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17 himself and all others similarly situated.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF PLACER

DANIEL ROSE, on behalf of himself and
all others similarly situated

Plaintiff,

v.

RABOBANK NATIONAL
ASSOCIATION (N.A.), a foreign
corporation and DOES 1 through 10,
inclusive,

Defendants.

CASE NO.

SCV0038802

CLASS ACTION, CCP §382

CLASS ACTION COMPLAINT AND
ENFORCEMENT ACTION UNDER THE
PRIVATE ATTORNEYS GENERAL ACT,
CALIFORNIA LABOR CODE §§2698 ET
SEQ.:

- (1) VIOLATION OF STATE AND FEDERAL
OVERTIME LAWS;
- (2) CAL. LABOR CODE VIOLATIONS;
- (3) WAITING TIME PENALTIES;
- (4) UNFAIR BUSINESS PRACTICES;
- (5) CALIFORNIA LABOR CODE PRIVATE
ATTORNEYS GENERAL ACT, CAL.
LABOR CODE §§ 2698 ET SEQ.

JURY TRIAL DEMAND

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF PLACER

DEC 20 2016

JAKE CHATTERS
EXECUTIVE OFFICER & CLERK
By: C. Waggoner, Deputy

BY FAX

1 Comes now Plaintiff DANIEL ROSE on behalf of himself and all others similarly situated
2 the general public, and all aggrieved employees (hereinafter “Rose” and/or “Plaintiff”) and
3 hereby complains against the Defendant RABOBANK NATIONAL ASSOCIATION (hereinafter
4 “Rabobank, N.A.” and/or Defendant), a foreign corporation that reports its principal place of
5 business in California to be in City of Roseville, County of Placer, California, and alleges as
6 follows:

7 **I.**

8 **INTRODUCTION**

9 1. Plaintiff herein seeks relief from this Court for Defendant’s deliberate and willful
10 attempt to avoid paying minimum wages and premium pay for overtime hours worked by
11 Mortgage Loan Officers, Loan Officers, and all other inside commissioned employees, who are
12 not eligible for the inside sales exemption under Section 7(i) of the Federal Fair Labor Standards
13 Act (“FLSA”, 29 U.S.C. §207(i)) on the grounds, *inter alia*, that financial institutions lack a retail
14 concept *per se*, and who are not paid the correct premium wages (half the regular rate) on
15 commissions paid during pay periods in which they earn commissions, and not paid the minimum
16 wages and overtime premium pay “free and clear” in all other pay periods, as required under both
17 California and federal law. None of the Defendant’s pay practices are properly disclosed as
18 required by California Labor Code Section 226(a)(9), *inter alia*. At an appropriate time, Plaintiff
19 also will amend this complaint to seek damages and penalties under the Private Attorney General
20 Act, Labor Code Section 2699, for the violations alleged herein as well.

21 2. Defendant maintains a complicated and sophisticated scheme to avoid payment of
22 statutorily required minimum wages and overtime premium wages due to its commissioned
23 employees in violation of California Labor Code §§ 221 and 223. Under California law,
24 commissions can only cover wages due for the pay period for which they are paid. *Peabody v.*
25 *Time Warner Cable, Inc.*, 59 Cal. 4th 662, 328 P.3d 1028 (2014). For those pay periods when
26 commissions are not paid, the Defendant purports to pay an hourly rate of \$10, with an overtime
27 premium pay of \$15 an hour. However, the Defendant secretly pays a lower wage while
28 purporting to pay the minimum wages by unlawfully deducting from commission wage payments
these statutory minimum wages and overtime payments in the very next pay period. Despite

1 appearances, Defendant pays its commissioned employees nothing for those pay periods when it
2 does not pay strictly commissions. This violates both the anti-kickback provisions of California
3 Labor Code 221 and the prohibition of secret payment rebates provisions of California Labor
4 Code 223.

5 3. For those pay periods in which it pays commissions, Defendant fails to pay
6 overtime pay at the correct premium rate. Because financial institutions like banks and mortgage
7 lenders are deemed by the United States Secretary of Labor to lack a “retail concept,” Defendant
8 must pay overtime premium pay for all hours worked in excess of forty per week and is not
9 eligible for the “retail sales exemption” of section 7(i) of the FLSA. The overtime premium due
10 is one half the regular rate for all hours worked in excess of forty per workweek.” See 29 C.F.R.
11 778.117-.118. The regular rate for all employee paid on a commission basis is one half the
12 commission divided by the hours worked during the pay period covered by the commissions. 29
13 C.F.R. 778.109 states that “The regular hourly rate of pay of an employee is determined by
14 dividing his total remuneration for employment (except statutory exclusions) in any workweek by
15 the total number of hours actually worked by him in that workweek for which such compensation
16 was paid.

