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13
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16 **IN THE UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 **Francis Costa, Amanda Hoffman, and Olivia**
19 **McIlravy-Ackert individually and on behalf**
20 **of others similarly situated,**

21 **Plaintiffs,**

22 **v.**

23 **Apple, Inc.,**

24 **Defendant.**

Case No. 3:23-CV-01353-WHO

**THIRD AMENDED CLASS AND
COLLECTIVE ACTION
COMPLAINT FOR DAMAGES,
RESTITUTION, AND OTHER
RELIEF**

**(1) Failure to Pay Overtime
Compensation in Violation of
the Fair Labor Standards Act
(29 U.S.C. § 201, et seq.)**

**(2) Failure to Pay Overtime
Compensation in Violation of
California Labor Law (Lab.
Code §§ 510, 1194, and 1198,
and California IWC Wage
Order(s))**

(3) Failure to Provide Itemized

**Wage Statements in Violation
of the California Labor Code
(Lab. Code § 226)**

**(4) Failure to Pay Earned Wages Upon
Discharge, Waiting Time Penalties
in Violation of California Labor
Code (Lab. Code §§ 201-203)**

**(5) Violation of California Business
and Professions Code § 17200, *et
seq.***

**(6) Unpaid Overtime Under New York
Law in Violation of NYCRR § 142-
2.2; New York Labor Law, Article
19 § 650, *et seq.***

**(7) Civil Penalties Pursuant to the
California Private Attorneys’
General Act (Lab. Code § 2698, *et
seq.*)**

PRELIMINARY STATEMENT

1. This is a putative class and collective action brought by Francis Costa, Amanda Hoffman, and Olivia McIlravy-Ackert (“Plaintiffs”), on behalf of themselves and the nationwide Fair Labor Standards Act (“FLSA”) Collective and by Plaintiffs Hoffman and McIlravy-Ackert on behalf of the proposed California Class, and by Plaintiff McIlravy-Ackert on behalf of the proposed New York Class. Plaintiffs and the putative class and collective members are or were employed by Apple, Inc. (“Defendant”) as non-exempt employees eligible for compensation in the form of restricted stock units (“RSUs”) and were denied proper compensation as required by federal and state wage and hour laws. These employees are similarly situated under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b) and Rule 23 of the Federal Rules of Civil Procedure.

2. The FLSA Collective is made up of all employees Defendant classified as non-exempt/overtime eligible who Defendant paid compensation in the form of RSUs who worked for Defendant at any time within three years prior to this action’s filing date through the trial of this action (the “Collective Period”).

3. The California Class is made up of employees Defendant classified as non-exempt/overtime eligible who Defendant paid compensation in the form of RSUs who worked for Defendant in the state of California at any time within four years prior to this action’s filing date

1 through the trial of this action (the “California Class Period”).

2 4. The New York Class is made up of employees Defendant classified as non-
3 exempt/overtime eligible who Defendant paid compensation in the form of RSUs who worked for
4 Defendant in the state of New York at any time within six years prior to this action’s filing date
5 through the trial of this action (the “New York Class Period”).

6 5. During the Collective Period, Defendant improperly calculated non-exempt
7 employees’ regular rate of pay, and therefore failed to pay proper overtime compensation to
8 Plaintiffs and each member of the FLSA Collective as required by federal law. Plaintiffs seek relief
9 for themselves and for the FLSA Collective to remedy Defendant’s failure to pay appropriate
10 overtime compensation.

11 6. During the California Class Period, Defendant improperly calculated non-exempt
12 employees’ regular rate of pay, and therefore failed to pay overtime compensation to Plaintiffs
13 Hoffman and McIlravy-Ackert and each member of the California Class as required by California
14 law. As a result of this failure to pay proper overtime, Defendant failed to pay all wages due at
15 separation. Defendant also failed to provide complete and accurate wage statements. Plaintiffs
16 Hoffman and McIlravy-Ackert seek relief for themselves and the California Class under California
17 law to remedy Defendant’s failure to pay appropriate overtime and premium pay, to promptly pay
18 all wages at the time of separation, and to provide accurate wage statements, in addition to equitable
19 and injunctive relief.

20 7. During the New York Class Period, Defendant improperly calculated non-exempt
21 employees’ regular rate of pay, and therefore failed to pay overtime compensation to Plaintiff
22 McIlravy-Ackert and each member of the New York Class as required by New York law. Plaintiff
23 McIlravy-Ackert seeks relief for herself and the New York Class under New York law to remedy
24 Defendant’s failure to pay appropriate overtime and premium pay, and to promptly pay all wages
25 at the time of separation, in addition to equitable and injunctive relief.

26 8. Plaintiff Hoffman also brings this action under the California Private Attorneys
27 General Act (“PAGA”), California Labor Code §§ 2698, *et seq.*, seeking civil penalties on behalf
28 of herself and other current and former employees Defendant classified as non-exempt/overtime

1 eligible who Defendant paid compensation in the form of RSUs for Defendant’s violations of Cal.
2 Labor Code §§ 201-203, 226, 510, 1194, 1198; Cal. Wage Order No. 4, and California Business
3 and Profession Code §§ 17200, *et seq.*

4 THE PARTIES

5 *Plaintiffs*

6 9. Plaintiff Costa is a resident of North Charleston, South Carolina. Plaintiff worked
7 for Defendant in Orlando, Florida from approximately June 2015 to September 2019 and in North
8 Charleston, South Carolina from approximately September 2019 to May 2022. Plaintiff worked
9 for Defendant as an At-Home Advisor.

10 10. Plaintiff’s written Consent to Join this action is attached as **Exhibit A** and was filed
11 on March 23, 2023 as ECF No. 1–1.

