compliant meal and rest periods, not paid for all time worked, not properly paid overtime, not paid at the correct regular rate of pay, not provided with accurate wage statements, not reimbursed for business expenses, and not timely paid final wages.

Defendants deny these claims and deny that they owe any penalties, but to avoid further time and expense in litigation, Defendants and Plaintiff have agreed to settle the case. The settlement resolves the claims asserted in the lawsuit on behalf of all employees who are or previously were employed by Defendants in California and classified as non-exempt employees during the period between September 13, 2020, to November 7, 2024 ("Aggrieved Employees").

According to Defendants' records, you are an Aggrieved Employee and are therefore entitled to a share of the settlement. This settlement check shall remain valid until [insert date].

This check is issued pursuant to the terms of the PAGA settlement in Merced County Superior Court Case No. 21CV-03773. The PAGA settlement settles and releases only claims for PAGA penalties and no other claims against Defendants.

This payment is taxable income for federal, state, and local tax purposes and may be reported to the appropriate taxing authorities. You may be required to make additional tax payments. Please consult a tax advisor to determine your individual tax payment and reporting situation. You will be mailed appropriate tax forms in [insert date]. Please notify us of any address changes so that any necessary tax forms can be mailed to your most current address.

If you have any questions about your award, please contact the settlement administrator, Apex Class Action LLC, at 1-800-355-0700.

# EXHIBIT 2

jcl law firm apc

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Jean-Claude Lapuyade, Esq.
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September 13, 2021

**Via Online Filing to LWDA and Certified Mail to Defendant**
**Labor and Workforce Development Agency**
Online Filing

CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.
c/o Steve O'hara
6245 North Freson Street, Ste. 103
Fresno, CA 93710
***Via Certified Mail with Return Receipt No. 7021 0350 0000 8465 3059***

**Re: Notice of Violations of California Labor Code Sections 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, and 2804, Violation of Applicable Industrial Welfare Commission Wage Order(s), and Pursuant to California Labor Code Section 2699.5**

Dear Sir/Madam:

This office represents TOSHI MAGEE ("Plaintiff") and other aggrieved employees in a proposed class and representative action against CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant"). This office intends to file the enclosed Class Action Complaint on behalf of Plaintiff and other similarly situated employees. The purpose of this correspondence is to provide the Labor and Workforce Development Agency with notice of alleged violations of the California Labor Code and certain facts and theories in support of the alleged violations in accordance with Labor Code section 2699.3.

Plaintiff was employed by Defendant in California from August of 2019 to October of 2020. Plaintiff was paid on an hourly basis and entitled to legally required meal and rest periods. At all times during their employment, Defendant failed to, among other things, provide Plaintiff, and all those similarly situated, with all legally mandated off-duty meal and rest periods.

As a consequence, Plaintiff contend that Defendant failed to fully compensate them, and other similarly situated and aggrieved employees, for all earned wages and failed to provide California-compliant meal and rest breaks and accurate wage statements. Accordingly, Plaintiffs contend that Defendant's conduct violated Labor Code sections §§ 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, 2804, and applicable wage orders, and is therefore actionable pursuant to section 2698 *et seq*.

**Plaintiff seeks to represent a group of aggrieved employees defined as all non-exempt and exempt employees who worked for Defendant during the relevant claim period.**

A true and correct copy of the proposed Complaint for the class action is attached hereto. The Complaint (i) identifies the alleged violations, (ii) details the facts and theories which support the alleged violations, (iii) details the specific work performed by Plaintiff, (iv) sets forth the people/entities, dates, classifications, violations, events, and actions which are at issue to the extent known to the Plaintiff, and (v) sets forth the illegal practices used by Defendant. Plaintiff therefore incorporates the allegations of the attached Complaint into this letter as if fully set forth herein.

To the extent that entities and/or individuals are named and charged with violations of the Labor Code—making them liable on an individual basis as permitted by numerous Labor Code Sections including, but not limited to 558, 558.1, and 1197.1—Plaintiff reserves any and all rights to add, substitute, or change the name of employer entities and/or individuals responsible for the violations at issue.

Any further amendments and changes to this notice shall relate back to the date of this notice. Consequently, Defendant is on notice that Plaintiff continues her investigation, with the full intent to amend and/or change this notice, to add any undiscovered violations of any of the provisions of the California Labor Code—to the extent that are applicable to this case—and to change and/or add the identities of any entities and/or individuals responsible for the violations contained herein.

If the agency needs any further information, please do not hesitate to ask. The class action lawsuit consists of a class of other aggrieved employees. As class counsel, our intention is to vigorously prosecute the class wide claims as alleged in the Complaint, and to procure civil penalties as provided by the Private Attorney General Act of 2004 on behalf of Plaintiffs and all aggrieved California employees and Class Members

Your earliest response to this notice is appreciated. If you have any questions or concerns, please do not hesitate to contact me at the above number and address.

Very truly yours,
JCL LAW FIRM, APC

Jean-Claude Lapuyade, Esq.

Enclosure (1)

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Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF MERCED**

TOSHI MAGEE, an individual, on behalf of herself, and on behalf of all persons similarly situated,

Plaintiffs,

vs.

CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California Corporation; and DOES 1 through 50, Inclusive;

Defendants.

Case No. ______________________________

**CLASS ACTION COMPLAINT FOR:**

1. UNFAIR COMPETITION IN VIOLATION OF CAL. BUS. & PROF. CODE §§ 17200, *et seq.*;
2. FAILURE TO PAY OVERTIME WAGES IN VIOLATION OF CAL. LAB. CODE §§ 510, *et seq.*
3. FAILURE TO PAY MINIMUM WAGES IN VIOLATION OF CAL. LAB. CODE §§ 1194, 1197 & 1197.1;
4. FAILURE TO PROVIDE REQUIRED MEAL PERIODS IN VIOLATION OF CAL. LAB. CODE §§ 226.7 & 512 AND THE APPLICABLE IWC WAGE ORDER;
5. FAILURE TO PROVIDE REQUIRED REST PERIODS IN VIOLATION OF CAL. LAB CODE §§ 226.7 & 512 AND THE APPLICABLE IWC WAGE ORDER;

6. FAILURE TO PROVIDE ACCURATE ITEMIZED STATEMENTS IN VIOLATION OF CAL. LAB. CODE § 226;
7. FAILURE TO PAY WAGES WHEN DUE IN VIOLATION OF CAL. LABOR CODE §§ 201, 202 AND 203;
8. FAILURE TO PAY SICK PAY AT THE CORRECT RATE OF PAY IN VIOLATION OF CAL. LAB. CODE § 246, *ET SEQ.*

**DEMAND FOR JURY TRIAL**

Plaintiff TOSHI MAGEE ("PLAINTIFF") an individual, on behalf of herself and all other similarly situated current and former employees alleges on information and belief, except for her own acts and knowledge which are based on personal knowledge, the following:

## THE PARTIES

1. Defendant CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("DEFENDANT" and/or "DEFENDANTS") is a California Corporation that at all relevant times owns and operates multiple children's dentistry and orthodontics offices throughout California.

2. The true names and capacities, whether individual, corporate, subsidiary, partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently unknown to PLAINTIFF who therefore sues these defendants by such fictitious names pursuant to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege the true names and capacities of Does 1 through 50, inclusive, when they are ascertained. PLAINTIFF is informed and believes, and based upon that information and belief allege, that the Defendants named in this Complaint, including DOES 1 through 50, inclusive (hereinafter collectively "DEFENDANTS" and/or "DEFENDANT"), are responsible in some manner for one or more of the events and happenings that proximately caused the injuries and damages hereinafter alleged.

3. The agents, servants and/or employees of the DEFENDANTS and each of them acting on behalf of the DEFENDANTS acted within the course and scope of his, her or its authority as the agent,

servant and/or employee of the DEFENDANTS, and personally participated in the conduct alleged herein on behalf of the DEFENDANTS with respect to the conduct alleged herein. Consequently, the acts of each of the DEFENDANTS are legally attributable to the other and all DEFENDANTS are jointly and severally liable to PLAINTIFF and those similarly situated, for the loss sustained as a proximate result of the conduct of the DEFENDANTS' agents, servants and/or employees.

4. DEFENDANTS were PLAINTIFF's employers or persons acting on behalf of PLAINTIFF's employer, within the meaning of California Labor Code § 558, who violated or caused to be violated, a section of Part 2, Chapter 1 of the California Labor Code or any provision regulating hours and days of work in any order of the Industrial Welfare Commission and, as such, are subject to civil penalties for each underpaid employee, as set forth in Labor Code § 558, at all relevant times.

5. DEFENDANTS were PLAINTIFF's employers or persons acting on behalf of PLAINTIFF's employer either individually or as an officer, agent, or employee of another person, within the meaning of California Labor Code § 1197.1, who paid or caused to be paid to any employee a wage less than the minimum fixed by California state law, and as such, are subject to civil penalties for each underpaid employee.

6. PLAINTIFF was employed by DEFENDANTS as a non-exempt employee from August of 2019 to October of 2020, paid on an hourly basis, and entitled to the legally required meal and rest periods and payment of minimum wages, and overtime wages due for all time worked.

7. PLAINTIFF brings this Class Action on behalf of herself and on behalf of all of DEFENDANTS' current and former non-exempt California employees (the "CALIFORNIA CLASS") at any time during the period beginning four years from the date of the filing of this Complaint and ending on a date determined by the Court (the "CLASS PERIOD"). The amount in controversy for the aggregate claim of CALIFORNIA CLASS Members is under five million dollars ($5,000,000.00). PLAINTIFF reserves the right to amend the following class definitions before the Court determines whether class certification is appropriate, or thereafter upon leave of Court.

8. PLAINTIFF brings this Class Action on behalf of herself and on behalf of the CALIFORNIA CLASS in order to fully compensate the CALIFORNIA CLASS for their losses incurred during the CLASS PERIOD caused by DEFENDANTS' uniform policy and practice which

(1) failed to provide PLAINTIFF and the CALIFORNIA CLASS with legally compliant meal and rest periods or an additional hour of pay at the regular rate of compensation in *lieu* thereof in violation of California Labor Code Sections 226.7(c) and the applicable Industrial Welfare Commission Wage Order, (2) failed to pay PLAINTIFF and the CALIFORNIA CLASS for all hours worked in violation of, *inter alia*, California Labor Code Sections 510, 1194, 1197, and 1197.1, and (3) failed to provide accurate itemized wage statements in violation of California Labor Code Sections 226 and 226.3.

9. DEFENDANTS' uniform policies and practices alleged herein were unlawful, unfair, and deceptive business practices whereby DEFENDANTS retained and continues to retain wages due PLAINTIFF and the other members of the CALIFORNIA CLASS.

10. PLAINTIFF and the other members of the CALIFORNIA CLASS seek an injunction enjoining such conduct by DEFENDANTS in the future, relief for the named PLAINTIFF and the other members of the CALIFORNIA CLASS who have been economically injured by DEFENDANT's past and current unlawful conduct, and all other appropriate legal and equitable relief.

## **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this Action pursuant to California Code of Civil Procedure, Section 410.10 and California Business & Professions Code, Section 17203. This action is brought as a Class Action on behalf of PLAINTIFF and similarly situated employees of DEFENDANTS pursuant to Cal. Code of Civ. Proc. § 382.

12. Venue is proper in this Court pursuant to California Code of Civil Procedure, Sections 395 and 395.5, because PLAINTIFF worked in this County for DEFENDANTS, and DEFENDANTS (i) currently maintain and at all relevant times, maintained offices and facilities in this County and/or conducts substantial business in this County, and (ii) committed the wrongful conduct herein alleged in this County against members of the CALIFORNIA CLASS.

## **THE CONDUCT**

13. In violation of the applicable sections of the California Labor Code and the requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANTS as a matter of company policy, practice and procedure, intentionally, knowingly and systematically failed to provide legally compliant meal and rest periods, failed to accurately compensate PLAINTIFF and the other members

of the CALIFORNIA CLASS for missed meal and rest periods, failed to pay PLAINTIFF and the other members of the CALIFORNIA CLASS for all time worked, failed to pay PLAINTIFF and the other members of the CALIFORNIA CLASS overtime at the regular rate, failed to compensate PLAINTIFF and other members of the CALIFORNIA CLASS meal rest premiums at the regular rate, and failed to issue to PLAINTIFF and the members of the CALIFORNIA CLASS with accurate itemized wage statements showing, among other things, all applicable hourly rates in effect during the pay periods and the corresponding amount of time worked at each hourly rate. DEFENDANTS' uniform policies and practices are intended to purposefully avoid the accurate and full payment for all time worked as required by California law which allows DEFENDANTS to illegally profit and gain an unfair advantage over competitors who comply with the law. To the extent equitable tolling operates to toll claims by the CALIFORNIA CLASS against DEFENDANTS, the CLASS PERIOD should be adjusted accordingly.

