

1 Laura L. Ho (SBN 173179)
lho@gbdhlegal.com
2 Byron R. Goldstein (SBN 289306)
brgoldstein@gbdhlegal.com
3 GOLDSTEIN, BORGEN, DARDARIAN & HO
300 Lakeside Drive, Suite 1000
4 Oakland, CA 94612
Tel: (510) 763-9800
5 Fax: (510) 835-1417

6 Bruce C. Fox
bruce.fox@obermayer.com
7 Jeffrey B. Cadle
jeffrey.cadle@obermayer.com
8 Andrew J. Horowitz
andrew.horowitz@obermayer.com
9 OBERMAYER REBMANN
MAXWELL & HIPPEL LLP
10 500 Grant Street, Ste. 5240
Pittsburgh, PA 15219
11 Tel.: (412) 566-1500

12 Attorneys for Plaintiff and the Proposed Class

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 WILMA FOSTER, on behalf of herself and all
others similarly situated,
16
17 Plaintiffs,
18 vs.
19 ADVANTAGE SALES AND MARKETING, LLC
d/b/a ADVANTAGE SOLUTIONS,
20 Defendant.

Case No.:
CLASS, COLLECTIVE, AND
REPRESENTATIVE ACTION
COMPLAINT FOR DAMAGES
DEMAND FOR JURY TRIAL
**1. Failure to Pay Overtime Wages under the
Fair Labor Standards Act;**
**2. Failure to Pay Overtime Wages under the
Cal. Lab. Code;**
**3. Failure to Provide Meal Periods under the
Cal. Lab. Code;**
**4. Failure to Provide Rest Periods under the
Cal. Lab. Code;**
**5. Failure to Provide Accurate Itemized
Wage Statements under the Cal. Lab.
Code;**
**6. Failure to Pay All Wages Due Upon
Termination under the Cal. Lab. Code;
and**
7. California Unfair Competition Law.

1 Plaintiff Wilma Foster states as follows:

2 **NATURE OF THE ACTION**

3 1. This class/collective action case arises out of the systemic unlawful treatment of Plaintiff
4 and other similarly situated current and former Customer Development Managers (“CDMs”) who
5 worked for Defendant Advantage Sales and Marketing, LLC d/b/a Advantage Solutions (“Advantage”).
6 Plaintiff alleges that she and other CDMs throughout the United States: (i) were misclassified as exempt
7 from the overtime protections of the federal Fair Labor Standards Act (“FLSA”); (ii) are entitled to
8 unpaid wages from Defendant for work performed for which they did not receive any compensation as
9 well as overtime work for which they did not receive any overtime premium pay as required by law, and
10 (iii) are entitled to liquidated damages pursuant to the FLSA.

11 2. Additionally, Plaintiff alleges that she and other CDMs in California (i) were
12 misclassified as exempt from the overtime protections of California Labor Code; (ii) are entitled to
13 unpaid wages from Defendant for work performed for which they did not receive any compensation as
14 well as overtime work for which they did not receive any overtime premium pay as required by law; (iii)
15 are entitled to meal and rest period premiums under Labor Code § 226.7 for Advantage’s failure to
16 provide meal or rest periods as required by the applicable Wage Order; (iv) are entitled to waiting time
17 penalties under Labor Code § 203 for Advantage’s failure to pay for all hours worked at the time of
18 termination of employment (for those who are no longer employed by Advantage); (v) are entitled to
19 statutory damages for Advantage’s failure to provide accurate itemized wage statements under Labor
20 Code § 226; and (vi) are entitled to restitution and an injunction under the Unfair Competition Law
21 (“UCL”) Business and Professions Code § 17200 *et seq.*

22 **THE PARTIES**

23 3. Plaintiff Wilma Foster is an adult individual residing in Castro Valley, California. Foster
24 has been employed by Advantage since April 14, 2016, and became a CDM in December 2016. Foster
25 remains employed by Advantage as a CDM. Her territory covers multiple locations between in the area
26 of Hayward, California.

27 4. Defendant Advantage Sales and Marketing, LLC d/b/a Advantage Solutions is a
28 California limited liability company located in Irvine, California. Defendant maintains its headquarters

1 at 18100 Von Karman Ave, Suite 1000, Irvine, California 92612. At all relevant times, Advantage has
2 continuously been an employer engaged in interstate commerce within the meaning of the FLSA, 29
3 U.S.C. §§ 206(a) and 207(a).