12 11. Plaintiff Hoffman is a resident of Indio, California. Plaintiff worked for Defendant
13 in Palm Desert, California from approximately September 2012 to October 2022. Plaintiff worked
14 for Defendant as a “Genius” (retail sales employee/senior tech advisor) and as an At-Home Senior
15 Tech Advisor.

16 12. Plaintiff Hoffman’s written Consent to Join this action is attached as **Exhibit B** and
17 was filed on May 4, 2023 as ECF No. 32–1.

18 13. Plaintiff McIlravy-Ackert is a resident of Rancho Mirage, California. Plaintiff
19 worked for Defendant in Palm Desert, California from approximately March 2013 to January 2016
20 and Rancho Cucamonga, California from approximately January 2016 to January 2017. Plaintiff
21 worked for Defendant in Albany, New York from approximately January 2017 to August 2020.
22 Plaintiff has had various job titles during her employment, including Product Specialist;
23 Preservations & Operations Specialist Career Experience (“CE”); Technical Specialist; CoreOs
24 Storage Systems QA CE; Technical Expert; Lead CE, and Non-Leadership Sourcer CE. During
25 Plaintiff’s experience as a CoreOS Store Systems CE, she worked in California from approximately
26 May 2018 to November 2018. Plaintiff currently works for Defendant in Palm Desert, California
27 as a Genius Administrator and has worked in California since approximately August 2020 to the
28 present.

1 14. Plaintiff McIlravy-Ackert’s written Consent to Join this action is attached as **Exhibit**
2 C and was filed on May 5, 2023 as ECF No. 33–1.

3 ***Defendant***

4 15. Defendant is an American multinational technology company and is the world’s
5 largest technology company by revenue. It specializes in computer and consumer electronics and
6 produces popular digital gadgets including the Mac computer, the iPod, and the iPhone.

7 16. Defendant is a California corporation with its principal place of business located in
8 Cupertino, California.

9 17. Defendant employed Plaintiffs and other similarly situated current and former FLSA
10 Collective, California Class Members, and New York Class Members and, at all material times,
11 directly and/or indirectly, jointly or severally, controlled and directed Plaintiffs’ and the FLSA
12 Collective’s, California Class Members’, and New York Class Members’ terms of employment and
13 compensation.

14 18. Defendant had the power to control the terms and conditions of employment of
15 Plaintiffs and other similarly situated current and former FLSA Collective, California Class
16 Members, and New York Class Members, including, without limitation, those terms and conditions
17 relating to the claims alleged herein.

18 19. Defendant meets the definition of an “Enterprise Engaged in Commerce” under 29
19 U.S.C. § 203 (s)(1), as (1) it has either employees engaged in commerce or the production of goods
20 for commerce or employees handling, selling, or otherwise working on goods or materials that have
21 been moved in or produced for commerce; and (2) it has a gross volume of sales made or business
22 done of not less than \$500,000.00.

23 **JURISDICTION AND VENUE**

24 20. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, as this
25 case is brought under the FLSA, 29 U.S.C. § 201, *et seq.* Plaintiffs signed consent forms to join
26 this lawsuit, which are attached as Exhibits A, B, and C. As this case proceeds, it is likely that
27 other individuals will file consent forms to join as opt-in Plaintiffs. This Court also has
28 supplemental jurisdiction over Plaintiff Hoffman’s, Plaintiff McIlravy-Ackert’s and the California

1 Class’s state law claims and Plaintiff McIlravy-Ackert’s and the New York Class’s state law claims;
2 and Plaintiff Hoffman’s California state law PAGA claims pursuant to 28 U.S.C. § 1367.

3 21. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C.
4 § 216(b).

5 22. Defendant is subject to personal jurisdiction in California as a California
6 corporation.

7 23. Venue is proper in the United States District Court, Northern District of California,
8 pursuant to 28 U.S.C. § 1391 because Defendant is incorporated in this District and, upon
9 information and belief, a substantial part of the events giving rise to the claims occurred in this
10 district. This case is properly assigned to the San Jose Division of the Northern District.

11 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

12 24. On June 16, 2023, Plaintiff Hoffman gave written notice to the California Labor &
13 Workforce Development Agency (“LWDA”) and to Defendant of the specific Labor Code
14 violations alleged to have been violated, including the facts and theories supporting the violations.
15 Plaintiffs also notified Defendant and its Counsel by certified mail. The LWDA has not taken any
16 action with regard to the claims, including providing notice of an intent to pursue the claims, and
17 thus the sixty-five-day limit for the agency to respond has expired, such that Plaintiffs have
18 exhausted their administrative remedies. A copy of Plaintiff’s PAGA Notice is attached hereto as
19 **Exhibit D.**

20 **FACTUAL ALLEGATIONS**

21 25. During the applicable statutory period, Plaintiffs, the FLSA Collective, the
22 California Class, and the New York Class worked for Defendant as hourly paid, non-exempt
23 employees. Defendant employed Plaintiff and the FLSA Collective within the meaning of the
24 FLSA.

25 26. Plaintiffs, the FLSA Collective, the California Class, and the New York Class are
26 or were hourly-paid, non-exempt employees eligible for overtime pay.

27 27. As part of their compensation, in addition to regular hourly pay, Defendant paid
28 Plaintiffs, and, upon information and belief, the FLSA Collective, the California Class, and the

1 New York Class, compensation in the form of restricted stock units (“RSUs”).

2 28. The FLSA, California law, and New York law require covered employers, such as
3 Defendant, to compensate all non-exempt employees such as Plaintiffs, and others similarly
4 situated, at a rate of not less than 1.5 times their regular rate of pay for work performed in excess
5 of forty (40) hours per workweek (state and federal law) and/or eight (8) hours per day (California
6 state law).

7 29. Under state and federal law, an employee’s “regular rate” of pay is not limited to an
8 employee’s hourly rate. The “regular rate” also includes an hourly rate derived from other non-
9 excludable compensation.