**A. <u>Meal Period Violations</u>**

14. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANTS were required to pay PLAINTIFF and CALIFORNIA CLASS Members for all their time worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work. From time-to-time during the CLASS PERIOD, DEFENDANTS required PLAINTIFF and CALIFORNIA CLASS Members to work without paying them for all the time they were under DEFENDANTS' control. Specifically, as a result of PLAINTIFF's demanding work requirements and DEFENDANT'S understaffing, DEFENDANTS required PLAINTIFF to work while clocked out during what was supposed to be PLAINTIFF's off-duty meal break. PLAINTIFF was from time to time interrupted by work assignments while clocked out for what should have been PLAINTIFF's off-duty meal break. Indeed, there were many days where PLAINTIFF did not even receive a partial lunch. As a result, the PLAINTIFF and other CALIFORNIA CLASS Members forfeited minimum wage and overtime wages by regularly working without their time being accurately recorded and without compensation at the applicable minimum wage and overtime rates. DEFENDANTS' uniform policy and practice not to pay PLAINTIFF and other

CALIFORNIA CLASS Members for all time worked is evidenced by DEFENDANTS' business records.

15. From time-to-time during the CLASS PERIOD, as a result of their rigorous work schedules, and DEFENDANTS' inadequate staffing practices, PLAINTIFF and other CALIFORNIA CLASS Members were from time to time unable to take thirty (30) minute off-duty meal breaks and were not fully relieved of duty for their meal periods. PLAINTIFF and other CALIFORNIA CLASS Members were required from time to time to perform work as ordered by DEFENDANTS for more than five (5) hours during some shifts without receiving a meal break. Further, DEFENDANTS from time to time failed to provide PLAINTIFF and CALIFORNIA CLASS Members with a second off-duty meal period for some workdays in which these employees were required by DEFENDANTS to work ten (10) hours of work from time to time. The nature of the work performed by PLAINTIFF and other CALIFORNIA CLASS Members does not qualify for limited and narrowly construed "on-duty" meal period exception. When they were provided with meal periods, PLAINTIFF and other CALIFORNIA CLASS Members were, from time to time, required to remain on duty and on call. PLAINTIFF and other CALIFORNIA CLASS Members therefore forfeited meal breaks without additional compensation and in accordance with DEFENDANTS' strict corporate policy and practice.

**B. Rest Period Violations**

16. From time-to-time during the CLASS PERIOD, PLAINTIFF and other CALIFORNIA CLASS members were also required from time to time to work in excess of four (4) hours without being provided ten (10) minute rest periods as a result of their rigorous work schedule, being required to take orders, receive payments, expedite services, provide janitorial services, and DEFENDANTS' inadequate staffing. Further, for the same reasons these employees were denied their first rest periods of at least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours from time to time, a first and second rest period of at least ten (10) minutes for some shifts worked of between six (6) and eight (8) hours from time to time, and a first, second and third rest period of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time. When they were provided with rest breaks, PLAINTIFF and other CALIFORNIA CLASS Members were, from time to time, required to remain on DEFENDANTS' premises, on duty and/or on call. PLAINTIFF and other

CALIFORNIA CLASS Members were also not provided with one-hour wages in lieu thereof. As a result of their rigorous work schedules and DEFENDANTS' inadequate staffing, PLAINTIFF and other CALIFORNIA CLASS Members were from time to time denied their proper rest periods by DEFENDANTS and DEFENDANTS' managers.

**C. <u>Regular Rate Violation – Overtime, Meal and Rest Period Premiums, and Sick Pay</u>**

17. From time-to-time during the CLASS PERIOD, DEFENDANTS failed and continue to fail to accurately calculate and pay PLAINTIFF and the other CALIFORNIA CLASS members for their overtime hours worked, meal and rest period premiums, and sick pay. As a result, PLAINTIFF and the other CALIFORNIA CLASS members forfeited wages due to them for working overtime without compensation at the correct overtime, meal and rest period premium, and sick pay rates. DEFENDANTS' uniform policy and practice to not pay the CALIFORNIA CLASS members the correct overtime rate for all overtime worked, meal and rest period premiums, and sick pay in accordance with applicable law is evidenced by DEFENDANTS' business records.

18. State law provides that employees must be paid overtime at one-and-one-half times their "regular rate of pay." PLAINTIFF and other CALIFORNIA CLASS members were compensated at an hourly rate plus incentive pay that was tied to specific elements of an employee's performance.

19. DEFENDANTS' non-discretionary bonus program provided the CALIFORNIA CLASS, including PLAINTIFF, with bonus compensation when the company met the various performance goals set by DEFENDANT. For example, DEFENDANT paid a bonus identified as the "Shaw Ave Bonus." However, when calculating the regular rate of pay, in those pay periods where PLAINTIFF and the CALIFORNIA CLASS worked overtime and earned non-discretionary bonus compensation, DEFENDANT failed to accurately include the non-discretionary bonus compensation as part of the employees' "regular rate of pay."

20. In other instances, when calculating the regular rate of pay, in those pay periods where PLAINTIFF and the CALIFORNIA CLASS worked overtime and earned this non-discretionary bonus, DEFENDANT failed to (1) accurately include the non-discretionary bonus compensation into the regular rate of pay and/or (2) calculated all hours worked rather than just all non-overtime hours worked into the regular rate of pay in violation of *Alvarado v. Dart* (2018) 4 Cal.5th 542.

21. As a matter of law, the incentive and commission compensation received by PLAINTIFFS and other CALIFORNIA CLASS members must be included and correctly calculated into the “regular rate of pay” for purposes of overtime compensation, meal and rest period premiums, and sick pay. DEFENDANTS’ failure to do so has resulted in DEFENDANTS’ systematic underpayment of overtime compensation, meal and rest period premiums, and sick pay to PLAINTIFF and other CALIFORNIA CLASS members. Specifically, California Labor Code Section 246 mandates that paid sick time for non-employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the non-exempt employee uses paid sick time, whether or not the employee actually works overtime in that workweek. DEFENDANTS’ conduct, as articulated herein, by failing to include the incentive compensation as part of the “regular rate of pay” for purposes of sick pay compensation was in violation of Cal. Lab. Code § 246.

22. In violation of the applicable sections of the California Labor Code and the requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANTS as a matter of company policy, practice and procedure, intentionally and knowingly failed to compensate PLAINTIFF and the other members of the CALIFORNIA CLASS at the correct rate of pay for all overtime worked and sick pay. This uniform policy and practice of DEFENDANTS is intended to purposefully avoid the payment of the correct overtime, meal and rest period premiums, and sick pay compensation as required by California law which allowed DEFENDANTS to illegally profit and gain an unfair advantage over competitors who complied with the law. To the extent equitable tolling operates to toll claims by the CALIFORNIA CLASS members against DEFENDANTS, the CLASS PERIOD should be adjusted accordingly.

**D. <u>Wage Statement Violations</u>**

23. California Labor Code Section 226 requires an employer to furnish its employees an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked, (3) the number of piece-rate units earned and any applicable piece-rate, (4) all deductions, (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 the employee’s 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 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.

24. From time to time during the CLASS PERIOD, when PLAINTIFF and other CALIFORNIA CLASS Members missed meal and rest breaks, or were paid inaccurate overtime, missed meal and rest period premiums and sick pay, or were not paid for all hours worked, DEFENDANTS also failed to provide PLAINTIFF and other CALIFORNIA CLASS Members with complete and accurate wage statements which failed to show, among other things, the total hours worked and all applicable hourly rates in effect during the pay period and the corresponding amount of time worked at each hourly rate, correct rates of pay for penalty payments or missed meal and rest periods.

25. In addition to the violations described above, DEFENDANTS, from time to time, failed to provide PLAINTIFF and the CALIFORNIA CLASS Members with wage statements that comply with Cal. Lab. Code § 226, including failing to provide the accurate total number of hours worked in each pay period. As a result, DEFENDANTS issued PLAINTIFF and the other members of the CALIFORNIA CLASS with wage statements that violate Cal. Lab. Code § 226. Further, DEFENDANTS' violations are knowing and intentional, were not isolated or due to an unintentional payroll error due to clerical or inadvertent mistake.

**C. <u>CLASS ACTION ALLEGATIONS</u>**

26. PLAINTIFF brings the First through Eighth Causes of Action as a class action pursuant to California Code of Civil Procedure § 382 on behalf of all of DEFENDANTS' current and former non-exempt California employees ("CALIFORNIA CLASS") during the period beginning four years prior to the filing of the Complaint and ending on a date determined by the Court ("CLASS PERIOD").

27. PLAINTIFF and the other CALIFORNIA CLASS Members have uniformly been deprived of wages and penalties from unpaid wages earned and due, including but not limited to unpaid minimum wages, unpaid overtime compensation, unpaid meal and rest period premiums, illegal meal and rest period policies, failure to separately compensate rest periods, failure to provide accurate itemized wage statements, failure to maintain required records, and interest, statutory and civil penalties, attorney's fees, costs, and expenses.

28. The members of the class are so numerous that joinder of all class members is impractical.

29. Common questions of law and fact regarding DEFENDANTS' conduct, including but not limited to, unpaid meal and rest period premiums, failure to accurately calculate the regular rate of pay for overtime compensation, meal and rest period premiums and sick pay, failure to accurately calculate the regular rate of compensation for missed meal and rest period premiums, failing to provide legally compliant meal and rest periods, failure to provide accurate itemized wage statements accurate, and failure to ensure they are paid at least minimum wage and overtime, exist as to all members of the class and predominate over any questions affecting solely any individual members of the class. Among the questions of law and fact common to the class are:

a. Whether DEFENDANTS maintained legally compliant meal period policies and practices;

b. Whether DEFENDANTS maintained legally compliant rest period policies and practices;

c. Whether DEFENDANTS failed to pay PLAINTIFF and the CALIFORNIA CLASS Members accurate premium payments for missed meal and rest periods;

d. Whether DEFENDANTS failed to pay PLAINTIFF and the CALIFORNIA CLASS Members accurate overtime wages, meal and rest premiums and sick pay;

e. Whether DEFENDANTS failed to pay PLAINTIFF and the CALIFORNIA CLASS Members at least minimum wage for all hours worked;

f. Whether DEFENDANTS issued legally compliant wage statements;

g. Whether DEFENDANTS committed an act of unfair competition by systematically failing to record and pay PLAINTIFF and the other members of the CALIFORNIA CLASS for all time worked;

h. Whether DEFENDANTS committed an act of unfair competition by systematically failing to record all meal and rest breaks missed by

PLAINTIFF and other CALIFORNIA CLASS Members, even though DEFENDANTS enjoyed the benefit of this work, required employees to perform this work and permits or suffers to permit this work;

i. Whether DEFENDANTS committed an act of unfair competition in violation of the UCL, by failing to provide the PLAINTIFF and the other members of the CALIFORNIA CLASS with the legally required meal and rest periods.

30. PLAINTIFF is a member of the CALIFORNIA CLASS and suffered damages as a result of DEFENDANTS' conduct and actions alleged herein.

31. PLAINTIFF's claims are typical of the claims of the class, and PLAINTIFF has the same interests as the other members of the class.

32. PLAINTIFF will fairly and adequately represent and protect the interests of the CALIFORNIA CLASS Members.

33. PLAINTIFF retained able class counsel with extensive experience in class action litigation.

34. Further, PLAINTIFF's interests are coincident with, and not antagonistic to, the interests of the other CALIFORNIA CLASS Members.

35. There is a strong community of interest among PLAINTIFF and the members of the CALIFORNIA CLASS to, *inter alia,* ensure that the combined assets of DEFENDANTS are sufficient to adequately compensate the members of the CALIFORNIA CLASS for the injuries sustained;

36. The questions of law and fact common to the CALIFORNIA CLASS Members predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

37. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all class members in impractical. Moreover, since the damages suffered by individual members of the class may be relatively small, the expense and burden of individual litigation makes it practically impossible for the members of the class individually to redress the wrongs done to them. Without class certification and determination of declaratory, injunctive,

statutory and other legal questions within the class format, prosecution of separate actions by individual members of the CALIFORNIA CLASS will create the risk of:

j. Inconsistent or varying adjudications with respect to individual members of the CALIFORNIA CLASS which would establish incompatible standards of conduct for the parties opposing the CALIFORNIA CLASS; and/or,

k. Adjudication with respect to individual members of the CALIFORNIA CLASS which would as a practical matter be dispositive of the interests of the other members not party to the adjudication or substantially impair or impeded their ability to protect their interests.