17 4. Rather than pay an overtime premium of half the regular rate for the periods
18 covered by the commission payment, and pay hourly with overtime premiums when applicable
19 for periods not included in the commission payments, Defendant subtracts the previously paid
20 hourly payments and then pays a half time rate on the remaining sum. The half time rate is not
21 half the rate of the commission payments divided by the hours worked during that commission
22 paid time period, but based upon the full month rather than the pay period covered by the
23 commissions, thereby lowering effective hourly premium rate of pay. The Defendant’s policy
24 states that “The additional amount will be calculated by allocating the commission (less the base
pay, including overtime) *evenly to each week or partial week in the month.*”

25 5. In other words, Defendant calculates the regular rate upon which commissions are
26 based by dividing the commissions earned by the entire monthly hours worked, or some variation
27 thereof, rather than by the time period covered by the commissions. If the employee works more
28 overtime in the non-commission portion of the month which is covered by the first pay period, the

1 employee's overtime rate for the commissioned portion of the month is disproportionately less
2 than if the employee had worked the same amount of overtime in the second half of the month
3 which is covered by the commission payment. Thus, the half time rate used to pay for overtime is
4 incorrect as a matter of law.

5 **II.**

6 **JURISDICTION AND VENUE**

7 6. The Superior Court of the State of California, for the County of Placer, has
8 jurisdiction over this case because Defendant has designated with the California Secretary of
9 State that it is a foreign corporation with its principle place of business within California is at 915
10 Highland Pointe Drive in Roseville, California, and because many of the alleged violations of the
11 Labor Code and the violations of B&PC §§17200 et seq. occurred in whole or in part at its
12 California corporate headquarters in Roseville.

13 7. Venue is proper in the Placer County Superior Court pursuant to Code of Civil
14 Procedure §395 (a) and 395.5, because Roseville is within the County of Placer.

15 **III.**

16 **PARTIES**

17 8. At all times relevant herein, Plaintiff DANIEL ROSE was a California resident
18 employed by Defendant to work as a loan officer within the State of California.

19 9. At all times relevant herein, Defendant RABOBANK NATIONAL
20 ASSOCIATION (also known as "Rabobank NA ") has been registered with California Secretary
21 of State as a foreign corporation with its principal place of business within California and
22 California Corporate headquarters located at 915 Highland Pointe Dr. #190, Roseville, CA
23 95678, within the County of Placer and is doing business as a Bank (commercial and savings),
24 Credit company, including small loan and personal loan companies, and/or a finance company,
25 and therefore lacks a retail concept within the meaning of 29 C.F.R. 770.317 and *Mitchell v.*
Kentucky Fin. Co., 359 U.S. 290, 79 S. Ct. 756, 3 L. Ed. 2d 815 (1959).

26 10. Plaintiff is ignorant of the true names and capacities, whether individual, corporate
27 or otherwise, of the fictitiously named defendants designated as DOES 1 - 10, inclusive. Plaintiff
28 is informed and believes, and thereon alleges, that each fictitiously named defendant was in some

1 way responsible for, participated in, or contributed to the matters and things complained of
2 herein, and is legally responsible for the damages complained of herein.

3 11. Plaintiff is informed and believes, and thereon alleges, that at all times herein
4 mentioned, each of the defendants, including each of the fictitiously named defendants, was the
5 agent, principal, employer or employee of each other defendant, and they were acting within the
6 course and scope of such relationship in doing the things herein alleged, or they ratified,
7 acquiesced in, consented to, aided, abetted and/or approved each and all of the acts of each of the
8 other defendants, so that each defendant is jointly and severally responsible and liable for the acts
9 alleged herein.

10 IV.

11 CLASS ACTION ALLEGATIONS

12 12. Pursuant to California Code of Civil Procedure (“CCP”) §382 and the common
13 law related thereto, a case should be treated as a class action when a court finds: (a) that the
14 predominant issues raised in the case are of a common interest; (b) that the parties are so
15 numerous that it is impracticable to bring them all before this Court; (c) that the proposed Class
16 and Subclass are clearly and easily ascertainable; (d) that the named representatives’ claims are
17 typical of the claims of the proposed classes; (e) that the Class representatives will adequately
18 represent the interests of the classes; and (e) that a class action is superior to other methods of
19 adjudicating the claims alleged herein. Plaintiff herein alleges that each and every one of the
20 foregoing can and will be demonstrated at the time for hearing on Plaintiff’s motion for class
21 certification.

22 13. Plaintiff brings this suit as a class action pursuant to CCP §382, on behalf of the
23 Class of individuals which are defined as follows: All persons who were employed by Defendant
24 within the State of California as a Mortgage Loan Officer, Loan Officers, and/or other inside
25 commissioned employees who are not eligible for the inside sales exemption within the four years
26 prior to the initial filing of the Complaint until the date of judgment herein.

27 14. Plaintiff also seeks to establish a Subclass of all persons in the class described
28 above who were not paid hourly wages “free and clear” for those pay periods when they were not
paid commissions, also referred to herein as the minimum wage subclass.

1 15. Plaintiff also seeks to establish a Subclass of all persons in the class described
2 above who were paid overtime on commissions only after the hourly payments were subtracted
3 from amounts due, and /or were paid a half time rate as overtime premium pay based upon a
4 regular rate period of time longer than allowed to be covered by commissions under California
5 law, also referred to herein as the overtime rate class.

6 16. Plaintiff also seeks to establish a Subclass of all persons in the class described
7 above whose pay statement failed to explain the actual rate of pay they received for all times
8 worked, also known as the Labor Code Section 226(a)(9) class.