10 30. For purposes of federal law, the regular rate on non-excludable compensation is
11 determined by dividing the non-excludable pay by the total number of hours worked during the
12 period in which that compensation was earned. Overtime is due at one-half that rate for all overtime
13 hours worked that period. This overtime pay is in addition to the overtime pay based on the
14 employee’s hourly rate.

15 31. For purposes of California and New York state law, the regular rate on non-
16 excludable pay is determined by dividing the payment by the total number of non-overtime hours
17 worked during the period in which that compensation was earned. Overtime is due at one-half
18 times that rate for overtime hours worked (and twice that rate for double-time hours worked under
19 California state law). This overtime pay is in addition to the overtime pay based on the employee’s
20 hourly rate.

21 32. Upon information and belief, Defendant paid Plaintiffs and other hourly paid, non-
22 exempt employees compensation in the form of RSUs that are earned during employment and that,
23 upon information and belief, have a one- to three-year vesting period.

24 33. Defendant maintains a common corporate policy not to include the value of vested
25 restricted stock unit compensation in the regular rates of pay of Plaintiffs, the FLSA Collective, the
26 California Class, and the New York Class.

27 34. As such, Defendant unlawfully underpaid the overtime rates of pay of Plaintiffs, the
28 FLSA Collective, the California Class, and the New York Class.

1 35. Upon information and belief, Defendant paid overtime pay to Plaintiffs, the FLSA
2 Collective, the California Class, and the New York Class without calculating the regular rate based
3 on all non-discretionary incentive pay, like RSUs. Because Defendant miscalculated the regular
4 rate, Defendant suffered and permitted Plaintiff, the FLSA Collective, the California Class, and the
5 New York Class to work more than forty (40) hours per week and/or eight (8) hours per day without
6 receiving proper overtime pay.

7 36. To meet Defendant's demands and the demands of its customers, Plaintiffs, and
8 upon information and belief, the FLSA Collective, the California Class, and the New York Class
9 routinely worked hours over forty (40) in a workweek, and California Class Members more than
10 eight (8) hours in a workday.

11 37. Defendant compensated Plaintiff Costa with RSUs that vested during the three years
12 preceding this action and the filing of Plaintiff Costa's Consent to Join form. However, Plaintiff
13 Costa's payroll records do not reflect that the value of his vested RSUs was included in Plaintiff's
14 overtime rate of pay. Plaintiff Costa's payroll records reflect that he worked hours over forty (40)
15 in several workweeks during periods between the granting and vesting of RSUs (which, upon
16 information and belief, was routinely a one- to three-year period) but do not reflect any true-up
17 payment for the increase to the overtime rate of pay due to the vested restricted stock unit
18 compensation.

19 38. For example, for the pay period with a check date of 4/17/20, Plaintiff Costa's
20 payroll records do not show that he had any vested RSUs. Plaintiff Costa worked 5.63 hours of
21 overtime during that pay period. Plaintiff Costa's regular rate of pay was \$19.29 and his overtime
22 pay rate was \$29.90. For the pay period with a check date of 5/1/20, Plaintiff's payroll records
23 show Plaintiff received vested RSUs in the amount of \$1,422.15. During that pay period, Plaintiff
24 Costa worked 2.15 hours of overtime. However, Plaintiff Costa's payroll records do not show that
25 Defendant included the RSU compensation as Plaintiff Costa's records show a regular rate of
26 \$19.29 and an overtime rate of \$29.90.

27 39. By way of another example, for the pay period with a check date of 1/22/21, Plaintiff
28 Costa's payroll records do not show that he had any vested RSUs. During that pay period Plaintiff

1 Costa worked .83 hours of overtime. Plaintiff Costa's regular rate of pay was \$19.94 and his
2 overtime rate of pay was \$30.92. For the pay period with a check date of 5/28/21, Plaintiff Costa's
3 payroll records show that he received vested RSUs in the amount of \$2,690.00. During that pay
4 period, Plaintiff Costa worked .50 hours of overtime. However, Plaintiff Costa's payroll records
5 do not show that Defendant included the RSU compensation as Plaintiff Costa's payroll records
6 show a regular rate of \$19.94 and an overtime rate of \$29.92.

7 40. Similarly, for the pay period with a check date of 7/9/21, Plaintiff Costa's payroll
8 records show that he received vested RSUs in the amount of \$2,690.00. Plaintiff Costa worked .92
9 hours of overtime during that pay period. However, Plaintiff Costa's payroll records do not show
10 that Defendant included the RSU compensation as Plaintiff Costa's payroll records show a regular
11 rate of \$19.94 and an overtime rate of pay of \$30.91.

12 41. Upon information and belief, in none of the weeks during the three years preceding
13 this action and the filing of Plaintiff Costa's Consent to Join form, did Defendant pay an additional
14 amount in overtime compensation for the value of the vested RSU compensation Plaintiff earned.
15 Thus, Plaintiff Costa was denied overtime compensation when he worked over forty (40) hours in
16 a workweek.

17 42. Defendant compensated Plaintiff Hoffman with RSUs during the four years
18 preceding this action and the filing of Plaintiff Hoffman's Consent to Join form. However, Plaintiff
19 Hoffman's payroll records do not reflect that the value of the vested RSUs was included in her
20 overtime rate of pay. Plaintiff Hoffman's payroll records reflect that she worked hours over forty
21 (40) hours per week and eight (8) hours per day in several workweeks during periods between the
22 granting and vesting of RSUs (which, upon information and belief, was routinely a one to three
23 year period) but do not reflect any true-up payment for the increase to the overtime rate of pay due
24 to the vested restricted stock unit compensation.