38. Class treatment provides manageable judicial treatment calculated to bring an efficient and rapid conclusion to all litigation of all wage and hour related claims arising out of the conduct of DEFENDANTS.

**<u>FIRST CAUSE OF ACTION</u>**

**For Unlawful Business Practices**

**[Cal. Bus. And Prof. Code §§ 17200, *et seq*.]**

**(By PLAINTIFF and the CALIFORNIA CLASS and Against All DEFENDANTS)**

39. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

40. DEFENDANTS are "person[s]" as that term is defined under Cal. Bus. and Prof. Code § 17021.

41. California Business & Professions Code §§ 17200, *et seq.* (the "UCL") defines unfair competition as any unlawful, unfair, or fraudulent business act or practice. Section 17203 authorizes injunctive, declaratory, and/or other equitable relief with respect to unfair competition as follows:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Cal. Bus. & Prof. Code § 17203.

42. By reason of this uniform conduct applicable to PLAINTIFF and all CALIFORNIA CLASS Members, during the CLASS PERIOD, DEFENDANTS commit acts of unfair competition in violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (the "UCL"), by engaging and continuing to engage in business practices which violates California law, including but not limited to, the applicable Industrial Wage Order(s), the California Code of Regulations and the California Labor Code including Sections 201, 202, 203, 204, 210, 226, 226.7, 246, 510, 512, 1194, 1197, 1197.1, 1198, & 2802 for which this Court should issue declaratory and other equitable relief pursuant to Cal. Bus. & Prof. Code § 17203 as may be necessary to prevent and remedy the conduct held to constitute unfair competition, including restitution of wages wrongfully withheld.

43. By the conduct alleged herein, DEFENDANTS' practices were unlawful and unfair in that these practices violated public policy, were immoral, unethical, oppressive, unscrupulous, or substantially injurious to employees, and were without valid justification or utility for which this Court should issue equitable and injunctive relief pursuant to Section 17203 of the California Business & Professions Code, including restitution of wages wrongfully withheld.

44. By the conduct alleged herein, DEFENDANTS' practices were deceptive and fraudulent in that DEFENDANTS' uniform policy and practice failed to, *inter alia*, provide the legally mandated meal and rest periods, the required accurate amount of compensation for missed meal and rest periods, overtime and minimum wages owed, provide accurate itemized wage statements, due to a systematic business practice that cannot be justified, pursuant to the applicable Cal. Lab. Code, and Industrial Welfare Commission requirements in violation of Cal. Bus. Code §§ 17200, *et seq.*, and for which this Court should issue injunctive and equitable relief, pursuant to Cal. Bus. & Prof. Code § 17203, including restitution of wages wrongfully withheld.

45. By the conduct alleged herein, DEFENDANTS' practices were also unlawful, unfair, and deceptive in that DEFENDANTS' employment practices caused PLAINTIFF and the other members of the CALIFORNIA CLASS to be underpaid during their employment with DEFENDANTS.

46. By the conduct alleged herein, DEFENDANTS' practices were also unlawful, unfair, and deceptive in that DEFENDANTS' uniform policies, practices and procedures failed to, *inter alia*,

provide the legally mandated meal and rest periods, the required accurate amount of compensation for missed meal and rest periods, overtime and minimum wages owed, provide accurate itemized wage statements, to PLAINTIFF and the other members of the CALIFORNIA CLASS as required by Cal. Labor Code.

47. Therefore, PLAINTIFF demands on behalf of herself and on behalf of each CALIFORNIA CLASS Member, one (1) hour of pay for each workday in which an off-duty meal period was not timely provided for each five (5) hours of work, and/or one (1) hour of pay for each workday in which a second off-duty meal period was not timely provided for each ten (10) hours of work.

48. PLAINTIFF further demands on behalf of herself and on behalf of each CALIFORNIA CLASS Member, one (1) hour of pay for each workday in which an off duty paid rest period was not timely provided as required by law.

49. PLAINTIFF further demands on all wages due to PLAINTIFF and the members of the CALIFORNIA CLASS as a result of working while off the clock on meal periods, inaccurately calculated overtime and missed meal and rest periods premiums.

50. By and through the unlawful and unfair business practices described herein, DEFENDANTS has obtained valuable property, money, and services from PLAINTIFF and the other members of the CALIFORNIA CLASS, including earned wages for all overtime worked, and has deprived them of valuable rights and benefits guaranteed by law and contract, all to the detriment of these employees and to the benefit of DEFENDANTS so as to allow DEFENDANTS to unfairly compete against competitors who comply with the law.

51. All the acts described herein as violations of, among other things, the Industrial Welfare Commission Wage Orders, the California Code of Regulations, and the California Labor Code, were unlawful and in violation of public policy, were immoral, unethical, oppressive and unscrupulous, were deceptive, and thereby constitute unlawful, unfair and deceptive business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq*.

52. PLAINTIFF and the other members of the CALIFORNIA CLASS are entitled to, and do, seek such relief as may be necessary to restore to them the money and property which DEFENDANTS has acquired, or of which PLAINTIFF and the other members of the CALIFORNIA CLASS have been

deprived, by means of the above described unlawful and unfair business practices, including earned but unpaid wages for all overtime worked.

53. PLAINTIFF and the other members of the CALIFORNIA CLASS are further entitled to, and do, seek a declaration that the described business practices are unlawful, unfair and deceptive, and that injunctive relief should be issued restraining DEFENDANTS from engaging in any unlawful and unfair business practices in the future.

54. PLAINTIFF and the other members of the CALIFORNIA CLASS have no plain, speedy and/or adequate remedy at law that will end the unlawful and unfair business practices of DEFENDANTS. Further, the practices herein alleged presently continue to occur unabated. As a result of the unlawful and unfair business practices described herein, PLAINTIFF and the other members of the CALIFORNIA CLASS have suffered and will continue to suffer irreparable legal and economic harm unless DEFENDANTS is restrained from continuing to engage in these unlawful and unfair business practices.

## <u>SECOND CAUSE OF ACTION</u>

**For Failure to Pay Overtime Compensation**

**[Cal. Lab. Code §§ 510, *et seq.*]**

**(By PLAINTIFF and the CALIFORNIA CLASS and Against All DEFENDANTS)**

55. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

56. PLAINTIFF and the other members of the CALIFORNIA CLASS for the period beginning four years prior to the filing of the Complaint and the present ("CLASS PERIOD") bring a claim for DEFENDANTS' willful and intentional violations of the California Labor Code and the Industrial Welfare Commission requirements for DEFENDANTS' failure to pay these employees for all overtime worked, including, work performed in excess of eight (8) hours in a workday, and/or twelve (12) hours in a workday, and/or forty (40) hours in any workweek.

57. Pursuant to Cal. Lab. Code § 204, other applicable laws and regulations, and public policy, an employer must timely pay its employees for all hours worked.

58. Cal. Lab. Code § 510 further provides that employees in California shall not be employed

more than eight (8) hours per workday and/or more than forty (40) hours per workweek unless they receive additional compensation beyond their regular wages in amounts specified by law.

59. Cal. Lab. Code § 1194 establishes an employee's right to recover unpaid wages, including overtime compensation and interest thereon, together with the costs of suit. Cal. Lab. Code § 1198 further states that the employment of an employee for longer hours than those fixed by the Industrial Welfare Commission is unlawful.

60. During the CLASS PERIOD, PLAINTIFF and CALIFORNIA CLASS Members were required by DEFENDANTS to work for DEFENDANTS and were not paid for all the time they worked or were not accurately compensated for all overtime hours worked.

61. DEFENDANTS' uniform pattern of unlawful wage and hour practices manifested, without limitation, applicable to the CALIFORNIA CLASS as a whole, as a result of implementing a uniform policy and practice that failed to accurately record overtime worked by PLAINTIFF and other CALIFORNIA CLASS Members and denied accurate compensation to PLAINTIFF and the other members of the CALIFORNIA CLASS for overtime worked, including, the overtime work performed in excess of eight (8) hours in a workday, and/or twelve (12) hours in a workday, and/or forty (40) hours in any workweek.

62. In committing these violations of the California Labor Code, DEFENDANTS inaccurately calculated the amount of overtime worked and the applicable overtime rates and consequently underpaid the actual time worked by PLAINTIFF and other members of the CALIFORNIA CLASS. DEFENDANTS acted in an illegal attempt to avoid the payment of all earned wages, and other benefits in violation of the California Labor Code, the Industrial Welfare Commission requirements and other applicable laws and regulations.

63. As a direct result of DEFENDANTS' unlawful wage practices as alleged herein, PLAINTIFF and the other members of the CALIFORNIA CLASS did not receive full compensation for all overtime worked.

64. Cal. Lab. Code § 515 sets out various categories of employees who are exempt from the overtime requirements of the law. None of these exemptions are applicable to PLAINTIFF and the other members of the CALIFORNIA CLASS. Further, PLAINTIFF and the other members of the

CALIFORNIA CLASS are not subject to a valid collective bargaining agreement that would preclude the causes of action contained herein this Complaint. Rather, the PLAINTIFF brings this Action on behalf of herself, and the CALIFORNIA CLASS based on DEFENDANTS' violations of non-negotiable, non-waivable rights provided by the State of California.

65. During the CLASS PERIOD, PLAINTIFF and the other members of the CALIFORNIA CLASS were paid less for time worked that they were entitled to, constituting a failure to pay all earned wages.

66. DEFENDANTS failed to accurately pay PLAINTIFF and the other members of the CALIFORNIA CLASS overtime wages for the time they worked which was in excess of the maximum hours permissible by law as required by Cal. Lab. Code §§ 510, 1194 & 1198, even though PLAINTIFF and the other members of the CALIFORNIA CLASS were required to work, and did in fact work, overtime as to which DEFENDANTS failed to accurately record and pay using the applicable overtime rate as evidenced by DEFENDANTS' business records and witnessed by employees.

67. By virtue of DEFENDANTS' unlawful failure to accurately pay all earned compensation to PLAINTIFF and the other members of the CALIFORNIA CLASS for the true time they worked, PLAINTIFF and the other members of the CALIFORNIA CLASS have suffered and will continue to suffer an economic injury in amounts which are presently unknown to them, and which will be ascertained according to proof at trial.

68. DEFENDANTS knew or should have known that PLAINTIFF and the other members of the CALIFORNIA CLASS were under compensated for all overtime worked. DEFENDANTS systematically elected, either through intentional malfeasance or gross nonfeasance, to not pay employees for their labor as a matter of uniform company policy, practice and procedure, and DEFENDANTS perpetrated this systematic scheme by refusing to pay PLAINTIFF and the other members of the CALIFORNIA CLASS for overtime worked.

69. In performing the acts and practices herein alleged in violation of California labor laws, and refusing to compensate the members of the CALIFORNIA CLASS for all time worked and provide them with the requisite overtime compensation, DEFENDANTS acted and continues to act intentionally, oppressively, and maliciously toward PLAINTIFF and the other members of the CALIFORNIA CLASS

with a conscious of and utter disregard for their legal rights, or the consequences to them, and with the despicable intent of depriving them of their property and legal rights, and otherwise causing them injury in order to increase company profits at the expense of these employees.

70. PLAINTIFF and the other members of the CALIFORNIA CLASS therefore request recovery of all unpaid wages, including overtime wages, according to proof, interest, statutory costs, as well as the assessment of any statutory penalties against DEFENDANTS, in a sum as provided by the California Labor Code and/or other applicable statutes. To the extent overtime compensation is determined to be owed to the CALIFORNIA CLASS Members who have terminated their employment, DEFENDANTS' conduct also violates Labor Code §§ 201 and/or 202, and therefore these individuals are also be entitled to waiting time penalties under Cal. Lab. Code § 203, which penalties are sought herein on behalf of these CALIFORNIA CLASS Members. DEFENDANTS' conduct as alleged herein was willful, intentional, and not in good faith. Further, PLAINTIFF and other CALIFORNIA CLASS Members are entitled to seek and recover statutory costs.

## THIRD CAUSE OF ACTION

**For Failure to Pay Minimum Wages**

**[Cal. Lab. Code §§ 1194, 1197 and 1197.1]**

**(By PLAINTIFF and the CALIFORNIA CLASS and Against All DEFENDANTS)**

71. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

72. PLAINTIFF and the other members of the CALIFORNIA CLASS bring a claim for DEFENDANTS' willful and intentional violations of the California Labor Code and the Industrial Welfare Commission requirements for DEFENDANTS' failure to accurately record, calculate and pay minimum wages to PLAINTIFF and CALIFORNIA CLASS Members during the CLASS PERIOD.