9 17. Plaintiff also seeks to establish the Subclass of all persons of the class described
10 above who terminated from employment with Defendant within three years of the initial filing of
11 the Complaint until the date of judgement herein, also referred to as the “Waiting penalties”
12 subclass.

13 18. Members of the Class and Subclass will hereinafter be referred to as “class
14 members.”

15 19. Plaintiffs reserve the right to redefine the Class and Subclass and to add additional
16 subclasses as appropriate based on further investigation, discovery, and specific theories of
17 liability.

18 20. **Numerosity:** Plaintiffs are informed and believe and based on such information
19 and belief, allege that, in conformity with CCP § 382, the potential membership in the Class and
20 the subclass is so numerous that joinder of all members is impractical. While the exact number of
21 members in each of the classes is presently unknown to Plaintiffs, Plaintiffs estimate membership
22 in the Class to exceed 50. The exact number and specific identities of the members of the Class
23 and the subclass, may be readily ascertained through inspection of Defendants’ business records.
24 Moreover, the disposition of class members’ claims by way of a class action will provide

25 21. **Commonality:** Plaintiff is informed and believes and based on such information
26 and belief alleges that numerous questions of law and/or fact are common to all members of the
27 class, including, without limitation:
28

- a. Whether the offset against commissions for wages ostensibly paid on an hourly basis during non-commission pay periods means that these hourly payments were not “free and clear” and thus the class members were not paid anything during those pay period, which is less than the minimum wages and overtime premium rates required under California Labor Code California Labor Code section 510 and California Wage Order 4–2001. (8 Cal.Code Regs. § 11040).
- b. Whether the deductions from payments previously paid on an hourly basis for non-commission pay periods and/or the inclusion of non-commission pay periods in the calculation of the regular rate resulted in an incorrect overtime premium rate such that class members did not receive the proper overtime premium pay for commission paid pay periods.
- c. Whether Defendants complied with the wage reporting requirements of Labor Code § 226 (a)(9);
- d. whether Defendants failed to timely pay Plaintiff and putative class members the wages due them during their employment;
- e. whether Defendants failed to timely pay wages due to Plaintiff and class members upon their discharge;
- f. whether Defendants’ failure to pay all wages due in accordance with the federal wage laws or the California Labor Code was willful or reckless;
- g. whether Defendants engaged in unfair business practices in violation of California Business & Professions Code §§ 17200, et seq.; and,
- h. the appropriate amount of damages, restitution, or monetary penalties resulting from Defendants’ violations of law.

22. **Typicality:** Plaintiff’s claims are typical of those of the class members, because plaintiff suffered the violations set forth in this Complaint.

23. **Adequacy:** Plaintiff will adequately protect the interests of class members. Plaintiff has no interests that are adverse to or in conflict with class members and is committed to the vigorous prosecution of this lawsuit. To that end, plaintiff has retained counsel who are competent and experienced in handling class actions on behalf of employees.

24. **Superiority:** A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. Furthermore, as the amount suffered by individual class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no inordinate difficulty in the management of this case as a class action. The class is geographically disbursed throughout California but the Defendant's policies and decisions affecting the class all emanated from its central offices located in Roseville, California. Plaintiff is informed and believes and based on such information and belief alleges that this action is properly brought as a class action, not only because the prerequisites of CCP §382 and common law related thereto are satisfied (as outlined above), but also because of the following:

- a. The prosecution of separate actions by or against individual members of the Class would create risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class;
- b. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
- c. Defendants have acted or refused to act on grounds generally applicable to all members of the Class, making declaratory relief appropriate with respect to all of the Class;
- d. Questions of law or fact common to the members of the Class predominate over any questions affecting only individual members; and, Class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy.

V.

PAGA ENFORCEMENT ACTION ALLEGATIONS

1 25. At all times set forth herein, PAGA was applicable to Plaintiff's employment by
2 Defendant as the employer.

3 26. At all times set forth herein, PAGA states that any provision of law under the
4 California labor code that provides for a civil penalty to be assessed and collected by the LWDA
5 for violations of the California labor code may, as an alternative, be recovered through a civil
6 action brought by an aggrieved employee on behalf of him or herself and other current or former
7 employees pursuant to procedures outlined in Labor Code § 2699.3.

8 27. Pursuant to PAGA, a civil action under PAGA may be brought by any "aggrieved
9 employee," who is a person that was employed by the alleged violator and against whom one or
10 more of the alleged violations was committed.

11 28. Defendants employed Plaintiff and other employees and committed the alleged
12 violations against Plaintiff and said employees in connection with their employment. Thus,
13 Plaintiff and these other employees are "aggrieved employees" as that term is defined in Labor
14 Code section 2699(c).

15 29. Pursuant to California Labor Code sections 2699.3 and 2699.5, an aggrieved
16 employee, including Plaintiffs, may pursue a civil action arising under PAGA after the following
17 requirements have been met:

- 18 e. The aggrieved employee shall give written notice electronically to the LWDA
19 with copy to the employer of the specific provisions of the California Labor Code
20 alleged to have been violated, including the facts and theories to support the
21 alleged violations.
- 22 f. The LWDA shall provide notice (hereinafter "LWDA Notice") to the employer
23 and the aggrieved employee by certified mail that it does not intend to investigate
24 the alleged violation within thirty (30) calendar days of the postmark date of the
25 Employee's Notice. Upon receipt of the LWDA Notice, or if the LWDA Notice
26 is not provided within thirty-three (33) calendar days of the postmark date of the
27 Employee's Notice, the aggrieved employee may commence a civil action
28 pursuant to California Labor Code section 2699 to recover civil penalties in
addition to any other penalties to which the employee may be entitled.