25 43. For example, for the pay period with a check date of 3/20/20, Plaintiff Hoffman's
26 payroll records show that Plaintiff Hoffman did not have any vested RSUs. During that pay period,
27 Plaintiff Hoffman worked 2.52 hours of overtime. Plaintiff Hoffman's regular rate of pay was
28 \$24.65 and overtime rate of pay \$36.98. For the pay period with a check date of 5/15/20, Plaintiff

1 Hoffman's payroll records show that she received vested RSUs in the amount of \$1,422.15. During
2 that pay period, Plaintiff Hoffman worked 1.77 hours of overtime. However, Plaintiff Hoffman's
3 payroll records do not show that Defendant included the RSU compensation, as Plaintiff Hoffman's
4 regular rate of pay of pay was \$24.65 and Plaintiff Hoffman's overtime rates were \$36.99 and
5 \$36.98.

6 44. Similarly, for the pay period with a check date of 6/12/20, Plaintiff Hoffman's
7 payroll records show that she received vested RSUs in the amount of \$1,422.15. During that pay
8 period, Plaintiff Hoffman worked 1.5 hours of overtime. Again, Plaintiff Hoffman's payroll
9 records do not reflect that Defendant included Plaintiff Hoffman's RSU compensation, as Plaintiff
10 Hoffman's regular rate of pay was \$24.65 and overtime rate was \$36.98.

11 45. Upon information and belief, in none of the weeks during the four years preceding
12 the filing of Plaintiff Hoffman's Consent to Join form, did Defendant pay an additional amount in
13 overtime compensation for the value of the vested RSU compensation Plaintiff earned for overtime
14 worked during the periods between when the RSUs were initially granted and then vested. Thus,
15 Plaintiff Hoffman was denied overtime compensation when she worked over forty (40) hours in a
16 workweek and eight (8) hours in a day.

17 46. Defendant compensated Plaintiff McIlravy-Ackert with RSUs during the six years
18 preceding this action and the filing of Plaintiff McIlravy-Ackert's Consent to Join form. However,
19 Plaintiff McIlravy-Ackert's payroll records do not reflect that the value of the vested RSUs was
20 included in her overtime rate of pay. Plaintiff McIlravy-Ackert's payroll records reflect that she
21 worked hours over forty (40) per week and eight (8) hours per day in several workweeks during
22 periods between the granting and vesting of RSUs (which, upon information and belief, was
23 routinely a one- to three-year period) but do not reflect any true-up payment for the increase to the
24 overtime rate of pay due to the vested restricted stock unit compensation.

25 47. For example, for the pay period with a check date of 2/7/20 (during which Plaintiff
26 McIlravy-Ackert worked for Defendant in New York), Plaintiff McIlravy-Ackert's payroll records
27 show that Plaintiff McIlravy-Ackert did not have any vested RSUs. During that pay period,
28 Plaintiff McIlravy-Ackert worked 2.08 hours of overtime. Plaintiff McIlravy-Ackert's regular rate

1 of pay was \$21.86 and overtime rate of pay was \$32.79. For the pay period with a check date of
2 7/24/20, Plaintiff McIlravy-Ackert's payroll records show that she received vested RSUs in the
3 amount of \$1,422.15. During that pay period, Plaintiff McIlravy-Ackert worked 1.02 hours of
4 overtime. However, Plaintiff McIlravy-Ackert's payroll records do not reflect that Defendant
5 included Plaintiff McIlravy-Ackert's RSU compensation, as Plaintiff McIlravy-Ackert's regular
6 rate of pay was \$21.86 and overtime rate of pay was \$32.79.

7 48. Defendant's conduct has been ongoing. For example, for the pay period with a
8 check date of 4/16/21 (during which Plaintiff McIlravy-Ackert worked for Defendant in
9 California), Plaintiff McIlravy-Ackert's payroll records show that Plaintiff McIlravy-Ackert did
10 not have any vested RSUs. During that pay period, Plaintiff McIlravy-Ackert worked 1.42 hours
11 of overtime. Plaintiff McIlravy-Ackert's regular rate of pay was \$22.49 and her overtime rate of
12 pay was \$33.74. For the pay period with a check date of 6/25/21, Plaintiff McIlravy-Ackert's
13 payroll records show that Plaintiff received vested RSUs in the amount of \$2,690.00. During that
14 pay period, Plaintiff McIlravy-Ackert worked 2.44 hours of overtime. However, Plaintiff
15 McIlravy-Ackert's payroll records do not show that Defendant included the RSU compensation, as
16 Plaintiff McIlravy-Ackert's regular rate of pay was \$22.49 and her overtime rates of pay were
17 \$33.73 and \$33.74.

18 49. Upon information and belief, in none of the weeks during the four years preceding
19 the filing of Plaintiff McIlravy-Ackert's Consent to Join form, did Defendant pay an additional
20 amount in overtime compensation for the value of the vested RSU compensation Plaintiff earned
21 for overtime worked during the periods between when the RSUs were initially granted and then
22 vested. Thus, Plaintiff McIlravy-Ackert was denied overtime compensation when she worked over
23 forty (40) hours in a workweek and eight (8) hours in a day.

24 50. Defendant's policy and practice of failing to include vested RSU compensation
25 when calculating the regular rate of pay deprived Plaintiffs, and others similarly situated of the
26 proper overtime wages guaranteed by law.

27 51. Plaintiffs and those similarly situated worked in excess of forty (40) hours per week,
28 and/or eight (8) hours per day (California employees) for Defendant on one or more occasions

1 without receiving proper overtime pay.

2 52. Because Defendant did not pay Plaintiffs and other non-exempt employees at the
3 appropriate overtime rate, Defendant's wage statements did not accurately reflect all rates of pay
4 and did not correctly itemize the hours worked at each rate of pay.

5 53. Defendant also failed to pay all wages that were due when employment ended,
6 including legally required overtime premiums at the appropriate rate. For example, more than thirty
7 (30) days have passed since the end of Plaintiff Hoffman's employment, and Defendant still has
8 not paid all wages that are due and owing.