73. Pursuant to Cal. Lab. Code § 204, other applicable laws and regulations, and public policy, an employer must timely pay its employees for all hours worked.

74. Cal. Lab. Code § 1197 provides the minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed in unlawful.

75. Cal. Lab. Code § 1194 establishes an employee's right to recover unpaid wages, including minimum wage compensation and interest thereon, together with the costs of suit.

76. DEFENDANTS maintain a uniform wage practice of paying PLAINTIFF and the other members of the CALIFORNIA CLASS without regard to the correct amount of time they work. For instance, as set forth herein, DEFENDANTS maintained a uniform policy that required PLAINTIFF to work while clocked out during what was supposed to be PLAINTIFF's off-duty meal break without compensation. Further, as set forth herein, DEFENDANTS' uniform policy and practice was to unlawfully and intentionally deny timely payment of wages due to PLAINTIFF and the other members of the CALIFORNIA CLASS.

77. DEFENDANTS' uniform pattern of unlawful wage and hour practices manifested, without limitation, applicable to the CALIFORNIA CLASS as a whole, as a result of implementing a uniform policy and practice that denies accurate compensation to PLAINTIFF and the other members of the CALIFORNIA CLASS in regard to minimum wage pay.

78. In committing these violations of the California Labor Code, DEFENDANTS inaccurately calculated the correct time worked and consequently underpaid the actual time worked by PLAINTIFF and other members of the CALIFORNIA CLASS. DEFENDANTS acted in an illegal attempt to avoid the payment of all earned wages, and other benefits in violation of the California Labor Code, the Industrial Welfare Commission requirements and other applicable laws and regulations.

79. As a direct result of DEFENDANTS' unlawful wage practices as alleged herein, PLAINTIFF and the other members of the CALIFORNIA CLASS did not receive the correct minimum wage compensation for their time worked for DEFENDANTS.

80. During the CLASS PERIOD, PLAINTIFF and the other members of the CALIFORNIA CLASS were paid less for time worked that they were entitled to, constituting a failure to pay all earned wages.

81. By virtue of DEFENDANTS' unlawful failure to accurately pay all earned compensation to PLAINTIFF and the other members of the CALIFORNIA CLASS for the true time they worked, PLAINTIFF and the other members of the CALIFORNIA CLASS have suffered and will continue to suffer an economic injury in amounts which are presently unknown to them, and which will be

ascertained according to proof at trial.

82. DEFENDANTS knew or should have known that PLAINTIFF and the other members of the CALIFORNIA CLASS were under compensated for their time worked. DEFENDANTS systematically elected, either through intentional malfeasance or gross nonfeasance, to not pay employees for their labor as a matter of uniform company policy, practice and procedure, and DEFENDANTS perpetrated this systematic scheme by refusing to pay PLAINTIFF and the other members of the CALIFORNIA CLASS the correct minimum wages for their time worked.

83. In performing the acts and practices herein alleged in violation of California labor laws, and refusing to compensate the members of the CALIFORNIA CLASS for all time worked and provide them with the requisite compensation, DEFENDANTS acted and continue to act intentionally, oppressively, and maliciously toward PLAINTIFF and the other members of the CALIFORNIA CLASS with a conscious and utter disregard for their legal rights, or the consequences to them, and with the despicable intent of depriving them of their property and legal rights, and otherwise causing them injury in order to increase company profits at the expense of these employees.

84. PLAINTIFF and the other members of the CALIFORNIA CLASS therefore request recovery of all unpaid wages, according to proof, interest, statutory costs, as well as the assessment of any statutory penalties against DEFENDANTS, in a sum as provided by the California Labor Code and/or other applicable statutes. To the extent minimum wage compensation is determined to be owed to the CALIFORNIA CLASS Members who have terminated their employment, DEFENDANTS' conduct also violates Labor Code §§ 201 and/or 202, and therefore these individuals are also be entitled to waiting time penalties under Cal. Lab. Code § 203, which penalties are sought herein on behalf of these CALIFORNIA CLASS members. DEFENDANTS' conduct as alleged herein was willful, intentional, and not in good faith. Further, PLAINTIFF and other CALIFORNIA CLASS Members are entitled to seek and recover statutory costs.

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## FOURTH CAUSE OF ACTION

**For Failure to Provide Required Meal Periods**

**[Cal. Lab. Code §§ 226.7 & 512]**

**(By PLAINTIFF and the CALIFORNIA CLASS and Against All DEFENDANTS)**

85. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

86. During the CLASS PERIOD, from time to time, DEFENDANTS failed to provide all the legally required off-duty meal breaks to PLAINTIFF and the other CALIFORNIA CLASS Members as required by the applicable Wage Order and Labor Code. The nature of the work performed by PLAINTIFF and CALIFORNIA CLASS Members did not prevent these employees from being relieved of all their duties for the legally required off-duty meal periods. As a result of their rigorous work schedules, PLAINTIFF and other CALIFORNIA CLASS Members were from time to time not fully relieved of duty by DEFENDANTS for their meal periods. Additionally, DEFENDANTS' failure to provide PLAINTIFF and the CALIFORNIA CLASS Members with legally required meal breaks prior to their fifth (5th) hour of work is evidenced by DEFENDANTS' business records from time to time. Further, DEFENDANTS failed to provide PLAINTIFF and CALIFORNIA CLASS Members with a second off-duty meal period in some workdays in which these employees were required by DEFENDANTS to work ten (10) hours of work. As a result, PLAINTIFF and other members of the CALIFORNIA CLASS therefore forfeited meal breaks without additional compensation and in accordance with DEFENDANTS' strict corporate policy and practice.

87. DEFENDANTS further violate California Labor Code §§ 226.7 and the applicable IWC Wage Order by failing to compensate PLAINTIFF and CALIFORNIA CLASS Members who were not provided a meal period, in accordance with the applicable Wage Order, one additional hour of compensation at each employee's regular rate of compensation for each workday that a meal period was not provided.

88. As a proximate result of the aforementioned violations, PLAINTIFF and CALIFORNIA CLASS Members have been damaged in an amount according to proof at trial, and seek all wages earned and due, interest, penalties, expenses and costs of suit.

## FIFTH CAUSE OF ACTION

**For Failure to Provide Required Rest Periods**

**[Cal. Lab. Code §§ 226.7 & 512]**

**(By PLAINTIFF and the CALIFORNIA CLASS and Against All DEFENDANTS)**

89. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

90. During the CLASS PERIOD, PLAINTIFF and other CALIFORNIA CLASS Members were from time to time required to work in excess of four (4) hours without being provided ten (10) minute rest periods. Further, these employees were denied their first rest periods of at least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours, a first and second rest period of at least ten (10) minutes for some shifts worked of between six (6) and eight (8) hours, and a first, second and third rest period of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time. PLAINTIFF and other CALIFORNIA CLASS Members were also not provided with one-hour wages in lieu thereof. As a result of their rigorous work schedules, PLAINTIFF and other CALIFORNIA CLASS Members were periodically denied their proper rest periods by DEFENDANTS and DEFENDANTS' managers.

91. DEFENDANTS further violated California Labor Code §§ 226.7 and the applicable IWC Wage Order by failing to compensate PLAINTIFF and CALIFORNIA CLASS Members who were not provided a rest period, in accordance with the applicable Wage Order, one additional hour of compensation at each employee's regular rate of compensation for each workday that rest period was not provided.

92. As a proximate result of the aforementioned violations, PLAINTIFF and CALIFORNIA CLASS Members have been damaged in an amount according to proof at trial, and seek all wages earned and due, interest, penalties, expenses and costs of suit.

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**<u>SIXTH CAUSE OF ACTION</u>**

**For Failure to Provide Accurate Itemized Statements**

**[Cal. Lab. Code §§ 226 and 226.2]**

**(By PLAINTIFF and the CALIFORNIA CLASS and Against All DEFENDANTS)**

93. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

94. Cal. Labor Code § 226 provides that an employer must furnish employees with an "accurate itemized" statement in writing showing:

1. Gross wages earned;
2. Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission;
3. The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
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 his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
8. The name and address of the legal entity that is the employer, 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.

95. During the CLASS PERIOD, DEFENDANTS also failed to provide PLAINTIFF and the other members of the CALIFORNIA CLASS with complete and accurate wage statements which failed

to accurately show, among other things, (1) total number of hours worked, (2) net wages earned, (3) gross wages earned; (4) net wages earned; and (5) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee in violation of California Labor Code Section 226(a).

96. In addition to the foregoing, DEFENDANTS failed to provide itemized wage statements to PLAINTIFF and members of the CALIFORNIA CLASS that complied with the requirements of California Labor Code Section 226.

97. DEFENDANTS knowingly and intentionally failed to comply with Cal. Labor Code § 226, causing injury and damages to the PLAINTIFF and the other members of the CALIFORNIA CLASS. These damages include, but are not limited to, costs expended calculating the correct rates for the overtime worked and the amount of employment taxes which were not properly paid to state and federal tax authorities. These damages are difficult to estimate. Therefore, PLAINTIFF and the other members of the CALIFORNIA CLASS may elect to recover liquidated damages of fifty dollars ($50.00) for the initial pay period in which the violation occurred, and one hundred dollars ($100.00) for each violation in a subsequent pay period pursuant to Cal. Lab. Code § 226, and all other damages and penalties available pursuant to Labor Code § 226.2(a)(6), all in an amount according to proof at the time of trial (but in no event more than four thousand dollars ($4,000.00) for PLAINTIFF and each respective member of the CALIFORNIA CLASS herein.

**SEVENTH CAUSE OF ACTION**

**FAILURE TO PAY WAGES WHEN DUE**

**(Cal Lab. Code §§201, 202, 203)**

**((By PLAINTIFF and the CALIFORNIA CLASS and Against All DEFENDANTS)**

98. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

99. Cal. Lab. Code § 200 provides that:

> As used in this article:(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. (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.

100. Cal. Lab. Code § 201 provides, in relevant part, that "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

101. Cal. Lab. Code § 202 provides, in relevant part, that:

> 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. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting.

102. There was no definite term in PLAINTIFF's or any CALIFORNIA CLASS Members' employment contract.

103. Cal. Lab. Code § 203 provides:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

104. The employment of PLAINTIFF and many CALIFORNIA CLASS Members terminated, and DEFENDANTS has not tendered payment of wages, to these employees who missed meal and rest breaks, as required by law.

105. Therefore, as provided by Cal Lab. Code § 203, on behalf of themselves and the members of the CALIFORNIA CLASS whose employment has, PLAINTIFF demands up to thirty days of pay as penalty for not paying all wages due at time of termination for all employees who terminated employment during the CLASS PERIOD and demands an accounting and payment of all wages due, plus interest and statutory costs as allowed by law.

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## EIGHTH CAUSE OF ACTION

**FAILURE TO PAY SICK PAY AT THE CORRECT RATE OF PAY**

**(Cal. Lab. Code § 246, *et seq.*)**

**(Alleged by PLAINTIFF and the CALIFORNIA CLASS and against all DEFENDANT)**

106. PLAINTIFF, and the other members of the CALIFORNIA CLASS, reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

107. Cal. Labor Code Sections 246(l)(1) mandates that "[p]aid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek."

108. From time-to-time, during the PLAINTIFF and other members of the CALIFORNIA CLASS were compensated at an hourly rate plus bonuses. As a matter of law, the bonus compensation received by PLAINTIFF and other members of the CALIFORNIA CLASS must be included in the "regular rate of pay."

109. From time-to-time during the CLASS PERIOD, in those pay periods where PLAINTIFF and other members of the CALIFORNIA LABOR SUB-CLASS earned hourly compensation and either non-discretionary incentive compensation, and took paid sick time, DEFENDANT failed to properly calculate the regular rate of pay for purposes of compensating paid sick time by omitting non-discretionary incentive pay from the regular rate of pay.

