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10 Attorneys for Defendant
11 US FOODS, INC.

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 FELIPE OSORIO, individually on
16 behalf of all individuals similarly
situated,

17 Plaintiff,

18 vs.

19 US FOODS, INC., WHICH WILL DO
20 BUSINESS IN CALIFORNIA AS U.S.
21 FOODSERVICE, INC., a Delaware
corporation; and DOES 1 through 25,
inclusive,

22 Defendants.
23

Case No. 2:21-CV-00179

**NOTICE OF REMOVAL BY
DEFENDANT US FOODS, INC.**

28 U.S.C. §§ 1332, 1441, 1446

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28 NOTICE OF REMOVAL BY
DEFENDANT US FOODS, INC.

1 TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL
 2 DISTRICT OF CALIFORNIA AND TO ALL PARTIES AND THEIR
 3 ATTORNEYS FOR RECORD:

4 PLEASE TAKE NOTICE that Defendant US Foods, Inc. files this Notice of
 5 Removal pursuant to 28 U.S.C. §§ 1332(d) (the Class Action Fairness Act), and
 6 1446(b) to effect removal of the above-captioned action, which was commenced in
 7 the Superior Court of the State of California in and for the County of Los Angeles.
 8 The removal is proper for the reasons stated below.

9 **BACKGROUND**

10 1. On December 8, 2020, Plaintiff Felipe Osorio, individually and
 11 purportedly on behalf of all others similarly situated, filed a Complaint in the
 12 Superior Court of California for the County of Los Angeles, entitled “*Felipe Osorio*
 13 *v. US Foods, Inc.*” Case Number 20STCV46858. The allegations of the Complaint
 14 in the Action are incorporated by reference in this Notice of Removal without
 15 necessarily admitting any of them.

16 2. The Complaint asserts causes of action on a class-wide basis for:
 17 (1) Failure to compensate all hours worked in violation of Industrial Welfare
 18 Commission Order No. 4 and California Labor Code sections 200, 226, 500, 510,
 19 1194, 1197, and 1198; (2) Failure to pay minimum wages in violation of Labor
 20 Code sections 1182.12, 1194, 1194.2, and 1197; (3) Failure to pay overtime
 21 compensation in violation of California Labor Code section 1194, *et seq.*;
 22 (4) Failure to provide proper wage statements in violation of California Labor
 23 section 226; (5) Violation of Labor Code sections 2698, *et seq.* (Private Attorneys
 24 General Act); and (6) Violations of California Business and Professions Code
 25 sections 17200, *et seq.*

26 3. Specifically, Plaintiff alleges that, beginning on or around April 21,
 27 2020, Defendant required Plaintiff and putative class members to wait in line for
 28 temperature checks at Defendant’s warehouses. Complaint ¶ 11. Plaintiff further

1 alleges that Defendants agreed to compensate Plaintiff and putative class members
2 at the rate of one minute at their regular hourly wage for time spent waiting in line
3 at temperature checks, but that these temperature checks forced them to wait up to
4 five minutes due to various factors. *Id.* ¶ 12. Plaintiff also alleges that Defendant
5 did not pay Plaintiff and putative class members for the time between the
6 temperature checks and the start of their shifts, although Plaintiff and putative class
7 members had to walk up to fifteen minutes from the temperature check station to
8 their workstations before they could begin to be paid for their time. *Id.* ¶ 13.
9 Plaintiff alleges that as a result of this unpaid time related to required temperature
10 checks, Defendant failed to pay Plaintiff and putative class members for all hours
11 worked, including minimum wages, overtime wages, and double-time wages; failed
12 to issue accurate wage statements; violated California's PAGA; and violated
13 California's UCL. *Id.* ¶¶ 10-19, *passim*.

14 4. Plaintiff further contends that this unpaid time should have been
15 compensated at applicable overtime rates due to the amount of time Plaintiff and
16 putative class members worked during their shifts. *Id.* ¶ 15. Plaintiff alleges
17 Defendant was required to pay Plaintiff and putative class members: (a) time and
18 one-half their regular rate of pay for hours worked in excess of eight hours in a
19 workday and/or forty hours in any workweek and for the first eight hours worked
20 on the seventh day of work in any one workweek; and (b) twice their regular rate of
21 pay for hours worked in excess of twelve hours in any one day or for hours worked
22 in excess of eight hours on any seventh day of work in a workweek. *Id.* ¶ 50.

23 5. Defendant was served with the Complaint on December 9, 2020. The
24 Summons and Complaint are attached hereto together with all other pleadings,
25 process, and orders served on US Foods as **Exhibits 1-8**. This Notice of Removal
26 is timely under any removal time period. 28 U.S.C. § 1446(b) (filed within thirty
27 days of the first receipt by Defendant of a copy of the Summons and Complaint in
28 this matter); *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1139 (9th Cir.