9 54. Defendant's conduct was willful, knowing and intentional, and in bad faith.
10 Defendant operated under a scheme that has caused significant damages to Plaintiffs and the
11 similarly situated individuals.

12 **COLLECTIVE ACTION ALLEGATIONS**

13 55. Plaintiffs bring FLSA overtime claims on behalf of themselves and all similarly
14 situated employees as authorized under the FLSA, 29 U.S.C. § 216(b). The employees similarly
15 situated are as follows:

16 **FLSA Collective:** All employees Defendant classified as non-exempt overtime eligible
17 who Defendant paid compensation in the form of RSUs, who worked for Defendant at any
18 time within three years prior to this action's filing date through trial.

19 56. Defendant operated under a scheme to deprive these employees of overtime
20 compensation by failing to properly compensate them for overtime hours worked.

21 57. Defendant is liable under the FLSA for failing to properly compensate Plaintiffs and
22 the FLSA Collective, and as such, notice should be sent to the FLSA Collective. There are
23 numerous similarly situated current and former employees of Defendant who have been denied
24 overtime pay in violation of the FLSA who would benefit from the issuance of Court-supervised
25 notice of this lawsuit and the opportunity to join. Those similarly situated employees are known to
26 Defendant and are readily identifiable through Defendant's records.

27 **CALIFORNIA CLASS ACTION ALLEGATIONS**

28 58. Plaintiffs Hoffman and McIlravy-Ackert bring this action on behalf of themselves

1 and as a class action on behalf of all similarly situated employees. The California Class is defined
2 as follows:

3 **California Class:** All employees Defendant classified as non-exempt/overtime eligible
4 who Defendant paid compensation in the form of RSUs, who worked for Defendant in the
5 state of California at any time within four years prior to this action's filing date through the
6 trial.

7 59. This action is properly brought as a class action pursuant to the class action
8 procedures of Rule 23 of the Federal Rules of Civil Procedure.

9 60. The class is so numerous that joinder of all members is impractical. While the exact
10 number and identities of class members are unknown at this time, and can only be ascertained
11 through appropriate discovery, Plaintiffs Hoffman and McIlravy-Ackert believe that there are more
12 than fifty (50) class members.

13 61. This litigation is properly brought as a class action because of the existence of
14 questions of fact and law common to Plaintiffs Hoffman and McIlravy-Ackert and other members
15 of the class which predominate over any questions affecting only individual members, including:

- 16 • Whether Defendant is liable to members of the class described above for violations
17 of the applicable labor code provisions;
- 18 • Whether Defendant improperly calculated the regular rate for purposes of overtime
19 payments to members of the class;
- 20 • Whether Defendant knowingly and intentionally failed to provide accurate wage
21 statements;
- 22 • Whether Defendant willfully failed to pay all wages due at termination; and
- 23 • Whether Defendant engaged in unfair competition.

24 62. This litigation is properly brought as a class action because Plaintiff Hoffman's and
25 Plaintiff McIlravy-Ackert's claims are typical of the claims of the class members, since all such
26 claims arise from Defendant's standard policies and practices.

27 63. Like all class members, Plaintiffs Hoffman and McIlravy-Ackert were damaged by
28 Defendant's system-wide policies and practices of improperly calculating the regular rate, failing

1 to provide compliant wage statements, and failing to pay all wages due at separation from
2 employment, thus giving rise to legal remedies under the California Labor Code.

3 64. Plaintiffs Hoffman and McIlravy-Ackert have no interests antagonistic to the
4 interests of other class members.

5 65. Plaintiffs Hoffman and McIlravy-Ackert are committed to the vigorous prosecution
6 of this action and retained competent counsel experienced in class action litigation. Accordingly,
7 Plaintiffs Hoffman and McIlravy-Ackert are adequate and will fairly and adequately protect the
8 interests of the class.

9 66. A class action is an appropriate and superior method for the fair and efficient
10 adjudication of the controversy, particularly in the context of wage and hour litigation where
11 individual plaintiffs lack the financial resources to vigorously prosecute separate lawsuits in federal
12 court against large corporate defendants.

13 67. Class certification is also fair and efficient because prosecution of separate actions
14 by individual class members would create a risk of differing adjudications with respect to such
15 individual members of the classes, which as a practical matter may be dispositive of the interests
16 of other members not parties to the adjudication, or substantially impair or impede their ability to
17 protect their interests. Plaintiffs Hoffman and McIlravy-Ackert anticipate there will be no difficulty
18 in the management of this litigation. This litigation presents claims under applicable Labor Code
19 provisions of a type that have often been prosecuted on a class-wide basis, and the manner of
20 identifying the class members and providing any monetary relief to it can easily be effectuated from
21 a review of Defendant's records.

22 68. Plaintiffs Hoffman and McIlravy-Ackert intend to send notice to the California
23 Class to the extent permitted by Fed. R. Civ. P. 23(c).

24 **NEW YORK CLASS ACTION ALLEGATIONS**

25 69. Plaintiff McIlravy-Ackert brings this action on behalf of herself and as a class action
26 on behalf of all similarly situated employees. The New York Class is defined as follows:

27 **New York Class:** All employees Defendant classified as non-exempt/overtime eligible who
28 Defendant paid compensation in the form of RSUs, who worked for Defendant in the state

1 of New York at any time within six (6) years prior to this action's filing through the trial.

2 70. This action is properly brought as a class action pursuant to the class action
3 procedures of Rule 23 of the Federal Rules of Civil Procedure.

4 71. The class is so numerous that joinder of all members is impractical. While the exact
5 number and identifies of class members are unknown at this time, and can only be ascertained
6 through appropriate discovery, Plaintiff McIlravy-Ackert believes that there are more than fifty
7 (50) class members.