110. DEFENDANT's uniform policy and practice of omitting non-discretionary bonuses from the regular rate of pay for purposes of paying paid sick pay, resulted in the underpayment of sick pay wages to PLAINTIFF and other members of the CALIFORNIA CLASS. PLAINTIFF and other members of the CALIFORNIA CLASS therefore request recovery of all unpaid wages, including sick pay wages, according to proof, interest, statutory costs, as well as the assessment of any statutory penalties against DEFENDANT, in a sum as provided by the California Labor Code and/or other applicable statutes. To the extent sick pay is determined to be owed to other members of the CALIFORNIA LABOR SUB-CLASS who have terminated their employment, DEFENDANT's conduct also violates Labor Code §§ 201 and/or 202, and therefore these individuals are also be entitled

to waiting time penalties under Cal. Lab. Code § 203, which penalties are sought herein on behalf of other members of the CALIFORNIA LABOR SUB-CLASS. DEFENDANT'S conduct as alleged herein was willful, intentional and not in good faith. Further, PLAINTIFF and other members of the CALIFORNIA CLASS are entitled to seek and recover statutory costs.

## PRAYER FOR RELIEF

WHEREFORE, PLAINTIFF prays for judgment against DEFENDANTS as follows:

1. On behalf of the CALIFORNIA CLASS:

A) That the Court certify the First Cause of Action asserted by the CALIFORNIA CLASS as a class action pursuant to Cal. Code of Civ. Proc. § 382;

B) An order temporarily, preliminarily and permanently enjoining and restraining DEFENDANTS from engaging in similar unlawful conduct as set forth herein;

C) An order requiring DEFENDANTS to pay all wages and all sums unlawfully withheld from compensation due to PLAINTIFF and the other members of the CALIFORNIA CLASS; and,

D) Restitutionary disgorgement of DEFENDANTS's ill-gotten gains into a fluid fund for restitution of the sums incidental to DEFENDANTS's violations due to PLAINTIFF and to the other members of the CALIFORNIA CLASS.

E) That the Court certify the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action asserted by the CALIFORNIA CLASS as a class action pursuant to Cal. Code of Civ. Proc. § 382;

1. Compensatory damages, according to proof at trial, including compensatory damages for minimum wage compensation, and overtime compensation due to PLAINTIFF and the other members of the CALIFORNIA CLASS, during the applicable CALIFORNIA CLASS PERIOD plus interest thereon at the statutory rate;

2. The greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per each member of the CALIFORNIA CLASS for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000), and an award of costs for violation of Cal. Lab. Code § 226;

3. Meal and rest period compensation pursuant to California Labor Code Section 226.7, 512 and the applicable IWC Wage Order;

4. For liquidated damages pursuant to California Labor Code Sections 1194.2 and 1197; and

5. The wages of all terminated employees as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced, in accordance with Cal. Lab. Code § 203.

2. On all claims:

A) An award of interest, including prejudgment interest at the legal rate;

B) Such other and further relief as the Court deems just and equitable; and,

C) An award of penalties, attorneys' fees and cost of suit, as allowable under the law, including, but not limited to, pursuant to Labor Code §226, §1194, and/ or §2699 *et seq*.

Dated: September 12, 2021

Respectfully Submitted,
JCL LAW FIRM, A.P.C.

By: ______________________________
Jean-Claude Lapuyade
Attorneys for PLAINTIFF

**DEMAND FOR JURY TRIAL**

PLAINTIFF demands a jury trial on all issues triable to a jury.

Dated: September 12, 2021

Respectfully Submitted,
JCL LAW FIRM, A.P.C.

By: ______________________________
Jean-Claude Lapuyade
Attorneys for PLAINTIFF

# EXHIBIT 3

jcl law firm apc
EMPLOYMENT LAWYERS

5440 Morehouse Drive
Suite 3600
San Diego, CA 92121
619-599-8292
Fax 619-599-8291
Toll-Free 1-888-498-6999

December 13, 2024

**Via Online Filing to LWDA and Certified Mail to Defendant**
**Labor and Workforce Development Agency**
Online Filing

**CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.**
**CHILDREN'S DENTISTRY AND ORTHODONTICS OF FRESNO A DENTAL OFFICE OF STEVEN O'HARA, DDS, INC.**
**CHILDREN'S DENTISTRY OF BAKERSFIELD A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.**
**CHILDREN'S DENTISTRY OF MADERA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.**
**CHILDREN'S DENTISTRY OF MERCED A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.**
**CHILDREN'S DENTISTRY OF VISALIA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC.**
**O'HARA PRIETO EVANS KUNKEL DENTAL, INC.**
c/o Larsen, Fishman & Callister
Doug M. Larsen, Esq.
Michael W. Green, Esq.
*larsen@flclaw.net*
*green@flclaw.net*
***Via Electronic Mail***

| | |
|---|---|
| Case: | Toshi Magee v. Children's Dentistry and Orthodontics A Dental Office of Steven O'Hara, DDS, Jordan Prieto, DDS, Jeffrey Evans, DDS, and Jeffrey Kunkel, DDS, Inc. |
| Case No.: | 21CV-03773 |
| LWDA Case No.: | LWDA-CM-844425-21 |

**Re: Amended Notice of Violations of California Labor Code Sections 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, and 2804, Violation of Applicable Industrial Welfare Commission Wage Order(s), and Pursuant to California Labor Code Section 2699.5**

Dear Sir/Madam:

This office represents TOSHI MAGEE ("Plaintiff") and other aggrieved employees in a representative action against CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry"), CHILDREN'S DENTISTRY AND ORTHODONTICS OF FRESNO A DENTAL OFFICE OF STEVEN O'HARA, DDS, INC. ("Defendant Children's Dentistry of Fresno"), CHILDREN'S DENTISTRY OF BAKERSFIELD A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's

Dentistry of Bakersfield"), CHILDREN'S DENTISTRY OF MADERA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry of Madera"), CHILDREN'S DENTISTRY OF MERCED A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry of Merced"), CHILDREN'S DENTISTRY OF VISALIA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC. ("Defendant Children's Dentistry of Visalio"), and O'HARA PRIETO EVANS KUNKEL DENTAL, INC. ("Defendant O'Hara") (hereinafter collectively "Defendants").

**The original claim in this case was submitted to the LWDA on September 13, 2021, by Plaintiff against Defendant Children's Dentistry. Plaintiff has since identified DOE Defendants 1-6 as additional defendants who acted as Plaintiff's joint-employer:**

**DOE 1 – CHILDREN'S DENTISTRY AND ORTHODONTICS OF FRESNO A DENTAL OFFICE OF STEVEN O'HARA, DDS, INC., a California corporation**
**DOE 2 – CHILDREN'S DENTISTRY OF BAKERSFIELD A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation**
**DOE 3 – CHILDREN'S DENTISTRY OF MADERA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation**
**DOE 4 – CHILDREN'S DENTISTRY OF MERCED A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation**
**DOE 5 – CHILDREN'S DENTISTRY OF VISALIA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation**
**DOE 6 – O'HARA PRIETO EVANS KUNKEL DENTAL, INC., a California corporation**

**Therefore, the claim is amended to add Defendant Children's Dentistry of Fresno, Defendant Children's Dentistry of Bakersfield, Defendant Children's Dentistry of Madera, Defendant Children's Dentistry of Merced, Defendant Children's Dentistry of Visalio, and Defendant O'Hara as additional employers and defendants in this case. Defendant Children's Dentistry of Fresno, Defendant Children's Dentistry of Bakersfield, Defendant Children's Dentistry of Madera, Defendant Children's Dentistry of Merced, Defendant Children's Dentistry of Visalio, and Defendant O'Hara will be added to Plaintiff's complaint with Merced County Superior Court in the same manner.**

This office intends to file the enclosed amendment to the operative Complaint on behalf of Plaintiff and other similarly situated employees. The purpose of this correspondence is to provide the Labor and Workforce Development Agency with notice of alleged violations of the California Labor Code and certain facts and theories in support of the alleged violations in accordance with Labor Code section 2699.3.

Plaintiff was employed by Defendants in California from August of 2019 to October of 2020. Plaintiff was paid on an hourly basis and entitled to legally required meal and rest periods. At all times during their employment, Defendants failed to, among other things, provide Plaintiff, and all those similarly situated, with all legally mandated off-duty meal and rest periods.

As a consequence, Plaintiff contends that Defendants failed to fully compensate them, and other similarly situated and aggrieved employees, for all earned wages and failed to provide California-compliant meal and rest breaks and accurate wage statements. Accordingly, Plaintiff contends that Defendants' conduct violated Labor Code sections §§ 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, 2804, and applicable wage orders, and is therefore actionable pursuant to section 2698 *et seq*.

**Plaintiff seeks to represent a group of aggrieved employees defined as all non-exempt and exempt employees who worked for Defendants during the relevant claim period.**

True and correct copies of the operative Complaint and proposed amendment are attached hereto. The Complaint (i) identifies the alleged violations, (ii) details the facts and theories which support the alleged violations, (iii) details the specific work performed by Plaintiff, (iv) sets forth the people/entities, dates, classifications, violations, events, and actions which are at issue to the extent known to the Plaintiff, and (v) sets forth the illegal practices used by Defendants. The amendment identifies Defendant Children's Dentistry of Fresno, Defendant Children's Dentistry of Bakersfield, Defendant Children's Dentistry of Madera, Defendant Children's Dentistry of Merced, Defendant Children's Dentistry of Visalio, and Defendant O'Hara as additional employers and defendants in this case. Defendant Children's Dentistry of Fresno, Defendant Children's Dentistry of Bakersfield, Defendant Children's Dentistry of Madera, Defendant Children's Dentistry of Merced, Defendant Children's Dentistry of Visalio, and Defendant O'Hara as Doe Defendants 1-6, respectively. Plaintiff therefore incorporates the allegations of the attached Complaint and amendment into this letter as if fully set forth herein.

To the extent that entities and/or individuals are named and charged with violations of the Labor Code—making them liable on an individual basis as permitted by numerous Labor Code Sections including, but not limited to 558, 558.1, and 1197.1—Plaintiff reserves any and all rights to add, substitute, or change the name of employer entities and/or individuals responsible for the violations at issue.

Any further amendments and changes to this notice shall relate back to the date of the original September 13, 2021, notice. Consequently, Defendants are on notice that Plaintiff continues her investigation, with the full intent to amend and/or change this notice, to add any undiscovered violations of any of the provisions of the California Labor Code—to the extent that are applicable to this case—and to change and/or add the identities of any entities and/or individuals responsible for the violations contained herein.

If the agency needs any further information, please do not hesitate to ask. The representative action lawsuit consists of other aggrieved employees. As counsel, our intention is to vigorously prosecute the claims as alleged in the operative Complaint, and to procure civil penalties as provided by the Private Attorney General Act of 2004 on behalf of Plaintiffs and all aggrieved California employees.

Your earliest response to this notice is appreciated. If you have any questions or concerns, please do not hesitate to contact me at the above number and address.

Sincerely yours,
**JCL LAW FIRM, APC**

Jean-Claude Lapuyade, Esq.
Attorney at Law

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Attorneys for Plaintiff TOSHI MAGEE

ELECTRONICALLY FILED
Merced Superior Court
3/30/2022 1:12 PM
Amanda Toste
Clerk of the Superior Court
By: Tawn Saephanh, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF MERCED**

TOSHI MAGEE, an individual, on behalf of herself, and on behalf of all persons similarly situated,

Plaintiffs,

vs.

CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California Corporation; and DOES 1 through 50, Inclusive;

Defendants.

Case No. 21CV-03773

**FIRST AMENDED REPRESENTATIVE ACTION COMPLAINT FOR:**

1. VIOLATIONS OF THE PRIVATE ATTORNEY GENERAL ACT AT LABOR CODE SECTIONS 2698 *ET SEQ.*

Plaintiff TOSHI MAGEE ("PLAINTIFF") an individual, in her representative capacity on behalf of herself, the State of California, and fellow current and former AGGRIEVED EMPLOYEES, defined *supra*, against Defendant CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., alleges on information and belief, except for her own acts and knowledge which are based on personal knowledge, the following:

**INTRODUCTION**

1. PLAINTIFF brings this representative action pursuant to the Private Attorneys General Act of 2004, California Labor Code § 2698, *et seq.* ("PAGA") on behalf of other current and former aggrieved employees of DEFENDANTS for engaging in a pattern and practice of wage and hour violations under the California Labor Code.

2. PLAINTIFF is informed and believes, and thereon alleges, that DEFENDANT decreased their employment-related costs by systematically violating California wage and hour laws.