4 **JURISDICTION AND VENUE**

5 5. This Court has subject matter jurisdiction over Plaintiff's FLSA claims pursuant to 29
6 U.S.C. § 216(b) and 28 U.S.C. § 1331. This Court has supplemental jurisdiction over the subject matter
7 of Plaintiff's California state law claims under 28 U.S.C. § 1367(a), because they are so related to the
8 FLSA claims as to form part of the same case or controversy.

9 6. This Court has jurisdiction over the Defendant, because Defendant is a company having
10 sufficient minimum contacts with the Northern District of California so as to render the exercise of
11 jurisdiction over the Defendant by this Court consistent with traditional notions of fair play and
12 substantial justice.

13 7. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

14 8. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201
15 and 2202.

16 **FACTUAL BASIS OF PLAINTIFF'S CLAIMS**

17 9. Among its various services, Advantage operates a retail delivery and management service
18 through which it delivers the consumer products of its clients to retail stores.

19 10. Advantage employs CDMs, including the Plaintiff, to be responsible for inventory and
20 advertising display within as many as 45 assigned retail stores within a designated geographic region.

21 11. The CDMs are organized into teams that are singularly focused on a manufacturer and/or
22 class of trade, such as grocery, mass, drug, home improvement, convenience, club, military, and natural.
23 Plaintiff is one of a group of CDMs in the North American Nutrition team who are focused on Gatorade
24 and Quaker products (the "Gatorade CDMs").

25 12. The principal job duties of Gatorade CDMs are to make sure that their assigned products
26 are properly stocked, priced and displayed within the shelf space at each of the CDMs' assigned stores.

27 13. Gatorade CDMs also occasionally engage in product sales conversations with retail
28 managers.

1 14. The following tasks are included in a Gatorade CDM's responsibilities at a retail store
2 and take up the majority of their work time:

3 a. Setting up pre-stocked shippers (also referred to as point-of-sales) at assigned
4 retail stores;

5 b. Building displays, end caps and stack-outs for Gatorade and/or Quaker products;
6 and

7 c. Transporting cardboard displays for placement in retail stores.

8 15. Additional duties of Gatorade CDMs include:

9 a. Participating in mandatory conference calls to receive instructions identifying the
10 quantity of products to be delivered to assigned stores;

11 b. Traveling to and attending regional and national sales meetings; and,

12 c. Cleaning and maintaining storage space where promotional displays and products
13 are delivered.

14 16. Although Gatorade CDMs have a number of job duties, as outlined above, those
15 responsibilities require no technical or specialized skills and no capital investment.

16 17. Gatorade CDMs, in fact, do not have any managerial responsibilities. Nor do they have
17 the authority to hire or fire other employees, or to make recommendations concerning the hiring or firing
18 of other employees.

19 18. In reality, Gatorade CDMs do not exercise any independent judgment in carrying out their
20 duties, which are instead dictated and monitored by supervisors based on directives from executive
21 personnel of Advantage.

22 19. Gatorade CDMs' principal duties consist of manual labor. They spend the majority of
23 their working hours performing such tasks.

24 20. Gatorade CDMs' duties do not relate directly to Advantage's management policies or
25 general business operations.

26 21. Gatorade CDMs do not have the authority to formulate policy or operating procedures.

27 22. Gatorade CDMs do not have the authority to negotiate on behalf of or bind Advantage on
28 significant matters.

1 23. Gatorade CDMs' primary duty is not making sales within the meaning of section 3(k) of
2 the FLSA, and their primary duty is not obtaining orders or contracts for services or for the use of
3 facilities for which a consideration will be paid by the client or customer.

4 24. Advantage willfully and deliberately misclassified the Gatorade CDMs as employees
5 exempt from the overtime provisions of both the FLSA, and for California Gatorade CDMs, exempt
6 from the overtime provisions of the California Labor Code and Wage Order, since December 2016.

7 25. During the relevant time period, Advantage was well aware that the Gatorade CDMs
8 worked at least 45 hours per week.

9 26. Based on this willful misclassification, Advantage justified requiring Gatorade CDMs
10 like the Plaintiff to work hours well in excess of 40 per week during the relevant time period, without
11 any compensation (straight time or overtime) for hours beyond forty per week and over eight hours in a
12 day, in violation of the FLSA and/or the California Labor Code.

13 27. Advantage did not compensate Gatorade CDMs for all time those employees spent
14 commuting between their homes and the first or last retail store serviced by them on a given workday.

15 28. Advantage failed to maintain accurate and sufficient time records for the Gatorade CDMs,
16 including the Plaintiff.

17 29. At all times during the relevant time period, Advantage has failed to provide 30 minute
18 off duty meal periods to California CDMs for every five hours of work.