30. Upon the filing of this complaint, Plaintiff has or will provide written notice as required by law to the LWDA and to Defendant of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations, pursuant to California Labor Code section 2699.3.

31. Over 33 days has not passed since Plaintiffs each sent the LWDA Notice described above. Therefore, Plaintiff intends to amend this complaint at the appropriate time to show the exhaustion of all administrative remedies required by PAGA.

32. A copy of this complaint has been, or will, be included in the notification to the LWDA and Defendant, so that the Plaintiff will have supplied the factual and legal basis upon which the administrative prerequisites under California Labor Code section 2699.3(a) to recover civil penalties and unpaid wages against Defendants, in addition to other remedies, for violations of California Labor Code will have been made.

VI.

STATEMENT OF COMMON FACTS

33. Plaintiff and all class members are not paid on a salary basis and must be paid the minimum wage and overtime premium pay as required by law for all non-exempt employees.

34. The Industrial Wage Commission for the State of California, has fixed the minimum hourly wage for non-exempt workers as set forth below:

effective date	new minimum wage	old minimum wage
January 1, 2016	\$10.00	\$9.00
July 1, 2014	\$9.00	\$8.00
January 1, 2008	\$8.00	\$7.50
January 1, 2007	\$7.50	\$6.75

35. California Labor Code § 1197 states “The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to

1 employees, and the payment of a lower wage than the minimum so fixed is unlawful. This section
2 does not change the applicability of local minimum wage laws to any entity.”

3 36. California Labor Code § 1194 states that “Notwithstanding any agreement to work
4 for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime
5 compensation applicable to the employee is entitled to recover in a civil action the unpaid balance
6 of the full amount of this minimum wage or overtime compensation, including interest thereon,
7 reasonable attorney's fees, and costs of suit.”

8 37. California Labor Code § 221(also referred to as the anti-kickback provision) states:
9 “It shall be unlawful for any employer to collect or receive from an employee any part of wages
10 theretofore paid by said employer to said employee.”

11 38. California Labor Code §223 (also known as the anti-secret rebate provision) states,
12 “Where any statute or contract requires an employer to maintain the designated wage scale, it
13 shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by
14 statute or by contract.”

15 39. California Labor Code § 510(a), in pertinent part states that:

16 Eight hours of labor constitutes a day’s work. Any work in excess of eight
17 hours in one workday and any work in excess of 40 hours in any one
18 workweek and the first eight hours worked on the seventh day of work in
19 any one workweek shall be compensated at the rate of no less than one and
20 one-half times the regular rate of pay for an employee. Any work in excess
21 of 12 hours in one day shall be compensated at the rate of no less than
22 twice the regular rate of pay for an employee. In addition, any work in
23 excess of eight hours on any seventh day of a workweek shall be
24 compensated at the rate of no less than twice the regular rate of pay of an
25 employee. Nothing in this section requires an employer to combine more
26 than one rate of overtime compensation in order to calculate the amount to
27 be paid to an employee for any hour of overtime work.

28 40. California Labor Code § 558 states in part “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 Commission
shall be subject to a civil penalty. . .”

41. California Labor Code § 226(a)(9) provides in relevant part:

1
2 Every employer shall, semimonthly or at the time of each payment of
3 wages, furnish each of his or her employees, either as a detachable part of
4 the check, draft, or voucher paying the employee's wages, or separately
5 when wages are paid by personal check or cash, an accurate itemized
6 statement in writing showing . . . all applicable hourly rates in effect
7 during the pay period and the corresponding number of hours worked at
8 each hourly rate by the employee. . ."

9 42. Plaintiff and all class members are employed by Defendants as Mortgage Loan
10 Officers, Loan Officers and/or commissioned inside employees. Defendant pays Plaintiff and
11 each class member a base hourly pay semi-monthly. In addition, Defendant pays a commission
12 minus the base pay previously paid once a month.

13 43. The Compensation section of the employment agreement applicable to Plaintiff
14 and, with minor variations not relevant herein, to all other class members states as follows:

15 Base Pay. Employee shall be paid at a rate of \$10.00 per hour for hours
16 worked in any given work week (the work week is from 12:00 midnight
17 Monday to 11 :59 p.m. Sunday) up to 40 hours and shall be paid overtime
18 for overtime hours worked in accordance with federal and state wage and
19 hour laws. Payment will be made on the 15th and the 30th of each month in
20 accordance with the Bank's regular payroll procedures for non-exempt
21 employees. Hourly wages and overtime paid to Employee are an advance
22 or draw against future commissions. The draw will be reconciled against
23 future commissions, meaning that Employee is not entitled to earn
24 commission compensation until and unless potential commissions exceed
25 the draw. The draw will be paid for each week the Employee works even if
26 commissions for that week do not equal or exceed the amount of the draw.