3. DEFENDANTS' systematic pattern of wage and hour and IWC Wage Order violations toward PLAINTIFF and other aggrieved employees in California include, *inter alia*:

**a.** Failure to provide compliant meal and rest periods;

**b.** Failure to allow employees to take duty-free meal and rest periods;

**c.** Failure to pay all minimum, regular and overtime wages;

**d.** Failure to correctly calculate the regular rate of pay;

**e.** Failure to maintain true and accurate records;

**f.** Failure to reimburse employees for required expenses;

**g.** Failure to provide accurate itemized wage statements; and

**h.** Failure to timely pay wages due during, and upon termination of employment.

4. PLAINTIFF brings this representative action against DEFENDANT on behalf of herself and all other aggrieved employees of DEFENDANT in California seeking all civil penalties and unpaid wages permitted pursuant to California Labor Code § 2699, *et seq.*

5. PLAINTIFF reserves the right to name additional representatives throughout the State of California

## THE PARTIES

6. Defendant CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., ("DEFENDANT" and/or "DEFENDANTS") is a California corporation that at all relevant times mentioned herein conducted and continues to conduct substantial business in the state of California, county of Merced, and owns and operates multiple children's dentistry and orthodontics offices.

7. PLAINTIFF was employed by DEFENDANTS as a non-exempt employee, paid on an hourly basis and entitled to certain bonuses, overtime pay and legally compliant meal and rest periods and payment of minimum wages from August of 2019 to October of 2020.

8. PLAINTIFFF brings this action in her representative capacity on behalf of the State of California and on behalf of all individuals who are or previously were employed by DEFENDANT in California who suffered one or more Labor Code violations enumerated in Labor Code §§ 2698 *et seq.* (hereinafter "AGGRIEVED EMPLOYEES") and who worked for DEFENDANTS between September 13, 2020 and the present ("PAGA PERIOD").

9. PLAINTIFF is an "AGGRIEVED EMPLOYEE" within the meaning of Labor Code § 2699(c) because she was employed by DEFENDANTS and suffered one or more of the alleged Labor Code violations committed by DEFENDANTS.

10. PLAINTIFF and all other AGRIEVED EMPLOYEES are, and at all relevant times were, employees of DEFENDANTS, within the meanings set forth in the California Labor Code and the applicable Industrial Welfare Commission Wage Order.

11. Each of the fictitiously named defendants participated in the acts alleged in this Complaint. The true names and capacities of the defendants named as DOES 1 THROUGH 50, inclusive, are presently unknown to PLAINTIFF. PLAINTIFF will amend this Complaint, setting forth the true names and capacities of these fictitiously named defendants when their true names are

This e-copy is the official court record (GC68150)

ascertained. PLAINTIFF is informed and believes, and on that basis alleges, that each of the fictitious defendants have participated in the acts alleged in this Complaint.

12. DEFENDANT, including DOES 1 THROUGH 50 (hereinafter collectively "DEFENDANTS"), were PLAINTIFF's employers or persons acting on behalf of PLAINTIFF's employer, within the meaning of California Labor Code § 558, who violated or caused to be violated, a section of Part 2, Chapter 1 of the California Labor Code or any provision regulating hours and days of work in any order of the Industrial Welfare Commission and, as such, are subject to civil penalties for each underpaid employee, as set forth in Labor Code § 558, at all relevant times.

13. DEFENDANTS were PLAINTIFF's employer or persons acting on behalf of PLAINTIFF's employer either individually or as an officer, agent, or employee of another person, within the meaning of California Labor Code § 1197.1, who paid or caused to be paid to any employee a wage less than the minimum fixed by California state law, and as such, are subject to civil penalties for each underpaid employee.

**JOINT EMPLOYER**

14. The Private Attorney General Act ("PAGA"), permits an aggrieved employee to enforce any provision of the California Labor Code that provides for a civil penalty. (*Lab. Code* § 2699(a).)

15. Section 558 of the California Labor Code provides that "any employer *or other person* acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commissions shall be subject to a civil penalty…" (*Lab. Code* § 558(a).);

16. Section 1197.1 of the Labor Code provides that "[a]ny employer *or other person* acting either individually or as 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…" (*Lab. Code* § 1197.1(a).)

17. Interpreting Sections 558 and 1197.1 of the Labor Code, California courts have held that a corporate employer's owners, officers and directors, are subject to civil penalties for the employer's failure to pay appropriate wages to its employees, and, since liability under either 558 or 1197.1 does not depend on a finding of an alter ego, no alter ego allegations or findings are necessary. *Atempa v.*

*Pedrazzani,* (2018) 27 Cal.App.5th 809; see generally *Ochoa-Hernandez v. Cjaders Food, Inc.* (2009 WL 1404694); *Thurman v. Bayshore Management, Inc.* (2017) 203 Cal.App.4th 1112, 1145-1146.

18. PLAINTIFF is informed and believes, and thereon alleges, that DEFENDANTS, and each of them, are subject to civil penalties for their failure to pay PLAINTIFF and the aggrieved employees the appropriate wages as complained of herein and proximately caused the complaints, injuries, and damages alleged herein.

19. At all relevant times, each Defendant, whether named or fictitious, was the agent, employee or other person acting on behalf of each other Defendant, and, in participating in the acts alleged in this Complaint, acted within the scope of such agency or employment and ratified the acts of the other.

20. Each Defendant, whether named or fictitious, exercised control over PLAINTIFF's wages, working hours, and/or working conditions.

21. Each Defendant, whether named or fictitious, acted in all respects pertinent to this action as the agent of the other DEFENDANTS, carried out a joint scheme, business plan or policy, and the acts of each Defendant are legally attributable to the other DEFENDANT.

**JURISDICTION AND VENUE**

22. This Court has jurisdiction over this Action pursuant to California Code of Civil Procedure, Section 410.10 and California Business & Professions Code, Section 17203. This Court has jurisdiction over PLAINTIFF's claims for civil penalties under the Private Attorney General Act of 2004, California Labor Code §2698, *et seq.*.

23. Venue is proper in this Court pursuant to California Code of Civil Procedure, Sections 395 and 395.5, because PLAINTIFF worked in this County for DEFENDANTS, resides in this County, and DEFENDANTS (i) currently maintains and at all relevant times maintained offices and facilities in this County and/or conducts substantial business in this County, and (ii) committed the wrongful conduct herein alleged in this County against PLAINTIFF and the AGGRIEVED EMPLOYEES.

**THE CONDUCT**

24. In violation of the applicable sections of the California Labor Code and the requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANTS as a matter of company

policy, practice and procedure, intentionally, knowingly and systematically failed to provide legally compliant meal and rest periods, failed to accurately compensate PLAINTIFF and the other AGGRIEVED EMPLOYEES for missed meal and rest periods, failed to pay PLAINTIFF and the other AGGRIEVED EMPLOYEES for all time worked, failed to pay PLAINTIFF and the other AGGRIEVED EMPLOYEES overtime at the regular rate, failed to compensate PLAINTIFF and other AGGRIEVED EMPLOYEES meal rest premiums at the regular rate, and failed to issue to PLAINTIFF and the AGGRIEVED EMPLOYEES with accurate itemized wage statements showing, among other things, all applicable hourly rates in effect during the pay periods and the corresponding amount of time worked at each hourly rate. DEFENDANTS' uniform policies and practices are intended to purposefully avoid the accurate and full payment for all time worked as required by California law which allows DEFENDANTS to illegally profit and gain an unfair advantage over competitors who comply with the law. To the extent equitable tolling operates to toll claims by the AGGRIEVED EMPLOYEES against DEFENDANTS, the PAGA PERIOD should be adjusted accordingly.

**A. <u>Meal Period Violations</u>**

25. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANTS were required to pay PLAINTIFF and AGGRIEVED EMPLOYEES for all their time worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work. From time-to-time during the PAGA PERIOD, DEFENDANTS required PLAINTIFF and AGGRIEVED EMPLOYEES to work without paying them for all the time they were under DEFENDANTS' control. Specifically, as a result of PLAINTIFF's demanding work requirements and DEFENDANT'S understaffing, DEFENDANTS required PLAINTIFF to work while clocked out during what was supposed to be PLAINTIFF's off-duty meal break. PLAINTIFF was from time to time interrupted by work assignments while clocked out for what should have been PLAINTIFF's off-duty meal break. Indeed, there were many days where PLAINTIFF did not even receive a partial lunch. As a result, the PLAINTIFF and other AGGRIEVED EMPLOYEES forfeited minimum wage and overtime wages by regularly working without their time being accurately recorded and without compensation at the applicable minimum wage and overtime

rates. DEFENDANTS' uniform policy and practice not to pay PLAINTIFF and other AGGRIEVED EMPLOYEES for all time worked is evidenced by DEFENDANTS' business records.

26. From time-to-time during the PAGA PERIOD, as a result of their rigorous work schedules, and DEFENDANTS' inadequate staffing practices, PLAINTIFF and other AGGRIEVED EMPLOYEES were from time to time unable to take thirty (30) minute off-duty meal breaks and were not fully relieved of duty for their meal periods. PLAINTIFF and other AGGRIEVED EMPLOYEES were required from time to time to perform work as ordered by DEFENDANTS for more than five (5) hours during some shifts without receiving a meal break. Further, DEFENDANTS from time to time failed to provide PLAINTIFF and AGGRIEVED EMPLOYEES with a second off-duty meal period for some workdays in which these employees were required by DEFENDANTS to work ten (10) hours of work from time to time. The nature of the work performed by PLAINTIFF and other AGGRIEVED EMPLOYEES does not qualify for limited and narrowly construed "on-duty" meal period exception. When they were provided with meal periods, PLAINTIFF and other AGGRIEVED EMPLOYEES were, from time to time, required to remain on duty and on call. PLAINTIFF and other AGGRIEVED EMPLOYEES therefore forfeited meal breaks without additional compensation and in accordance with DEFENDANTS' strict corporate policy and practice.

**B. <u>Rest Period Violations</u>**

27. From time-to-time during the PAGA PERIOD, PLAINTIFF and other AGGRIEVED EMPLOYEES were also required from time to time to work in excess of four (4) hours without being provided ten (10) minute rest periods as a result of their rigorous work schedule, being required to take orders, receive payments, expedite services, provide janitorial services, and DEFENDANTS' inadequate staffing. Further, for the same reasons these employees were denied their first rest periods of at least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours from time to time, a first and second rest period of at least ten (10) minutes for some shifts worked of between six (6) and eight (8) hours from time to time, and a first, second and third rest period of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time. When they were provided with rest breaks, PLAINTIFF and other AGGRIEVED EMPLOYEES were, from time to time, required to remain on DEFENDANTS' premises, on duty and/or on call. PLAINTIFF and other AGGRIEVED

EMPLOYEES were also not provided with one-hour wages in lieu thereof. As a result of their rigorous work schedules and DEFENDANTS' inadequate staffing, PLAINTIFF and other AGGRIEVED EMPLOYEES were from time to time denied their proper rest periods by DEFENDANTS and DEFENDANTS' managers.

**C. Regular Rate Violation – Overtime, Double Time, Meal and Rest Period Premiums, and Sick Pay**

28. From time-to-time during the PAGA PERIOD, DEFENDANTS failed and continue to fail to accurately calculate and pay PLAINTIFF and the other AGGRIEVED EMPLOYEES for their overtime hours worked, meal and rest period premiums, and sick pay. As a result, PLAINTIFF and the other AGGRIEVED EMPLOYEES forfeited wages due to them for working overtime without compensation at the correct overtime, meal and rest period premium, and sick pay rates. DEFENDANTS' uniform policy and practice to not pay the AGGRIEVED EMPLOYEES the correct overtime rate for all overtime worked, meal and rest period premiums, and sick pay in accordance with applicable law is evidenced by DEFENDANTS' business records.

29. State law provides that employees must be paid overtime at one-and-one-half times their "regular rate of pay." PLAINTIFF and other AGGRIEVED EMPLOYEES were compensated at an hourly rate plus incentive pay that was tied to specific elements of an employee's performance.

30. DEFENDANTS' non-discretionary bonus program provided the AGGRIEVED EMPLOYEES, including PLAINTIFF, with bonus compensation when the company met the various performance goals set by DEFENDANT. For example, DEFENDANT paid a bonus identified as the "Shaw Ave Bonus." However, when calculating the regular rate of pay, in those pay periods where PLAINTIFF and the AGGRIEVED EMPLOYEES worked overtime and earned non-discretionary bonus compensation, DEFENDANT failed to accurately include the non-discretionary bonus compensation as part of the employees' "regular rate of pay."

31. In other instances, when calculating the regular rate of pay, in those pay periods where PLAINTIFF and the AGGRIEVED EMPLOYEES worked overtime and earned this non-discretionary bonus, DEFENDANT failed to (1) accurately include the non-discretionary bonus compensation into

the regular rate of pay and/or (2) calculated all hours worked rather than just all non-overtime hours worked into the regular rate of pay in violation of *Alvarado v. Dart* (2018) 4 Cal.5th 542.