19 30. At all times during the relevant time period, Advantage has failed to provide a ten minute
20 rest period to California CDMs for every shift from three and one-half hours to six hours in length, two
21 ten minute rest periods for every shift of more than six hours up to ten hours, and three ten minute rest
22 periods for shifts of more than ten hours up to fourteen hours.

23 31. At all times during the relevant time period, Advantage has failed provide California
24 CDMs with accurate itemized wage statements under Labor Code § 226 showing gross wages earned,
25 total hours worked, net wages earned, and all applicable hourly rates in effect during pay period and the
26 corresponding number of hours worked at each hourly rate by the employee.

1 **NATIONWIDE COLLECTIVE ACTION ALLEGATIONS**

2 32. Pursuant to 29 U.S.C. § 216, Plaintiff seeks to prosecute their FLSA claims as a collective
3 action on behalf of all persons who are or were formerly employed by Advantage as Gatorade CDMs in
4 the United States at any time since December 2016 (the “Collective Action Period”) who were not paid
5 for hours actually worked as well as for overtime compensation at rates not less than one and one-half
6 times their regular rate of pay for hours worked in excess of forty hours per workweek (the “Collective
7 Action Members”).

8 33. There are numerous similarly situated current and former Gatorade CDMs throughout the
9 country who would benefit from the issuance of a Court-supervised notice of the instant lawsuit and the
10 opportunity to join the instant lawsuit. Those similarly situated employees are known to Defendant and
11 are readily identifiable through Defendant’s records.

12 34. Plaintiff and other Gatorade CDMs are similarly situated because they all had similar
13 duties; performed similar tasks; were subjected to the same requirements under the FLSA to be paid
14 overtime wages unless specifically and properly exempted thereunder; were not so exempted; were
15 subjected to similar pay plans; were required, suffered, or permitted to work, and did work, in excess of
16 forty hours per week; and were not paid at a rate of one and one-half times their respective correct regular
17 rates of pay for all such overtime hours worked.

18 **CALIFORNIA CLASS ACTION ALLEGATIONS**

19 35. Plaintiff Foster (“Plaintiff”) seeks to proceed as a class action with regard to Plaintiff’s
20 California law claims, pursuant to Federal Rule of Civil Procedure 23 on behalf of the following class
21 of persons:

22 All persons employed by Advantage within the State of California as a
23 Customer Development Manager in the North American Nutrition team at
any time since December 2016.

24 36. The putative class is so numerous that joinder of all members is impracticable. Although
25 the precise number of such persons is unknown, and the facts on which the calculation of that number
26 would be based are presently within the sole custody and/or control of the Defendant, upon information
27 and belief, Advantage has employed over 40 CDMs in California since December 2016.

1 37. Upon information and belief, a number of CDMs have left employment with Advantage
2 from December 2016 through the present. Most of these CDMs would not be likely to file individual
3 suits because they lack adequate financial resources, access to attorneys or knowledge of their claims.

4 38. The Plaintiff will fairly and adequately protect the interests of the putative California
5 class and has retained counsel that is experienced and competent in the fields of employment law and
6 class action litigation. Plaintiff has no interest that is contrary to or in conflict with those of the California
7 class.

8 39. A class action is superior to other available methods for the fair and efficient adjudication
9 of this controversy, since joinder of all members is impracticable. Furthermore, inasmuch as the damages
10 suffered by individual California class members may be relatively small, the expense and burden of
11 individual litigation make it virtually impossible for the California class members to individually seek
12 redress for the wrongs done to them.

13 40. Common questions of law and fact predominate in this action because Advantage has
14 acted on grounds generally applicable to all members. Among the questions of law and fact common to
15 the Plaintiff and California class members are:

16 a. Whether Advantage employed the Plaintiff and California class members within
17 the meaning of the FLSA;

18 b. Whether Advantage willfully misclassified Plaintiff and California class members
19 as exempt from the overtime provisions of the FLSA and California law;

20 c. Whether Advantage failed to pay Plaintiff and California class members for all
21 hours worked and whether they received no compensation, as well as no overtime compensation, for
22 hours worked in excess of forty hours per workweek and hours worked in excess of eight hours per day,
23 in violation of the FLSA and/or California law;

24 d. What proof of hours is sufficient where the employer fails in its duty to maintain
25 accurate time records within the meaning of the FLSA;

26 e. Whether Advantage failed to pay all wages due to former employees in the
27 California class at the time of their termination;

28

1 f. Whether Advantage failed to provide accurate itemized wage statements to
2 Plaintiff and California class members;

3 g. Whether Advantage’s conduct is “unlawful,” “unfair,” or “fraudulent” under
4 California Business & Professions Code § 17200 et seq.;

5 h. Whether injunctive relief, restitution and other equitable remedies, and penalties
6 are warranted;

7 i. Whether Advantage is liable for all damages and prejudgment interest claimed
8 hereunder; and,

9 j. Whether Advantage is liable for costs and attorneys’ fees.