27 Commissions. Employee is also eligible for commission compensation.
28 Commissions will be calculated, reconciled with base pay, and paid on the
15th of each month, for the previous month. Generally, a commission is
earned after a loan is closed, and when commission reconciliations can be
reasonably calculated. A commission for a brokered loan is earned on the
date of receipt of the HUD-1 and broker check, and when commission
reconciliations can be reasonably calculated. Eligibility to receive
commissions is based on the following calculation: Hourly wages
(including overtime) paid to Employee during the previous calendar month
shall be deducted from commissions due to Employee on the 15th of the
following month and Employee shall be paid the difference, assuming
commissions exceed wages. In addition, if Employee worked overtime
during the previous month and is being paid a commission, pursuant to
federal and state law, Employee will receive additional compensation for

1 overtime hours. The additional amount will be calculated by allocating the
2 commission (less the base pay, including overtime) evenly to each week or
3 partial week in the month. No commission shall be paid if commissions
4 earned do not exceed the previous month's wages paid.

5 44. The wage statement does not reflect the hourly pay rate for Plaintiff and other
6 class members.

7 **VII.**
8 **FIRST CAUSE OF ACTION**

9 **Failure to Pay Minimum Wages And Overtime Without Subsequent Deduction In Non-**
10 **Commission Pay Periods**

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

13 46. As set forth hereinabove, Defendant pays its commissioned employees twice a
14 month. The first monthly payment is based upon hours worked at the minimum wage rate. Thus,
15 it appears that the Defendant has paid the minimum wage and overtime required by statute.

16 47. But then, Defendant subtracts the minimum wages and overtime it paid in the first
17 monthly pay period from the commission payments made in the second pay period. As the
18 compensation section of the employment agreement states: "Hourly wages (including overtime)
19 paid to Employee during the previous calendar month shall be deducted from commissions due to
20 Employee on the 15th of the following month and Employee shall be paid the difference,
21 assuming commissions exceed wages."

22 48. By deducting the wages paid in the first pay period from the wages earned in the
23 second pay period, the Defendant has violated Labor Code § 221 which prohibits an employer
24 from recovering wages paid. This provision prohibits an employer from receiving from an
25 employee any wage paid by the employer to the employee either by deduction or recovery after
26 payment of the wage. By appearing to have paid the wages required by statute in the first pay
27 period, but receiving a concealed rebate of such wages in the second pay period, the Defendant
28 has violated the provisions of California Labor Code § 223.

49. In reality, the Defendant has totally failed to pay the wages and overtime premium
pay required by statute in the first pay period. The compensation section of the employment

1 agreement states “Hourly wages and overtime paid to Employee are an advance or draw against
2 future commissions.” A draw is a loan, and therefore the Defendant does not actually pay the
3 employees anything for the first pay period of each month.

4 50. Plaintiff and the class members seek damages in the amounts earned in the first
5 monthly pay period and improperly deducted from second pay period, plus liquidated damages
6 for failing to pay minimum wages under Labor Code § 1194.2 as well as interest thereon,
7 reasonable attorney’s fees, and costs of suit fees pursuant to Labor Code § 1194.

8 51. Defendant is also subject to civil penalties and restitution of wages payable to
9 Plaintiff and all Class Members pursuant to Labor Code § 1179.1 as follows:

10 (1) For any initial violation that is intentionally committed, one hundred dollars (\$100)
11 for each underpaid employee for each pay period for which the employee is underpaid.
12 This amount shall be in addition to an amount sufficient to recover underpaid wages.

13 (2) For each subsequent violation for the same specific offense, two hundred fifty
14 dollars (\$250) for each underpaid employee for each pay period for which the
15 employee is underpaid regardless of whether the initial violation is intentionally
16 committed. This amount shall be in addition to an amount sufficient to recover
17 underpaid wages.

18 (3) Wages recovered pursuant to this section shall be paid to the affected employee.

19 These penalties are in addition to any other penalty provided by law and are recoverable by
20 private individuals on behalf of the state of California under the Private Attorney General Act,
21 Labor Code § 2699, et. seq.

22 52. Defendant is also subject to civil penalties and restitution of wages payable to
23 Plaintiff and all Class Members pursuant to Labor Code § 558 for violating the applicable
24 Wage Order as follows:

25 (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each
26 pay period for which the employee was underpaid in addition to an amount sufficient
27 to recover underpaid wages.

28 (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid
employee for each pay period for which the employee was underpaid in addition to an
amount sufficient to recover underpaid wages.

(3) Wages recovered pursuant to this section shall be paid to the affected employee.

1
2 These penalties are in addition to any other penalty provided by law and are recoverable by
3 private individuals on behalf of the state of California under the Private Attorney General Act,
4 Labor Code § 2699, et. seq.

5 **XIII.**

6 **SECOND CAUSE OF ACTION**

7 **Failure to Pay the Correct Overtime Premium Rate on Commissions**

8 53. Plaintiff re-alleges and incorporates by reference the allegations contained in
9 preceding paragraphs as though fully set forth herein.