32. As a matter of law, the incentive and commission compensation received by PLAINTIFFS and other AGGRIEVED EMPLOYEES must be included and correctly calculated into the "regular rate of pay" for purposes of overtime compensation, meal and rest period premiums, and sick pay. DEFENDANTS' failure to do so has resulted in DEFENDANTS' systematic underpayment of overtime compensation, meal and rest period premiums, and sick pay to PLAINTIFF and other AGGRIEVED EMPLOYEES. Specifically, California Labor Code Section 246 mandates that paid sick time for non-employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the non-exempt employee uses paid sick time, whether or not the employee actually works overtime in that workweek. DEFENDANTS' conduct, as articulated herein, by failing to include the incentive compensation as part of the "regular rate of pay" for purposes of sick pay compensation was in violation of Cal. Lab. Code § 246.

33. In violation of the applicable sections of the California Labor Code and the requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANTS as a matter of company policy, practice and procedure, intentionally and knowingly failed to compensate PLAINTIFF and the other AGGRIEVED EMPLOYEES at the correct rate of pay for all overtime worked and sick pay. This uniform policy and practice of DEFENDANTS is intended to purposefully avoid the payment of the correct overtime, meal and rest period premiums, and sick pay compensation as required by California law which allowed DEFENDANTS to illegally profit and gain an unfair advantage over competitors who complied with the law. To the extent equitable tolling operates to toll claims by the AGGRIEVED EMPLOYEES against DEFENDANTS, the PAGA PERIOD should be adjusted accordingly

**D. <u>Wage Statement Violations</u>**

34. California Labor Code Section 226 requires an employer to furnish its employees an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked, (3) the number of piece-rate units earned and any applicable piece-rate, (4) all deductions, (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 the employee's 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 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.

35. From time-to-time during the PAGA PERIOD, when PLAINTIFF and other AGGRIEVED EMPLOYEES missed meal and rest breaks, or were paid inaccurate overtime, missed meal and rest period premiums and sick pay, or were not paid for all hours worked, DEFENDANTS also failed to provide PLAINTIFF and other AGGRIEVED EMPLOYEES with complete and accurate wage statements which failed to show, among other things, the total hours worked and all applicable hourly rates in effect during the pay period and the corresponding amount of time worked at each hourly rate, correct rates of pay for penalty payments or missed meal and rest periods.

36. In addition to the violations described above, DEFENDANTS, from time to time, failed to provide PLAINTIFF and the AGGRIEVED EMPLOYEES with wage statements that comply with Cal. Lab. Code § 226, including failing to provide the accurate total number of hours worked in each pay period. As a result, DEFENDANTS issued PLAINTIFF and the other AGGRIEVED EMPLOYEES with wage statements that violate Cal. Lab. Code § 226. Further, DEFENDANTS' violations are knowing and intentional, were not isolated or due to an unintentional payroll error due to clerical or inadvertent mistake.

37. Specifically, as to PLAINTIFF, PLAINTIFF was from time to time unable to take off duty meal and rest breaks and was not fully relieved of duty for her rest and meal periods. PLAINTIFF was required to perform work as ordered by DEFENDANTS for more than five (5) hours during a shift without receiving an off-duty meal break. Further, DEFENDANTS failed to provide PLAINTIFF with a second off-duty meal period each workday in which she was required by DEFENDANT to work ten (10) hours of work. When DEFENDANTS provided PLAINTIFF with a meal and/or rest break, they required PLAINTIFF to remain on the premises, on-duty and on-call, for the meal and/or rest break. PLAINTIFF therefore forfeited meal and rest breaks without additional compensation and in accordance with DEFENDANTS' strict corporate policy and practice. Moreover, DEFENDANTS also provided PLAINTIFF with a paystub that failed to comply with Cal. Lab. Code § 226. To date,

DEFENDANTS have not fully paid PLAINTIFF the minimum, overtime and double time compensation still owed to her or any penalty wages owed to her under Cal. Lab. Code § 203. The amount in controversy for PLAINTIFF individually does not exceed the sum or value of $75,000

**FIRST CAUSE OF ACTION**

**For Civil Penalties Pursuant to Private Attorneys General Act ("PAGA")**

**[Cal. Lab. Code §§ 2698, et seq.]**

**(By PLAINTIFF and AGGRIEVED EMPLOYEES and Against All DEFENDANTS)**

38. PLAINTIFF and the AGGRIEVED EMPLOYEES reallege and incorporate by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

39. PAGA is a mechanism by which the State of California itself can enforce state labor laws through the employee suing under the PAGA who do so as the proxy or agent of the state's labor law enforcement agencies. An action to recover civil penalties under PAGA is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. The purpose of the PAGA is not to recover damages or restitution, but to create a means of "deputizing" citizens as private attorneys general to enforce the Labor Code. In enacting PAGA, the California Legislature specified that "it was ... in the public interest to allow aggrieved employees, acting as private attorneys general to recover civil penalties for Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA claims cannot be subject to arbitration.

40. PLAINTIFF brings this Representative Action on behalf of the State of California with respect to herself and all other current and former AGGRIEVED EMPLOYEES employed by DEFENDANTS during the PAGA PERIOD.

41. At all relevant times, for the reasons described herein, and others, PLAINTIFF and the AGGRIEVED EMPLOYEES were aggrieved employees of DEFENDANTS within the meaning of Labor Code Section 2699(c).

42. Labor Code Sections 2699(a) and (g) authorize an AGGRIEVED EMPLOYEE, like PLAINTIFF, on behalf of herself and other current or former employees, to bring a civil action to recover civil penalties pursuant to the procedures specified in Labor Code Section 2699.3

43. PLAINTIFF complied with the procedures for bringing suit specified in Labor Code

Section 2699.3. By certified letter, return receipt requested, dated September 13, 2021, PLAINTIFF gave written notice to the Labor and Workforce Development Agency ("LWDA") and to DEENDANTS of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

44. As of the date of this complaint, more than sixty-five (65) days after serving the LWDA with notice and amended notice of DEFENDANTS' violations, the LWDA has not provided any notice by certified mail of its intent to investigate the DEFENDANTS' alleged violations as mandated by Labor Code Section 2699.3(a)(2)(A). Accordingly, pursuant to Labor Code Section 2699.3(a)(2)A, PLAINTIFF may commence and is authorized to pursue this cause of action.

45. To the extent that it applies, PLAINTIFF invokes the tolling permitted pursuant to the California State Judicial Counsel amended Rule of Court, Emergency Rule Number 9, tolled the statute of limitation and statutes of repose from April 6, 2020 to either (a) August 3, 2020 for statutes of limitation and repose for civil causes of action that are 180 days or less, of (b) October 1, 2020 for statutes of limitation and repose for civil causes of action that exceed 180 days.

46. Pursuant to Labor Code Sections 2699(a) and (f), PLAINTIFF and the AGGRIEVED EMPLOYEES are entitled to civil penalties for DEFENDANTS' violations of Labor Code Section 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14 1198, 1199, 2802, and 2804 in the following amounts:

a. For violation of Labor Code Sections 201, 202, 203, and 204, one hundred dollars ($100) for each AGGRIEVED EMPLOYEE per pay period for the initial violation and two hundred dollars ($200) for AGGIEVED EMPLOYEE per pay period for each subsequent violation [penalty per Labor Code Section 2699(f)(2)];

b. For violations of Labor Code Section 226(a), a civil penalty in the amount of two hundred fifty dollars ($250) for each AGGRIEVED EMOPLOYEE for any initial violation and one thousand dollars for each subsequent violation [penalty per Labor Code Section 226.3];

c. For violations of Labor Code Sections 204, a civil penalty in the amount of one hundred dollars ($100) for each AGGRIEVED EMPLOYEE for any initial violation and two hundred dollars ($200) for AGGIEVED EMPLOYEE for each subsequent violation [penalty per Labor Code Section 210];

d. For violations of Labor Code Sections 226.7, 510 and 512, a civil penalty in the amount of fifty dollars ($50) for each underpaid AGGRIEVED EMPLOYEE for the initial violation and hundred dollars ($100) for each underpaid AGGIEVED EMPLOYEE for each subsequent violation [penalty per Labor Code Section 558];

e. For violations of Labor Code Section 2269(a), a civil penalty in the amount of two hundred fifty dollars ($250) per AGGRIEVED EMPLOYEE per violation in an initial citation and one thousand dollars ($1,000) per AGGRIEVED EMPLOYEE for each subsequent violation [penalty per Labor Code Section 226.3];

f. For violations of Labor Code Section 1174(d), a civil penalty in the amount of five hundred ($500) dollars for per AGGRIEVED EMPLOYEE [penalty per Labor Code Section 1174.5].

g. For violations of Labor Code Sections 1194, 1194.2, 1197, 1198 and 1199, a civil penalty in the amount of one hundred dollars ($100) per AGGRIEVED EMPLOYEE per pay period for the initial violation and two hundred dollars fifty ($250) per AGGIEVED EMPLOYEE per pay period for each subsequent violation [penalty per Labor Code Section].

47. For all provisions of the Labor Code for which civil penalty is not specifically provided, Labor Code § 2699(f) imposes upon Defendant a penalty of one hundred dollars ($100) for each AGGRIEVED EMPLOYEE per pay period for the initial violation and two hundred dollars ($200) for each AGGRIEVED EMPLOYEE per pay period for each subsequent violation. PLAINTIFF and the AGGRIEVED EMPLOYEES are entitled to an award of reasonable attorney's fees and costs in connection with their claims for civil penalties pursuant to Labor Code Section 2699(g)(1).

48. To the extent that any of the conduct and violations alleged herein did not affect PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that affected other AGGRIEVED EMPLOYEES. (*Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 519; See also *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th 745, 751 ["PAGA allows an "aggrieved employee"—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer."], Emphasis added, reh'g denied (June 13, 2018).)

**PRAYER FOR RELIEF**

WHEREFORE**,** PLAINTIFF prays for judgment against DEFENDANT as follows:

(a) For reasonable attorney's fees and costs of suit to the extent permitted by law, including pursuant to Labor Code § 2699, *et seq.*;

(b) For civil penalties to the extent permitted by law pursuant to the Labor Code under the Private Attorneys General Act; and

For such other relief as the Court deems just and proper.

Dated: March 30, 2022

Respectfully Submitted,
JCL LAW FIRM, A.P.C.

By: ______________________________
Jean-Claude Lapuyade
Attorneys for PLAINTIFF

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Attorneys for PLAINTIFF TOSHI MAGEE

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY MERCED**

| | |
|---|---|
| TOSHI MAGEE, an individual, on behalf of herself, and on behalf of all persons similarly situated,<br>Plaintiff,<br>v.<br><br>CHILDREN'S DENTISTRY AND ORTHODONTICS A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California Corporation; and DOES 1 through 50, Inclusive;<br>Defendants. | Case No.: 21CV-03773<br><br>**AMENDMENT TO THE COMPLAINT TO ADD DOE DEFENDANTS 1-6**<br><br>Action Filed: November 17, 2021<br><br>Judge: Hon. Mark V. Bacciarini<br>Dept.: 8 |

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

Plaintiff TOSHI MAGEE, having learned the true name of the Defendants designated in the operative Complaint as DOE 1-6, hereby substitutes the true names for the fictitious names wherever they appear in the operative Complaint as follows:

DOE 1 – CHILDREN'S DENTISTRY AND ORTHODONTICS OF FRESNO A DENTAL OFFICE OF STEVEN O'HARA, DDS, INC., a California corporation

DOE 2 – CHILDREN'S DENTISTRY OF BAKERSFIELD A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation

DOE 3 – CHILDREN'S DENTISTRY OF MADERA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation

DOE 4 – CHILDREN'S DENTISTRY OF MERCED A DENTAL OFFICE OF STEVEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation

DOE 5 – CHILDREN'S DENTISTRY OF VISALIA A DENTAL OFFICE OF STEPHEN O'HARA, DDS, JORDAN PRIETO, DDS, JEFFREY EVANS, DDS, AND JEFFREY KUNKEL, DDS, INC., a California corporation

DOE 6 – O'HARA PRIETO EVANS KUNKEL DENTAL, INC., a California corporation

DATED: December 13, 2024

Respectfully Submitted,

**ZAKAY LAW GROUP, APLC**

By:______________________

Shani O. Zakay, Esq.