2013) (thirty-day removal period not triggered by indeterminate complaint that “does not make clear whether the required jurisdictional elements are present”).

CLASS ACTION FAIRNESS ACT

6. Defendant removes this action based upon the Class Action Fairness Act of 2005, codified in 28 U.S.C. § 1332(d). This Court has original jurisdiction of this action under § 1332(d)(2). As set forth below, this action is removable pursuant to 28 U.S.C. § 1441(a) because it is a class action in which at least one class member is a citizen of a state different from that of any one defendant, the proposed class exceeds 100 members, and the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2)(A). Further, no defendant identified in the Complaint is a state, officer of a state, or a governmental agency. 28 U.S.C. § 1332(d)(5).

DIVERSITY OF CITIZENSHIP

7. CAFA’s diversity requirement is satisfied when at least one plaintiff is a citizen of a state in which none of the defendants are citizens. 28 U.S.C. §§ 1332(d)(2), 1332(d)(5)(B), 1453(a).

8. Plaintiff’s Citizenship. Plaintiff alleges that he was, at all times relevant to this Complaint, an adult individual living and working in the State of California and that he was employed by Defendant in the State of California. Complaint ¶¶ 1, 8. For diversity purposes, a person is a “citizen” of the state in which he or she is domiciled. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088 (9th Cir. 1983). A person’s domicile is the place he or she resides with the intention to remain or to which he or she intends to return. *Kanter v. Warner–Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). Residence is *prima facie* the domicile. *See Ayala v. Cox Automotive, Inc.*, 2016 WL 6561284, at *4 (C.D. Cal. 2016) (allegation that Plaintiff “is, and at all times mentioned in the Complaint was,” a California resident “gives rise to a presumption that Plaintiff is a California

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1 citizen”); *State Farm Mut. Auto. Ins. Co. v. Dyer*, 19 F.3d 514, 520 (10th Cir.
2 1994). Defendant therefore alleges that Plaintiff is a citizen of California.

3 9. Defendant US Foods’ Citizenship. For diversity purposes, a
4 corporation “shall be deemed a citizen of any State by which it has been
5 incorporated and of the State where it has its principal place of business.”
6 28 U.S.C. § 1332(c)(1). A corporation’s principal place of business is “where a
7 corporation’s officers direct, control, and coordinate the corporation’s activities.
8 *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010) (adopting “nerve center” test to
9 determine corporation’s principal place of business). The proper inquiry is to
10 determine a corporation’s “center of overall direction, control and coordination.”
11 *Id.*

12 10. US Foods is now, and was at the time of the filing of the Complaint, a
13 corporation incorporated under the laws of the State of Delaware. Complaint ¶ 2.
14 US Foods’ principal place of business is currently, and was at the time of filing of
15 the Complaint has been, Rosemont, Illinois. US Foods’ corporate headquarters is
16 located in Rosemont, Illinois. US Foods also maintains its corporate books and
17 records in Rosemont, Illinois. US Foods’ Board meetings are held in Rosemont,
18 Illinois where the corporate offices are located. Therefore, US Foods is a citizen of
19 Delaware and Illinois for the purposes of determining diversity of citizenship.

20 11. Doe Defendant’s Citizenship. The citizenship of fictitious defendants
21 is disregarded for purposes of establishing removal jurisdiction under 28 U.S.C.
22 § 1332. See 28 U.S.C. § 1441(a); *see also Bryant v. Ford Motor Co.*, 886 F.2d
23 1526, 1528 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990).

24 12. Based on the Complaint, therefore, at least one member of the putative
25 class is a citizen of a state different from that of one Defendant. *See* 28 U.S.C.
26 § 1332(d)(2)(A) (requiring only “minimal diversity” under which “any member of a
27 class of plaintiffs is a citizen of a State different from any defendant”)

28 ///

PROPOSED CLASS SIZE

13. CAFA’s requirement that proposed class members be no less than 100 under 28 U.S.C. § 1332(d)(5)(B) is satisfied here because the alleged putative class has more than 100 members.

14. Plaintiff seeks to represent all individuals who have been, or currently are, employed by Defendant as non-exempt employees at any time between April 21, 2020 through the date that judgment is entered. Complaint ¶¶ 20-21. Plaintiff alleges that “during the Class Period, hundreds of Class members have been employed by Defendants as non-exempt employees in the State of California.” *Id.* ¶ 22. Defendant asserts that the putative class has more than 100 members. The actual number of non-exempt individuals who are or were employed by Defendant within the State of California between April 21, 2020 to January 8, 2021 is at least 1,424. This number does not include Defendant’s non-California employees whom Plaintiff purportedly seeks to represent in the Complaint based on a strict reading of his class definition, which is not limited to California employees. *See id.* ¶ 20.