10 54. As set forth hereinabove, Defendant calculates the overtime premium rate for
11 commissions paid by dividing by the hours worked each month by the net of commissions earned
12 minus the amount of the hourly base rate previously paid in the prior pay period. As stated in the
13 compensation section of the employment agreement with emphasis supplied:

14 In addition, if Employee worked overtime during the previous month and is
15 being paid a commission, pursuant to federal and state law, Employee will
16 receive additional compensation for overtime hours. **The additional
amount will be calculated by allocating the commission (less the base
pay, including overtime) evenly to each week or partial week in the
month.**

17 55. To correctly calculate the overtime premium rate for commission paid employees,
18 an employer must simply divide the total amount earned in the pay period by the hours worked in
19 that same pay period, times half (since the commissions cover the straight time rate), times the
20 hours worked overtime in that pay period. Here, the employer uses a lower number than the total
21 earned in the pay period and divides by more hours worked in that pay period, resulting in an
22 artificially low overtime premium rate for pay periods covered by commission payments.

23 56. In this case, the Defendant violates the requirement that overtime premium be one
24 and one half times the “regular rate” in two ways. First, by subtracting the wages fictitiously paid
25 in the previous pay period, the Defendant lowers the total for which commissions are paid such
26 that the entire earnings for the pay period is calculated based upon a number that is less than what
27 is actually earned for that pay period. Second, by allocating the commissions “evenly to each
28 week or partial week in the month” the Defendant is actually dividing the commissions by the

1 entire month, rather than by the pay period, thus violating the rule of *Peabody v. Time Warner*
2 *Cable, Inc.*, 59 Cal. 4th 662, 328 P.3d 1028 (2014), that one pay period cannot be used to offset
3 another, and reducing the regular rate significantly.

4 57. Plaintiff and the class members seek damages in the amounts improperly withheld
5 in an amount to be proved at time of trial, along with all appropriate penalties, including but not
6 limited to the remedies made available under, *inter alia*, California Labor Code §§ 203, 225.5,
7 and 558, as well as prejudgment interest pursuant to Labor Code §§ 218.6 and 1194(a), Civil
8 Code §§ 3287 and §3289, and reasonable attorneys' fees pursuant to Labor Code § 1194

9 58. Defendant is also subject to civil penalties and restitution of wages payable to
10 Plaintiff and all Class Members pursuant to Labor Code § 558 as follows:

11 (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each
12 pay period for which the employee was underpaid in addition to an amount sufficient
13 to recover underpaid wages.

14 (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid
15 employee for each pay period for which the employee was underpaid in addition to an
16 amount sufficient to recover underpaid wages.

17 (3) Wages recovered pursuant to this section shall be paid to the affected employee.

18 These penalties are in addition to any other penalty provided by law and are recoverable by
19 private individuals on behalf of the state of California under the Private Attorney General Act,
20 Labor Code § 2699, et. seq.

21 IX.

22 THIRD CAUSE OF ACTION

23 Failure to Provide Accurate Wage Statements

24 59. Plaintiff realleges and incorporates by this reference all the paragraphs above in
25 this Complaint as though fully set forth herein.

26 60. Defendant knowingly and intentionally failed to provide timely, accurate, itemized wage
27 statements showing, *inter alia*, hours worked, to Plaintiff and Class Members in accordance with Labor
28 Code § 226(a) and applicable Wage Order No. 9. Such failure caused injury to Plaintiff and Class

1 Members by, among other things, impeding them from knowing the amount of wages to which they are
2 and were legally entitled.

3 61. Plaintiff's good faith estimate of the number of pay periods in which Defendant failed
4 to provide accurate itemized wage statements to Plaintiff and Class Members is each and every pay
5 period during the Class Period.

6 62. Plaintiff and the Class Members are entitled to and seek injunctive relief requiring
7 Defendant to comply with Labor Code §§ 226(a) and further seek the amount provided under Labor
8 Code § 226(e), including the greater of all actual damages or fifty dollars (\$50) for the initial pay period
9 in which a violation occurred and one hundred dollars (\$100) per employee for each violation in a
10 subsequent pay period.

11 63. Defendant is also subject to civil penalties for Labor Code §§ 226(a) violations "in
12 the amount of two hundred and fifty dollars (\$250) per employee per violation in an initial
13 citation and one thousand (\$1,000) per employee for each violation in a subsequent citation . . .
14 ." as provided by Labor Code §§ 226.3. These penalties are in addition to any other penalty
15 provided by law and are recoverable by private individuals on behalf of the state of California under
16 the Private Attorney General Act, Labor Code § 2699, et. seq.

17 64. Because Defendant's conduct described immediately above is an act of unfair
18 competition and a business practice in violation of California Business & Professions Code
19 Section 17200, Plaintiff further demands the Defendant be enjoined from continuing to provide
20 inaccurate pay statements that fail to include the amount of hours worked by each employee, the
21 hourly rate of pay, and the amount of all overtime hours worked at the corresponding hourly
22 rate.

23 X.

24 FOURTH CAUSE OF ACTION

25 Waiting Time Penalties

26 65. Plaintiff re-alleges and incorporates by reference the allegations contained in the
27 preceding paragraphs as though fully set forth herein.