8 72. This litigation is properly brought as a class action because of the existence of
9 questions of law and fact common to Plaintiff McIlravy-Ackert and other members of the class
10 which predominate over any questions affecting only individual members including:

- 11 • Whether Defendant improperly calculated the regular rate for purposes of overtime
12 and violated New York law by failing to pay proper overtime wages;
- 13 • The proper measure and calculation of damages; and
- 14 • Whether Defendant's actions were willful or in good faith.

15 73. This litigation is properly brought as a class action because Plaintiff McIlravy-
16 Ackert's claims are typical of the claims of the class members, since all such claims arise from
17 Defendant's standard policies and practices.

18 74. Like all class members, Plaintiff McIlravy-Ackert was damaged by Defendant's
19 system-wide policies and practices of improperly calculating the regular rate giving rise to legal
20 remedies under New York state law.

21 75. Plaintiff McIlravy-Ackert is committed to the vigorous prosecution of this action
22 and retained competent and experienced counsel in class action litigation. Accordingly, Plaintiff
23 McIlravy-Ackert is adequate and will fairly and adequately protect the interests of the class.

24 76. A class action is an appropriate and superior method for the fair and efficient
25 adjudication of the controversy, particularly in the context of wage and hour litigation where
26 individual plaintiffs lack the financial resources to vigorously prosecute separate lawsuits in federal
27 court against large corporate defendants.

28 77. Class certification is also fair and efficient because prosecution of separate actions

1 by individual class members would create a risk of differing adjudications with respect to such
2 individual members of the classes, which as a practical matter may be dispositive of the interests
3 of other members not parties to the adjudication, or substantially impair or impede their ability to
4 protect their interests. Plaintiff McIlravy-Ackert anticipates there will be no difficulty in the
5 management of this litigation. This litigation presents claims under New York state law of a type
6 that have often been prosecuted on a class-wide basis, and the matter of identifying the class
7 members and providing any monetary relief to it can easily be effectuated from a review of
8 Defendant's records.

9 78. Plaintiff McIlravy-Ackert intends to send notice to the New York Class to the extent
10 permitted by Fed. R. Civ. P. 23(c).

11 **FIRST CLAIM FOR RELIEF**

12 **FAILURE TO PAY OVERTIME UNDER THE FLSA**

13 29 U.S.C. §§ 201, *et seq.*

14 (On Behalf of Plaintiffs and the FLSA Collective)

15 79. Plaintiffs and the FLSA Collective re-allege and incorporate by reference all
16 preceding paragraphs and allegations.

17 80. Defendant is an employer of Plaintiffs and the FLSA Collective and is engaged in
18 commerce and/or the production of goods for commerce within the meaning of 29 U.S.C. §§ 206(a)
19 and 207(a).

20 81. Plaintiffs and the FLSA Collective were employees within the meaning of 29 U.S.C.
21 §§ 203(e) and 207(a).

22 82. Plaintiffs consent in writing to be a part of this action, pursuant to 29 U.S.C.
23 § 216(b). As this case proceeds, it is likely that other individuals will sign consent forms and join
24 as plaintiffs.

25 83. The FLSA requires all covered employers, such as Defendant, to compensate all
26 non-exempt employees at a rate of not less than one and one-half times their regular rate of pay for
27 work performed in excess of forty (40) hours per work week.

28 84. The regular rate of pay is not limited to hourly pay, but also includes the rate derived

1 from non-discretionary incentive payments and other forms of compensation, including vested
2 restricted stock units.

3 85. Plaintiffs and the FLSA Collective are entitled to be paid overtime compensation, at
4 the proper rate, for all hours worked. By miscalculating the regular rate and failing to compensate
5 Plaintiff and the FLSA Collective proper overtime compensation, Defendant violated the FLSA,
6 29 U.S.C. §§ 201, *et seq.*

7 86. Defendant is aware of its obligations under the FLSA but did not make a good faith
8 effort to comply with the FLSA with respect to its time keeping and compensation of Plaintiff and
9 the Collective Action Members.

10 87. Because Defendant's violations of the FLSA have been willful, a three-year statute
11 of limitations applies, pursuant to 29 U.S.C. § 255, as it may be further extended or tolled by
12 agreement, equity, or operation of law.

13 88. As a result of Defendant's willful violations of the FLSA, Plaintiffs and the
14 Collective Action Members have suffered damages by being denied overtime wages in accordance
15 with the FLSA in amounts to be determined at trial and are entitled to recovery of such amounts,
16 liquidated damages, prejudgment interest, attorney's fees, costs, and expenses pursuant to 29
17 U.S.C. § 216(b).

18 **SECOND CLAIM FOR RELIEF**

19 **FAILURE TO PAY OVERTIME UNDER CALIFORNIA LAW**

20 Cal. Wage Order No. 4; Cal. Labor Code §§ 510, 1194, 1198

21 (On Behalf of Plaintiffs Hoffman, McIlravy-Ackert, and the California Class)

22 89. Plaintiffs Hoffman and McIlravy-Ackert allege and incorporate by reference all
23 preceding paragraphs and allegations.

24 90. At all times relevant to this action, Plaintiffs Hoffman and McIlravy-Ackert and
25 members of the California Class were employed by Defendant within the meaning of the California
26 Labor Code.

27 91. By the course of conduct set forth above, Defendant violated Cal. Labor Code
28 §§ 510, 1194, and 1198.

1 preceding paragraphs and allegations.

2 100. Defendant knowingly and intentionally failed to provide Plaintiffs Hoffman and
3 McIlravy-Ackert and the California Class with timely, accurate, itemized wage statements showing
4 all items required pursuant to California Labor Code § 226(a), including, but not limited to, the
5 proper rates of pay and hours worked at each rate of pay.