THE AMOUNT IN CONTROVERSY EXCEEDS \$5 MILLION

15. In considering the amount in controversy, what matters is the amount put in controversy by plaintiff’s complaint, not what amount the defendant will actually owe (if anything). “[T]he amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of defendant’s liability.” *Lewis v. Verizon Comm., Inc.*, 627 F.3d 395, 400 (9th Cir. 2010); *Korn v. Polo Ralph Lauren*, 536 F.Supp.2d 1199, 1205 (E.D. Cal. 2008) (“Where a statutory maximum is specified, courts may consider the maximum statutory penalty available in determining whether the jurisdictional amount in controversy requirement is met”). Consequently, the existence of a defense that may apply to some or all of the claims is irrelevant. “[A]ffirmative defenses, counterclaims, and potential offsets may not be invoked to demonstrate the amount-in-controversy is actually less than the jurisdictional minimum.” *Lara v. Trimac Transp. Servs. (W.)*

1 *Inc.*, No. CV 10-4280-GHK (JCx), 2010 WL 3119366 at *3 (C.D. Cal. Aug. 6,
 2 2010) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292,
 3 (1938) (“[T]he fact that it appears from the face of the complaint that the defendant
 4 has a valid defense, if asserted, to all or a portion of the claim . . . will not justify
 5 remand.”)). If the rule were otherwise, then a court would need to decide the merits
 6 before deciding the jurisdictional issue, which is plainly untenable. *Lara*, 2010 WL
 7 3119366 at *3, quoting *Larsen v. Hofman*, 444 F. Supp. 245 (D.D.C. 1977)
 8 (“Jurisdictional determinations would otherwise have to await the outcome of trial
 9 on the merits in which counterclaims, set-offs, etc. may or may not be raised and,
 10 even if raised, may ultimately be demonstrated to be invalid”).

11 16. The alleged amount in controversy in this proposed class action
 12 exceeds, in the aggregate, \$5,000,000, exclusive of interest and costs. Defendant
 13 denies Plaintiff’s claims in their entirety and asserts that Plaintiff’s claims are not
 14 amenable to class treatment, but provides the following analysis of potential
 15 damages (without admitting liability) based on the allegations in Plaintiff’s
 16 Complaint in order to demonstrate that Plaintiff’s Complaint puts a sufficient
 17 amount “in controversy” to warrant removal under 28 U.S.C. § 1332(d).

18 17. Plaintiff seeks to recover, among many things, unpaid wages,
 19 liquidated damages, penalties under the Labor Code, restitution, nominal damages,
 20 and attorneys’ fees, costs, and interest based on the allegations that Defendant
 21 violated various wage-and-hour laws.

22 18. Plaintiff’s Complaint is silent as to the total amount of damages
 23 claimed. When the amount in controversy is not readily apparent from a complaint,
 24 “the court may consider facts in the removal petition” to determine the potential
 25 damages at issue. *Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005)
 26 (quoting *Singer v. State Farm Mut. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997)). A
 27 defendant must provide “a plausible allegation that the amount in controversy
 28 exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co. v.*

1 *Owens*, 574 U.S. 81, 89 (2014); *see also Ibarra v. Manheim Invs., Inc.*, 775 F.3d
 2 1193, 1197-98 (9th Cir. 2015) (“[A] defendant can establish the amount in
 3 controversy by an unchallenged, plausible assertion of the amount in controversy in
 4 its notice of removal.”). The defendant’s amount in controversy allegation should
 5 be accepted when not contested by the plaintiff or questioned by the court. *Dart*,
 6 574 U.S. at 87. Thus, Defendant is only required to establish that it is plausible that
 7 the amount in controversy exceeds \$5,000,000.

8 19. Statutory penalties may be considered by the Court when determining
 9 the amount in controversy. *See Chabner v. United of Omaha Life Ins. Co.*, 225
 10 F.3d 1042, 1046 n.3 (9th Cir. 2000); *Korn v. Polo Ralph Lauren*, 536 F.Supp.2d
 11 1199, 1205 (E.D. Cal. 2008) (“Where a statutory maximum is specified, courts may
 12 consider the maximum statutory penalty available in determining whether the
 13 jurisdictional amount in controversy requirement is met”). The Court should also
 14 include requests for attorneys’ fees in determining the amount in controversy. *See*
 15 *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998).

16 20. An initial review of Defendant’s records shows that during the
 17 proposed class period from April 21, 2020 to January 8, 2021, Defendant employed
 18 at least 1,424 non-exempt employees in California who would qualify as part of the
 19 putative class members based on Plaintiff’s allegations. The approximate average
 20 hourly rate of pay for these non-exempt putative class members is more than \$26.41
 21 per hour. During that same period, these non-exempt putative class members
 22 worked at least 50,047 workweeks.