28 66. California Labor Code §201 requires an employer who discharges an employee to
pay all compensation due and owing to the employee immediately upon the employee's discharge

1 from employment. California Labor Code § 202 requires an employer promptly pay all
2 compensation due and owing to an employee within 72 hours after that employee's employment
3 terminates, including by resignation. California Labor Code § 204 requires an employer to pay
4 all wages due to its employees when those wages are due. California Labor Code § 203 provides
5 that if an employer willfully fails to pay all compensation due promptly upon discharge or
6 resignation, as required by §§ 201 and 202, the employer shall be liable for waiting time penalties
7 in the form of continued compensation for up to 30 work days.

8 67. As noted hereinabove, Defendant's failure to pay minimum wages and overtime
9 properly in non-commission pay periods, and Defendant's failure to properly calculate overtime
10 premium rates in commission paid weeks, results in an underpayment of wages to all terminated
11 employees in violation of Labor Code § 203.

12 68. Defendant has willfully failed to make timely payment of the full wages due to
13 these employees who have quit or have been discharged, thereby violating California Labor Code
14 §§ 201-202.

15 69. The failure to completely compensate these employees means that Defendants
16 have not only violated, but they also continue to violate California Labor Code § 204, which
17 requires employers, including many of the Defendants herein, to pay their employees thier full
18 wages when due.

19 70. On behalf of waiting penalties Subclass of terminated employees, Plaintiff seeks
20 the penalties to which they are entitled pursuant to Labor Code §203, in the amount of each
21 members' daily wage multiplied by thirty (30) days, the exact amount of which is to be
22 determined at trial.

23 **XI.**

24 **FIFTH CAUSE OF ACTION**

25 **Unfair Business Practices**

26 71. Plaintiff re-alleges and incorporates by reference the allegations contained in the
27 preceding paragraphs as though fully set forth herein.
28

72. As described above, Defendant has engaged in unfair business practices in California by utilizing and engaging in an unlawful pattern and practice of failing to properly pay employee compensation.

73. Defendant's use of such practices constitutes an unfair business practice, unfair competition, and provides an unfair advantage over Defendant's competitors. Plaintiff and other similarly situated members of the general public seek full restitution on account of the economic injuries they have suffered along with disgorgement of ill-gotten gains from the Defendant as necessary and according to proof, to restore any and all monies withheld, acquired and/or converted by Defendant by means of the unfair business practices complained of herein.

74. Plaintiff seeks on her own behalf and on behalf of the general public, the appointment of a receiver, as necessary, to oversee said restitution, including all wages earned and unpaid, including interest thereon.

75. The acts complained of herein, occurred, at least in part, within the last four (4) years preceding this Complaint for Damages.

76. Further, if Defendant is not enjoined from the unlawful conduct described above, Defendant will continue unabated in their unlawful conduct, which will continue to result in irreparable injury to members of the general public, including, but not limited to all members of the Class who are current employees of the Defendant, and for which there is no adequate remedy at law. Thus, Plaintiff requests that the Court issue a preliminary and permanent injunction prohibiting Defendant from engaging in the foregoing conduct.

77. Plaintiff, on behalf of the general public and members of the Class, seeks full restitution from Defendant, as necessary and according to proof, to restore all monies withheld, acquired and/or converted by Defendant by means of the unfair practices complained of herein.

XII.

SIXTH CAUSE OF ACTION

California Labor Code Private Attorneys General Act,

Cal. Labor Code §§ 2698 Et Seq.

78. Plaintiff re-alleges and incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

1 79. Plaintiff on behalf of himself, all aggrieved employees and/or on behalf of the
2 putative classes herein, as well as the general public of the State of California alleges that
3 Defendants here have violated the following provisions of the California Labor Code in the
4 following provisions of the applicable IWC Wage Order in which violations are actionable
5 through the PAGA, as previously alleged herein: California Labor Code §§ 201, 202, 203, 204,
6 204a, 204b, 221, 223, 225.5, 510, 558 1194 and 1197 as well as the orders of the Industrial Wage
7 Commission.

8 80. Each of these violations entitles Plaintiff, as a private attorney general, to recover
9 the applicable statutory civil penalties on her own behalf, on behalf of all aggrieved employees,
10 and on behalf of the general public.

11 81. California Labor Code §2699 (a), which is part of PAGA, provides in pertinent
12 part:

13 notwithstanding any other provision of law, any provision of this code that
14 provides for a civil penalty to be assessed and collected by the Labor and Workforce
15 Development Agency or any of its departments, divisions, commissions, boards, agencies,
16 or employees, for a violation of this code, may, as an alternative, be recovered through a
17 civil action brought by an aggrieved employee on behalf of himself or herself and other
18 current or former employees pursuant to the procedures specified in Section 2699.3.

19 California Labor Code § 2699 (F), which is part of PAGA, provides in pertinent
20 part:

21 for all provisions of this code except for those for which a civil penalty is
22 specifically provided, there is established a civil penalty for a violation of these
23 provisions, as follows:...

24 (2) If, at the time of the alleged violation, the person employs one or more
25 employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee
26 per pay period for the initial violation and two hundred (\$200) for each for each aggrieved
27 employee per pay period for each subsequent violation.

28 82. Plaintiff and the Class are entitled to civil penalties, to be paid by Defendants and
allocated as PAGA requires, pursuant to California Labor Code § 2699(a) for Defendants'

1 violations of the California Labor Code and IWC Wage Orders for which violations a civil
2 penalty is already specifically provided by law; and Plaintiff is entitled to civil penalties, to be
3 paid by Defendants and allocated as PAGA requires, pursuant to California Labor Code §2699 for
4 Defendants' violations of the California Labor Code and IWC Wage Orders for which violations
5 a civil penalty is not already specifically provided.