6 101. Pursuant to Labor Code section 226(e)(2), Plaintiffs Hoffman and McIlravy-Ackert
7 and members of the California Class suffered injury because, due to Defendant's failure to provide
8 the required information, Plaintiffs Hoffman and McIlravy-Ackert, and the California Class could
9 not promptly and easily determine, among other things, their rates of pay and hours worked at each
10 rate of pay. Plaintiffs Hoffman and McIlravy-Ackert, individually and on behalf of the California
11 Class, are entitled to and seek injunctive relief requiring Defendant to comply with Labor Code §
12 226(a) and further seeks the amount provided under Labor Code § 226(e), including the greater of
13 all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and
14 one hundred dollars (\$100) for each violation in a subsequent pay period, plus attorneys' fees and
15 costs.

16 **FOURTH CLAIM FOR RELIEF**

17 **WAITING TIME PENALTIES**

18 California Labor Code §§ 201-203

19 (On Behalf of Plaintiffs Hoffman, McIlravy-Ackert, and the California Class)

20 102. Plaintiffs Hoffman and McIlravy-Ackert re-allege and incorporate by reference all
21 preceding paragraphs and allegations.

22 103. California Labor Code sections 201 and 202 require an employer to pay its
23 employees all wages due within the time specified by law. Labor Code section 203 provides that
24 if an employer willfully fails to pay such wages, the employer must continue to pay the subject
25 employee's wages until the back wages are paid in full or an action is commenced, up to a maximum
26 of thirty days of wages.

27 104. Plaintiffs and other Class Members who ceased employment with Defendant are
28 entitled to unpaid compensation, but to date have not received such compensation, more than 72

1 hours after the cessation of their employment.

2 105. Defendant failed to pay the earned and unpaid wages of Plaintiffs Hoffman and
3 McIlravy-Ackert and Class Members within 30 days from the time such wages should have been
4 paid under Labor Code sections 201 and 202.

5 106. Defendant willfully failed to timely compensate Plaintiffs Hoffman and McIlravy-
6 Ackert and other Class Members at the proper overtime rate for overtime hours worked. As a result,
7 Defendant is liable to Plaintiffs Hoffman and McIlravy-Ackert and other Class members whose
8 employment ended within the year prior to the initial filing of this suit for waiting time penalties
9 under California Labor Code section 203.

10 **FIFTH CLAIM FOR RELIEF**

11 **CALIFORNIA UNFAIR COMPETITION LAW**

12 Cal. Bus. & Prof. Code §§ 17200, *et seq.*

13 (On Behalf of Plaintiffs Hoffman, McIlravy-Ackert, and the California Class)

14 107. Plaintiffs Hoffman and McIlravy-Ackert re-allege and incorporate by reference all
15 preceding paragraphs and allegations.

16 108. The foregoing conduct, as alleged, violates the California Unfair Competition Law
17 (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et seq.* The UCL prohibits unfair competition by
18 prohibiting, *inter alia*, any unlawful or unfair business acts or practices.

19 109. Beginning at a date unknown to Plaintiffs, at least as long ago as the year 2012,
20 Defendant committed acts of unfair competition, as defined by the UCL, by, among other things,
21 engaging in the acts and practices described herein. Defendant’s conduct as herein alleged has
22 injured Plaintiffs Hoffman, McIlravy-Ackert, and Class Members by wrongfully denying them
23 earned wages, and therefore was substantially injurious to Plaintiffs Hoffman, McIlravy-Ackert,
24 and Class Members.

25 110. Defendant engaged in unfair competition in violation of the UCL by violating, *inter*
26 *alia*, each of the following laws: California Labor Code §§ 510, 1194, and 1198; California Labor
27 Code § 226; California Labor Code §§ 201–03; IWC Wage Order 4. Each of these violations
28 constitutes an independent and separate violation of the UCL:

1 111. Defendant's course of conduct, acts, and practices in violation of the California laws
2 mentioned in the above paragraph constitute separate and independent violations of the UCL.
3 Defendant's conduct described herein violates the policy or spirit of such laws or otherwise
4 significantly threatens or harms competition.

5 112. The harm to Plaintiffs Hoffman and McIlravy-Ackert and California Class Members
6 in being wrongfully denied lawfully earned wages outweighed the utility, if any, of Defendant's
7 policies or practices and therefore, Defendant's actions described herein constitute an unfair
8 business practice or act within the meaning of the UCL.

9 113. Plaintiffs Hoffman and McIlravy-Ackert and members of the California Class have
10 no adequate remedy at law.

11 114. As a result of Defendant's unfair business practices (failing to include Plaintiff
12 Hoffman's and McIlravy-Ackert's vested RSU compensation in their overtime rate of pay),
13 Plaintiffs Hoffman and McIlravy-Ackert and the California Class have lost money or property and
14 suffered injury in fact. Specifically, Plaintiffs Hoffman and McIlravy-Ackert have lost money due
15 to Defendant's failure to pay Plaintiffs the proper overtime rate.

16 115. Such conduct in the above paragraph is ongoing. Defendant continues to fail to pay
17 Plaintiff McIlravy-Ackert, a current employe, the proper overtime rate.

18 116. Pursuant to Business and Professions Code § 17200, *et seq.*, Plaintiffs Hoffman and
19 McIlravy-Ackert are entitled to restitution of the overtime earnings other unpaid wages alleged
20 herein that were withheld and retained by Defendant during a period that commences four years
21 prior to the filing of this action, a permanent injunction requiring Defendant to pay required wages,
22 an award of attorneys' fees pursuant to Code of Civil Procedure § 1021.5 and other applicable law,
23 and costs.

24 **SIXTH CLAIM FOR RELIEF**

25 **UNPAID OVERTIME UNDER THE NEW YORK LABOR LAW**

26 NYCRR § 142-2.2; New York Labor Law, Article 19, §§ 650, *et seq.*

27 (On Behalf of Plaintiff McIlravy-Ackert and the New York Class)

28 117. Plaintiff McIlravy-Ackert re-alleges and incorporates by reference all preceding

1 paragraphs and allegations.