10 41. Plaintiff knows of no difficulty that might be encountered in the management of this
11 litigation that would preclude its maintenance as a class action.

12 **FIRST CAUSE OF ACTION**
13 **[Fair Labor Standards Act]**

14 42. Plaintiff, on behalf of herself and all Collective Action Members, re-alleges and
15 incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

16 43. During the Collective Action Period, Advantage has been, and continues to be, an
17 employer engaged in interstate commerce within the meaning of the FLSA.

18 44. During the Collective Action Period, Advantage employed, and/or continues to employ,
19 Plaintiff and each of the Collective Action Members within the meaning of the FLSA.

20 45. During the Collective Action Period, Advantage has had annual gross revenues in excess
21 of \$500,000.

22 46. During the Collective Action Period, Advantage had a policy and practice of
23 misclassifying the Gatorade CDMs, including Plaintiff and the Collective Action Members, as exempt
24 under the FLSA.

25 47. During the Collective Action Period, Advantage had a policy and practice of refusing to
26 pay any compensation, including straight time and overtime compensation, to Gatorade CDMs for hours
27 worked in excess of forty hours per workweek.
28

1 48. As a result of Advantage's willful failure to compensate its Gatorade CDMs, including
2 Plaintiff and the Collective Action Members, for all the hours worked by them, as well as, at a rate not
3 less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a
4 workweek, Advantage has violated and continues to violate the FLSA, including sections 207(a)(1) and
5 215(a).

6 49. As a result of Advantage's misclassification of its Gatorade CDMs and its attendant
7 failure to record, report, credit and/or compensate the Plaintiff and the Collective Action Members, the
8 Defendant has failed to make, keep and preserve records with respect to each of its employees sufficient
9 to determine the wages, hours, and other conditions and practices of employment in violation of the
10 FLSA, including sections 211(c) and 215(a).

11 50. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the
12 meaning of the statute, 29 U.S.C. § 255(a).

13 51. Due to Advantage's FLSA violations, Plaintiff, on behalf of herself and the Collective
14 Action Members, is entitled to recover from Defendant their unpaid wages, as well as overtime
15 compensation, an additional amount – equal to the unpaid wages and overtime – as liquidated damages,
16 reasonable attorneys' fees, and costs and disbursements of this action, pursuant to § 216(b) of the FLSA.

17 **SECOND CAUSE OF ACTION**
18 **[Cal. Labor Code §§ 510, 558, and 11984 *et seq.***
and Wage Order No. 7-2001]

19 52. Plaintiff, on behalf of herself and all California class action members, re-alleges and
20 incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

21 53. Since at least December 2016, Advantage required Plaintiff and California class members
22 to work in excess of eight (8) hours per workday and forty (40) hours per workweek. However,
23 Advantage failed to fully pay the overtime wages that Plaintiff and California class members earned.

24 54. California Labor Code § 510 and the applicable Wage Order require that an employer
25 compensate all work performed by an employee in excess of eight (8) hours per workday and forty (40)
26 hours per workweek, at one and one-half times the employee's regular rate of pay.

27 55. California Labor Code § 1194 states that any employee receiving less than the legal
28 overtime compensation applicable is entitled to recover in a civil action the unpaid balance of the full

1 amount of his overtime compensation, including interest thereon, reasonable attorneys' fees, and costs
2 of suit.

3 56. During all relevant times, Advantage knowingly and willfully failed to pay overtime
4 earned and due to Plaintiff and California class members. Advantage's conduct deprived Plaintiff and
5 California class members of full and timely payment for all overtime hours worked in violation of the
6 California Labor Code.

7 57. Plaintiff, on behalf of herself and similarly situated California class members, also
8 requests further relief as described below.

9 **THIRD CAUSE OF ACTION**
10 **Failure to Provide Mandated Meal Periods**
[Cal. Labor Code §§ 226.7, 512, and 1194, and Cal. Code Regs. tit. 8 §§ 11040, 11070]

11 58. Plaintiff, on behalf of herself and all California class action members, re-alleges and
12 incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

13 59. California Labor Code § 512(a) states in pertinent part: “[A]n employer may not employ
14 an employee for a work period of more than five hours per day without providing the employee with a
15 meal period of not less than 30 minutes. An employer may not employ an employee for a work period
16 of more than 10 hours per day without providing the employee with a second meal period of not less
17 than 30 minutes”

18 60. Wage Order Nos. 4 and 7 each state, in relevant part, “No employer shall employ any
19 person for a work period of more than five (5) hours without a meal period of not less than 30 minutes.”
20 If no meal period is provided, the Wage Orders require the employer to “pay the employee one (1) hour
21 of pay at the employee’s regular rate of compensation for each workday that the meal period is not
22 provided.”