6 83. Plaintiff is in the process of exhausting all administrative remedies as required by
7 California Labor Code 2699.3 and will seek to amend this section to demand actual penalties and
8 damages as soon as practical.

9 XIII.

10 PRAYER FOR RELIEF

11 **WHEREFORE**, Plaintiff prays this Court enter a judgment against Defendant as follows:

12 1. For the First Cause of Action for Failure to Pay Minimum Wages And Overtime

13 Without Subsequent Deduction In Non-Commission Pay Periods:

- 14 a. Damages in the amounts Defendant improperly failed to pay Plaintiff and the
15 class' as minimum wages and overtime in an amount to be proved at time of
16 trial,
- 17 b. all appropriate penalties, including but not limited to the remedies made
18 available under, inter alia, California Labor Code §§ 203, 558 and 1194.2,
- 19 c. prejudgment interest pursuant to Labor Code §§218.6 and 1194(a), Civil Code
20 §§ 3287 and §3289, and
- 21 d. reasonable attorney's fees pursuant to Labor Code §§ 1194 and 1194.3.

22 2. For the Second Cause of Action for Failure to Pay the Correct Overtime Premium

Rate on Commissions:

- 23 a. Damages in the amounts Defendant improperly failed to pay Plaintiff and the
24 class' as overtime premiums in an amount to be proved at time of trial,
- 25 b. all appropriate penalties, including but not limited to the remedies made
26 available under, inter alia, California Labor Code §§ 203, 558 and 1194.2,
- 27 c. prejudgment interest pursuant to Labor Code §§218.6 and 1194(a), Civil Code
28 §§ 3287 and §3289, and

- 1 d. reasonable attorney's fees pursuant to Labor Code §§ 1194.
- 2
- 3 3. For the Third Cause of Action for Waiting Time Penalties: penalties to which Plaintiff
- 4 and the class are entitled pursuant to Labor Code §203 against Defendant Employer, in
- 5 the amount of each Waiting Penalty subclass members' daily wage multiplied by
- 6 thirty (30) days, the exact amount of which is to be determined at trial;
- 7 4. For the Fourth Cause of Action for Unfair Business Practices:
- 8 a. For an accounting, under administration of Plaintiff and/or the receiver and
- 9 subject to Court review, to determine the amount to be returned by Defendant,
- 10 and the amounts to be refunded to members of the classes who are owed
- 11 monies by Defendant;
- 12 b. For an Order requiring Defendant to make full restitution and payment
- 13 pursuant to California law;
- 14 c. For an Order for a preliminary and/or permanent injunction prohibiting
- 15 Defendant from engaging in the acts complained of herein;
- 16 d. For all other appropriate injunctive, declaratory and equitable relief;
- 17 e. For interest to the extent permitted by law;
- 18 f. For an award of reasonable attorneys' fees and costs incurred in the
- 19 investigation, filing and prosecution of this action pursuant to CCP §1021.5,
- 20 B&PC §17200, et seq., Labor Code §1194 and/or any other applicable
- 21 provision of law;
- 22 g. Appointment of a receiver, as necessary to oversee the restitution and/or
- 23 disgorgement of profits obtained by Defendants by way of the unfair business
- 24 practices complained of above in the eighth cause of action; and,
- 25 h. For all other relief as the Court may deem proper.
- 26 5. For the Fourth Cause of Action for California Labor Code Private Attorneys General
- 27 Act, Cal. Labor Code §§ 2698 Et Seq.:
- 28 a. That after the exhaustion of all administrative proceedings, the Court allows
- the complaint to be amended and then to declare, adjudge and decree that
- Defendant Employer violated the following California Labor Code sections as

1 to Plaintiff and aggrieved employees: Labor Code §§ 201, 202, 203, 204, 204a,
2 204b, 212, 221, 222, 223, 226, 450, and 558;

3 b. For civil penalties and unpaid wages pursuant to California Labor Code
4 sections 2699(a) and/or 2699(f) and (g) and 558, plus costs and attorneys' fees,
5 for violations of, *inter alia*, California Labor Code §§ 201, 202, 203, 204,
6 204a, 204b, 212, 221, 222, 223, 225.5, 226, 450; and

7 c. For such other and further relief as the Court may deem equitable and
8 appropriate.

- 9 6. For the costs incurred in this action, including reasonable attorneys' fees and
10 expenses, pursuant to Labor Code § 1194, Government Code § 1021.5 as well as any
11 other code section authorizing attorney fees;
12 7. An order requiring Defendant to immediately cease their wrongful conduct as set forth
13 above;
14 8. For pre-judgment and post-judgment interest at the legal rate;
15 9. For an order certifying the case as a class action, designating Plaintiff as class
16 representative and Plaintiff's counsel as Class Counsel; and
17 10. Such further legal and equitable relief as this Court may deem just and proper.

18 Dated: December 19, 2016

Thierman Buck, LLP

19 By: 

20 Mark R. Thierman
21 Attorneys for Plaintiff Rose
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