Attorney for Plaintiff

# EXHIBIT 4

# EXHIBIT 5

APEX
CLASS ACTION ADMINISTRATION

**Quotation Request:**
Rachel Newman
Zakay Law Group, APC
rachel@zakaylaw.com
619.255.9047

| | |
|---|---|
| **Case Name:** | **Magee v. Children's Dentistry and Orthodontic** |
| Date: | Tuesday, December 17, 2024 |
| RFP Number: | 11780011 |

**Prepared By:**
Sean Hartranft
Apex Class Action LLC
Sean@apexclassaction.com
949.878.3676

| Settlement Specifications | |
|---|---|
| **Number of Aggrieved Employees** | **230** |
| **Certified Language Translation:** | **Yes** |
| **Static Settlement Website** | **No** |
| **Percentage of Undeliverable Mail** | **20%** |

| Professional Services | Fee Calculation | Rate(s) | Quantity | Estimated Cost |
|---|---|---|---|---|
| **Data Analytics and Standardization** | | | | |
| Import and Standardize Data* | Per Hour | $125.00 | 1 | $125.00 |
| Data Analyst | Per Hour | $150.00 | 1 | $150.00 |
| *Data provided must be in a workable format. Apex can standardize provided data at an additional cost of $150/hr. | | | | |
| | | | Sub Total: | $275.00 |
| **Project Management** | | | | |
| Project Management | Per Hour | $150.00 | 2 | $300.00 |
| Project Coordinator | Per Hour | $90.00 | 2 | $180.00 |
| Data Analyst and Reporting | Per Hour | $140.00 | 1 | $140.00 |
| | | | Sub Total: | $620.00 |
| **Toll-Free Contact Center, Website, Reporting & Pre-Distribution** | | | | |
| Form Set Up | Per Hour | $120.00 | 1 | $120.00 |
| Bilingual Toll-Free Contact Center | Static Rate | $60.00 | 1 | $60.00 |
| NCOA Address Update (USPS) | Static Rate | $50.10 | 1 | $50.10 |
| Certified Language Translation: Spanish | Static Rate | $750.00 | 1 | $750.00 |
| Settlement Status Reports | Static Rate | $750.00 | 1 | Waived |
| | | | Sub Total: | $980.10 |

APEX
CLASS ACTION ADMINISTRATION

| Professional Services | Fee Calculation | Rate(s) | Quantity | Estimated Cost |
|---|---|---|---|---|
| **Distribution & Settlement Fund Management** | | | | |
| Settlement Calculations | Per Hour | $120.00 | 2 | $240.00 |
| Account Management and Reconciliation | Per Hour | $140.00 | 2 | $280.00 |
| Print & Mail Distribution Settlement Check (IRS Form 1099 if applicable) | Per Piece | $1.50 | 230 | $345.00 |
| USPS First Class Postage | Per Piece | $0.73 | 230 | $167.90 |
| Remail Distribution to Updated Address (Skip Trace) | Per Piece | $2.00 | 46 | $92.00 |
| Individual Income Tax Preparation & Reporting | Per Hour | $100.00 | 5 | $500.00 |
| QSF Income Tax Reporting (per calendar year) | Per Year | $750.00 | 1 | $750.00 |
| | | | | |
| | | | Sub Total: | $2,374.90 |
| **Post Distribution Reconciliation** | | | | |
| Bank Account Reconciliation | Per Hour | $135.00 | 1 | $135.00 |
| Project Management Reconciliation | Per Hour | $100.00 | 1 | $100.00 |
| Declarations | Per Hour | $120.00 | 2 | $240.00 |
| | | | | |
| | | | Sub Total: | $475.00 |
| | | | **TOTAL ESTIMATED AMOUNT:** | **$4,725.00** |
| | | | **DISCOUNTED WILL NOT EXCEED:** | **$4,125.00** |

Thank you for your business!

CLASS ACTION ADMINISTRATION

# Terms & Conditions

The following Terms and Conditions govern the provision of all services to be provided by Apex Class Action and its affiliates ("Apex") to the Client. These terms and conditions are binding and shall apply to all services provided by Apex in relation to any related services or products.

1. Services: Apex commits to providing the Client with the administrative services detailed in the attached Proposal (the "Services").

2. Payment Terms: As compensation for the legal services to be provided, the Client agrees to pay Apex all fees detailed in the Proposal. The fees quoted in the Proposal (and any subsequent proposals for additional services) are estimates based on the information provided to Apex by the Client. Apex makes no representation that the estimated fees in the Proposal or any subsequent proposals for additional services shall equal the actual fees charged by Apex to the Client, which fees (including individual line items) may be greater or less than estimated. If additional services are requested on an hourly basis and are not specifically detailed in the Proposal, Apex will prepare estimates for such services subject to approval by the Client. In the performance of such additional services, Apex will charge standard hourly fees which shall apply.

3. Incurred Expenses: In relation to the provision of services outlined in this agreement, the Client agrees to reimburse Apex for all reasonable out-of-pocket expenses incurred. Such expenses may include, but are not limited to, costs associated with postage, media production or publication, banking fees, brokerage fees, messenger and delivery service expenses, travel expenses, filing fees, office supplies, meals, staff overtime expenses, and other related costs and expenses. If not otherwise specified in writing, fees for print notice and certain expenses, such as media publication and postage, must be paid immediately upon invoicing and, in certain cases, at least ten (10) days prior to the date on which such expenses will be incurred.

4. Invoicing: Apex shall present invoices for its fees and expenses on a monthly basis, except as provided in Section 3. The Client agrees to pay each invoice within 30 days of receipt. In the event of non-payment within 90 days of the billing date, an additional service charge of 1.5% per month may apply. Apex reserves the right to increase its prices, charges, and rates annually, subject to reasonable adjustments. If any price increases exceed 10%, Apex shall give thirty (30) days' notice to the Client. In the event of any unpaid invoices beyond 120 days of the due date, Apex reserves the right to withhold services and reports until payment is received, subject to notice to the Client. It is important to note that Apex's failure to provide services and reports in such instances shall not constitute a default under this agreement.

5. Case Duration: The duration of these Terms and Conditions, except for the data storage obligations stated in Section 13, shall be in effect until 30 days following the completion of the Services as described in the Proposal. The parties may extend these Terms and Conditions in writing for a mutually agreed-upon period beyond this initial 30-day period.

6. Termination of Services: Either party may terminate the Services by providing thirty (30) days written notice to the other party. Alternatively, termination may occur immediately upon written notice for Cause, as defined below. Cause means (I) Apex's gross negligence or willful misconduct that causes serious and material harm to the Client; (ii) the Client's failure to pay Apex invoices for more than one hundred twenty (120) days from the date of the invoice; or (iii) the accrual of invoices or unpaid services where Apex reasonably believes it will not be paid. Termination of the Services shall not relieve the Client of its obligation to pay Apex for services rendered prior to the termination.

7. Independent Contractor: As an independent contractor, Apex will provide services under the terms of this agreement. It is agreed that neither Apex nor any of its employees will be considered an employee of the Client. Consequently, Apex and its employees will not be eligible for any benefits provided by the Client to its employees. The Client will not make any tax deductions from the payments due to Apex for state or federal tax purposes. Apex will be solely responsible for paying all taxes and other payments due on payments received from the Client under this agreement.

8. Apex warrants that the Services outlined in the Proposal will be performed in accordance with the standards generally adhered to by professionals providing similar services. It is acknowledged that the Services may entail the likelihood of some human and machine errors, omissions, delays, and losses that may result in damage. However, Apex shall not be held liable for such errors, omissions, delays, or losses unless they are caused by its gross negligence or willful misconduct. In the event of any breach of this warranty by Apex, the Client's sole remedy will be limited to Apex's rerunning, at its expense, any inaccurate output provided that such inaccuracies occurred solely as a result of Apex's gross negligence or willful misconduct under this agreement.

9. Limitation of Liability: The Client acknowledges that Apex shall not be held liable for any consequential, special, or incidental damages incurred by the Client in relation to the performance of Services, whether the claim is based on breach of warranty, contract, tort (including negligence), strict liability, or any other grounds. Under no circumstances shall Apex's liability to the Client, for any Losses (including court costs and reasonable attorney’s fees), arising out of or in connection with these Terms and Conditions, exceed the total amount charged or chargeable to the Client for the specific service(s) that caused the Losses.

10. Indemnification: The Client agrees to indemnify and hold harmless Apex from any losses, suits, actions, judgments, fines, costs, liabilities, or claims arising from any action or proceeding relating to the Services provided by Apex, regardless of whether or not it results in liability (collectively referred to as "Indemnified Claims"). However, this indemnification provision shall not apply to the extent that such Indemnified Claims are caused by Apex's willful misconduct, gross negligence, or breach of these Terms and Conditions. This provision shall survive termination of the Services.

11. Confidentiality: Apex will uphold strict confidentiality between Apex and the Client and applies to all non-public records, documents, systems, procedures, processes, software, and other information received by either party in connection with the performance of services under these terms. Both Apex and the Client agree to keep confidential all such non-public information, including any material marked or identified as confidential or proprietary. Any such confidential information shall not be disclosed, provided, disseminated, or otherwise made available to any third party, except as required to fulfill the parties' obligations under these terms. The parties acknowledge that in the event of any request to disclose any confidential information in connection with a legal or administrative proceeding, or otherwise to comply with a legal requirement, prompt notice of such request must be given to the other party to enable that party to seek an appropriate protective order or other remedy or to waive compliance with the relevant provisions of these terms. If the Client seeks a protective order or another remedy, Apex, at the Client's expense, will cooperate with and assist the Client in such efforts. If the Client fails to obtain a protective order or waives compliance with the relevant provisions of these terms, Apex will disclose only that portion of the confidential information that it determines it is required to disclose. This confidentiality provision shall survive termination of the services provided. Both parties acknowledge and agree that any breach of this these terms may cause irreparable harm to the non-breaching party and that injunctive relief may be necessary to prevent any actual or threatened breach. The terms set forth between the parties supersede all prior negotiations, understandings, and agreements between the parties concerning confidentiality. These terms may only be amended in writing and signed by both parties.

12. Ownership of the programs, system data, and materials provided by Apex to the Client during the course of providing services herein shall solely belong to Apex. It is acknowledged that fees and expenses paid by the Client do not confer any rights in such property. It is also understood that the said property is made available to the Client solely for the purpose of using it during and in connection with the services provided by Apex.

13. Apex may derive financial benefits from financial institutions in connection with the deposit and investment of funds with such institutions, including without limitation, discounts on eligible banking services and fees, and loans at favorable rates.

14. COMPLETE AGREEMENT. These Terms and Conditions, along with the attached Proposal, represent the complete agreement and understanding between the parties and override any prior agreements (whether written or oral) between Apex and the Client regarding the subject matter. Any modification to these Terms and Conditions may only be made in writing and must be signed by both Apex and the Client. The headings in this document are included for convenience only and do not alter or restrict any provisions in these Terms and Conditions. They may not be used in the interpretation of these Terms and Conditions.

15. This provision outlines the requirements for providing notice or other communication under this agreement. All such communications must be in writing and can be delivered either by personal delivery or through U.S. Mail with prepaid postage or overnight courier. Once delivered personally or sent through the mail, the notice will be considered given after five (5) days from the deposit date in the U.S. Mail. Alternatively, if sent through an overnight courier, the notice will be considered given one business day after delivery to the such courier. It's important to note that the notice must be provided to a responsible officer or principal of the Client or Apex, depending on the case.

16. Force Majeure: In the event of any failure or delay in performance due to circumstances beyond Apex's control, including but not limited to strikes, lockouts, fires, floods, acts of God or public enemy, riots, civil disorders, insurrections, war or war conditions, or interference by civil or military authorities, Apex shall not be held liable for any resulting loss or damage. The time for performance under this agreement shall be extended for a period equal to the duration of the disabling cause and a reasonable time thereafter. This provision shall constitute a force majeure clause and shall be construed accordingly.

17. The applicable state and federal laws shall govern the interpretation and enforcement of these Terms and Conditions. No choice of law or conflict of laws provisions shall affect this governing law provision.

18. Severability: This applies to all clauses and covenants contained within these Terms and Conditions. In the event that any clause or covenant is deemed invalid, illegal, or unenforceable, the remaining provisions shall remain valid and enforceable to the fullest extent permissible by law. The validity, legality, and enforceability of the remaining provisions shall in no way be affected or impaired by the invalidity, illegality, or unenforceability of any provision deemed so.

19. Nonwaiver: This applies to these Terms and Conditions. This means that any failure by one party to enforce a provision of these terms on one or more occasions shall not be construed as a waiver of that provision. In other words, any failure to enforce a provision does not give up the right to enforce it in the future. All provisions of these Terms and Conditions remain in full force and effect, regardless of any prior failure to enforce them.