23 61. California Labor Code § 226.7 states, in relevant part, “An employer shall not require an
24 employee to work during a meal ... period mandated pursuant to an applicable statute, or applicable
25 regulation, standard, or order of the Industrial Welfare Commission.” Section 226.7 requires an
26 employer to pay one additional hour of pay at the employee’s regular rate if the meal or rest period is
27 not provided.

SIXTH CAUSE OF ACTION
Failure to Pay All Wages Upon Termination

[Cal. Labor Code §§ 201, 202, 203, and 256, and Wage Order No. 7-2001]

1
2
3 77. Plaintiff, on behalf of herself and all California class action members, re-alleges and
4 incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

5 78. California Labor Code § 201 provides that any discharged employee is entitled to all
6 wages due at the time of discharge.

7 79. Where an employer willfully fails to pay discharged or quitting employees all wages due
8 as required under the California Labor Code, the employer is liable to such employees under California
9 Labor Code § 203 for waiting time penalties in the amount of one (1) day's compensation at the
10 employees' regular rate of pay for each day the wages are withheld, up to thirty (30) days.

11 80. During all relevant times, Advantage knowingly and willful violated California Labor
12 Code §§ 201 and 202 by failing to pay Plaintiff and California class members who are no longer
13 employed by Advantage all wages owed as alleged herein. Advantage is therefore liable to Plaintiff and
14 California class members who are no longer employed by Advantage for waiting time penalties as
15 required by California Labor Code § 203.

16 81. Plaintiff, on behalf of herself and similarly situated California members, also requests
17 further relief as described below.

18 **SEVENTH CAUSE OF ACTION**
19 **Unfair Competition Law Violations**
20 **[Cal. Business & Professions Code § 17200 *et seq.*]**

21 82. Plaintiff, on behalf of herself and all California class action members, re-alleges and
22 incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

23 83. California Business & Professions Code § 17200 *et seq.* prohibits unfair competition in
24 the form of any unlawful, unfair, deceptive, or fraudulent business practices.

25 84. Plaintiff brings this cause of action individually and as representatives of all others subject
26 to Advantage's unlawful acts and practices.

27 85. Since at least December 2016, Advantage committed unlawful, unfair, deceptive, and/or
28 fraudulent acts as defined by California Business & Professions Code § 17200. Advantage's unlawful,
unfair, deceptive, and/or fraudulent business practices include, without limitation, failing to pay for all

1 hours worked, failing to pay overtime wages, failing to provide mandated meal and rest periods, failing
2 to timely pay all wages earned, failing to furnish accurate itemized wage statements, failing to keep
3 required payroll records, and failing to pay all wages upon termination in violation of California law
4 and/or the FLSA.

5 86. As a result of this unlawful and/or unfair and/or fraudulent business practice, Advantage
6 reaped unfair benefits and illegal profits at the expense of Plaintiff and California class members.
7 Advantage must disgorge these ill-gotten gains and restore Plaintiff and California class members all
8 wrongfully withheld wages, including, but not limited to overtime compensation.

9 87. Plaintiff, on behalf of herself and similarly situated California class members, also
10 requests further relief as described below.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff, on behalf of herself and all other similarly situated employees,
13 respectfully requests that this Court grant the following relief:

14 1. Designation of this action as a collective action on behalf of the Collective Action
15 Members and prompt issuance of notice pursuant to 29 U.S.C. §216(b) to all Collective Action Members,
16 apprising her of the pendency of this action, permitting her to assert timely FLSA claims in this action
17 by filing individual consents to opt into this proceeding and appointing Plaintiff and her counsel to
18 represent the Collective Action Members;

19 2. Certification of this action as a class action pursuant to Rule 23 for the California class
20 members, and appointing Plaintiff as Class Representative and her attorneys as Class Counsel.

21 3. Issuance of a declaratory judgment that the practices complained of herein are unlawful
22 under the FLSA and California law;

23 4. Award of unpaid wages, as well as all overtime compensation, due under the FLSA and
24 California law to Plaintiff, the Collective Action Members, and the California class members;

25 5. Award of liquidated damages to Plaintiff and Collective Action Members as a result of
26 Advantage's willful failure to pay for all wages dues as well as overtime compensation pursuant to the
27 FLSA;