2 118. At all relevant times, Plaintiff McIlravy-Ackert and members of the New York Class
3 were employees within the meaning of New York Labor Law (“NYLL”) § 651(5).

4 119. At all relevant times, Defendant was an employer within the meaning of NYLL §
5 651(6).

6 120. New York law requires Defendant to pay overtime compensation at a rate of not less
7 than one and one-half times the employee’s regular rate of pay for all hours worked in excess of
8 forty (40) hours in a workweek. 12 NYCRR § 142-2.2.

9 121. The regular rate of pay is not limited to hourly pay, but also includes the rate derived
10 from non-discretionary incentive payments and other forms of compensation, including RSUs.

11 122. New York’s overtime regulations substantially incorporate and adopt the FLSA’s
12 overtime regulations.

13 123. By the course of conduct set forth above, Defendant, pursuant to its policies and
14 practices, refused and failed to pay Plaintiff McIlravy-Ackert and the New York Class proper
15 overtime wages by miscalculating the regular rate of pay for hours worked over forty (40) in a
16 workweek.

17 124. Plaintiff and the New York Class worked more than forty (40) hours in a workweek
18 for Defendant in one or more workweeks within the past six (6) years, but due to Defendant’s policy
19 and practice of miscalculating the regular rate and failure to pay proper overtime pay, they did not
20 receive proper overtime pay in violation of 12 NYCRR § 142-2.2.

21 125. Defendant’s actions were willful and Defendant did not have a good-faith basis to
22 believe that its underpayment was in compliance with the law. *See* NYLL § 663(1).

23 126. As a direct and proximate result of Defendant’s unlawful conduct, Plaintiff
24 McIlravy-Ackert and the New York Class have suffered damages in an amount to be determined.

25 127. Plaintiff McIlravy-Ackert and the New York Class seek damages in the amount of
26 their unpaid wages, liquidated damages, pre- and post-judgment interest, reasonable attorneys’ fees
27 and costs, and such other legal and equitable relief as the Court deems proper.

28 **SEVENTH CLAIM FOR RELIEF**

- 1 of the pendency of this action, and permitting them to assert timely
2 FLSA claims in this action by filing individual consent forms
3 pursuant to 29 U.S.C. § 216(b);
- 4 B. Judgment against Defendant for violation of the overtime provisions
5 of the FLSA;
- 6 C. Judgment that Defendant’s violations as described above were
7 willful;
- 8 D. An award in an amount equal to Plaintiffs’ and the FLSA
9 Collective’s unpaid back wages at the correct overtime rate;
- 10 E. An award to Plaintiffs and the FLSA Collective for liquidated
11 damages;
- 12 F. An award of reasonable attorneys’ fees and costs;
- 13 G. An award of prejudgment interest to the extent liquidated damages
14 are not awarded;
- 15 H. Leave to add additional plaintiffs by motion, the filing of written
16 consent forms, or any other method approved by the Court; and
- 17 I. For such other and further relief, in law or equity, as this Court may
18 deem appropriate and just.

19 **WHEREFORE**, Plaintiffs Hoffman and McIlravy-Ackert, on behalf of themselves and the
20 California Class, pray for additional relief as follows:

- 21 A. That the Court determine that this action may be maintained as a class
22 action under Rule 23(b)(1) and (3) of the Federal Rules of Civil Procedure;
- 23 B. That Plaintiffs Hoffman and McIlravy-Ackert be designated as
24 representatives of the Rule 23 California Class, and Plaintiffs’ Counsel be
25 designated as Class Counsel;
- 26 C. An award of unpaid overtime wages, other due wages, and injunctive
27 relief, pursuant to California law;
- 28 D. Appropriate equitable relief to remedy Defendant’s violations of state law;

- 1 E. Appropriate statutory penalties;
- 2 F. An award of damages and restitution to be paid by Defendant according to
- 3 proof;
- 4 G. Attorneys' fees and costs of suit, including expert fees pursuant to Cal. Labor
- 5 Code §§ 1194 and 226, 2699(g)(1), and Cal. Code of Civil Procedure §
- 6 1021.5;
- 7 H. That Defendant be further enjoined to cease and desist from the unlawful
- 8 activities in violation of the state laws cited above;
- 9 I. Pre-judgment and post-judgment interest, as provided by law;
- 10 J. Leave to amend to add a claim under the California Private Attorneys
- 11 Generals Act; and
- 12 K. Such other further relief, in law or equity, as the Court may deem just and
- 13 proper.

14 **WHEREFORE**, Plaintiff McIlravy-Ackert, individually and on behalf of the New York
15 Class, prays for relief as follows:

- 16 A. That the Court determine that this action may be maintained as a class action
- 17 under Rule 23(b)(1) and (3) of the Federal Rules of Civil Procedure;
- 18 B. That Plaintiff McIlravy-Ackert be designated as representative of the Rule
- 19 23 New York Class, and Plaintiff's Counsel be designated as Class Counsel;
- 20 C. Judgment against Defendant for violation of the overtime provisions of the
- 21 NYCRR and the NYLL;
- 22 D. An award of damages, liquidated damages, appropriate statutory penalties,
- 23 pre-judgment and post-judgment interest, and attorneys' fees and costs to be
- 24 paid by Defendant pursuant to New York law; and
- 25 E. Such other relief as the Court may deem just and proper.

26 **WHEREFORE**, Plaintiff Hoffman, on behalf of herself and other aggrieved employes,
27 prays for additional relief as follows:

- 28 A. Appropriate penalties under PAGA;

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- B. Attorneys' fees and costs of suit, including expert fees pursuant to Cal. Labor Code § 2699(g)(1); and
- C. Such other equitable relief as the Court may deem just and proper.

Dated: 10/27/23

By: s/Michele R. Fisher
Michele R. Fisher

*Attorney for Plaintiffs, the Putative FLSA
Collective, the Putative California Class, and the
Putative New York Class*