23 21. **Alleged Failure to Pay Overtime Wages:** Plaintiff brings his first,
 24 second, and third causes of action on the same theory that Plaintiff and putative
 25 class members were not compensated for all hours worked in connection with the
 26 allegedly unpaid temperature checks. *Id.* ¶¶ 30-56. Plaintiff further contends that
 27 this unpaid time should have been compensated at applicable overtime rates due to
 28 the amount of time Plaintiff and putative class members worked during their shifts.

1 *Id.* ¶ 15. Thus, instead of calculating the alleged amount in controversy using *each*
 2 of these three causes of action (*e.g.*, 19 minutes of unpaid time at employees'
 3 hourly rates of pay, 19 minutes of unpaid time at the California minimum wage,
 4 *and* 19 minutes of unpaid time at the overtime rates of pay), Defendant
 5 conservatively calculates these alleged damages as solely overtime wages under
 6 Plaintiff's third cause of action. *Id.* ¶¶ 49-56. Plaintiff alleges Defendant was
 7 required to pay Plaintiff and putative class members: (a) time and one-half their
 8 regular rate of pay for hours worked in excess of eight hours in a workday and/or
 9 forty hours in any workweek and for the first eight hours worked on the seventh
 10 day of work in any one workweek; and (b) twice their regular rate of pay for hours
 11 worked in excess of twelve hours in any one day or for hours worked in excess of
 12 eight hours on any seventh day of work in a workweek. *Id.* ¶ 50. The average
 13 hourly rate of pay for the putative class members is more than \$26.41 per hour.
 14 Assuming that Defendant failed to pay Plaintiff and the putative class members for
 15 19 minutes in connection with the temperature checks, Plaintiff alleges at least
 16 **\$2,812,665** for this claim. (19 minutes of overtime ÷ 60 minutes per hour x 4.48
 17 shifts per workweek x 50,047 workweeks x 1.5 x the average hourly rate of pay of
 18 \$26.41 = \$2,812,665).

19 **22. Alleged Penalties Under Labor Code Section 226:** Plaintiff's fourth
 20 cause of action is for failure to provide accurate itemized wage statements.
 21 Complaint ¶¶ 57-61. Plaintiff alleges that Defendant failed to provide Plaintiff and
 22 the putative class members with accurate itemized wage statements that correctly
 23 reflected all hours worked as required by Labor Code section 226 and that
 24 Defendant is liable for damages and statutory penalties. *Id.*; *see also* Lab. Code
 25 § 226(e) (penalty of \$50 for the initial pay period in which a violation occurs, \$100
 26 for subsequent violations, with a maximum penalty of \$4,000 per employee). For
 27 the period of April 21, 2020 through January 8, 2021, there were at least 1,424
 28 putative class members employed who received at least one wage statement during

1 the proposed class period. Assuming these putative class members each
 2 experienced wage statement violations as a result of the allegedly unpaid
 3 temperature checks, Plaintiff alleges at least **\$3,758,900** in penalties for this claim.
 4 $(682 \text{ union employees} \times \$50 + \$100 \times 23,819 \text{ subsequent weekly pay periods} =$
 5 $\$2,416,000 \text{ plus } 742 \text{ nonunion employees} \times \$50 + \$100 \times 13,058 \text{ subsequent}$
 6 $\text{biweekly pay periods} = \$1,342,900).$

7 **23. Alleged Waiting Time Penalties:** Plaintiff's first and third causes of
 8 action include allegations seeking recovery of waiting time penalties under Labor
 9 Code section 203. Complaint ¶¶ 33, 37, and 55. Section 203 provides for up to 30
 10 days' wages as a "waiting time" penalty for employers who willfully fail to pay
 11 wages owed upon termination. Lab. Code § 203. At least 129 putative class
 12 members ended their employment with Defendant from April 21, 2020 to
 13 January 8, 2021. Given Plaintiff's allegations about the allegedly unpaid
 14 temperature checks, it is reasonable to assume for purposes of the amount in
 15 controversy that each employee leaving employment would have experienced at
 16 least one incident resulting in underpayment during their employment. Complaint
 17 ¶¶ 11-13. Conservatively estimating that each of those putative class members
 18 worked an average of only eight hours per day at the approximate average final
 19 hourly rate of pay of at least \$25.68, and assuming 30 days of penalties for each
 20 terminated employee, Plaintiff's allegations would result in Section 203 penalties of
 21 at least **\$795,053**. $(129 \text{ former employees} \times [8 \text{ hours} \times \$25.68 \text{ final hourly rate of}$
 22 $\text{pay}] \times 30 \text{ days} = \$795,053).$

23 **24.** As the calculations above demonstrate, there is well over \$5 million in
 24 controversy in this action: $\$2,812,665 \text{ (overtime)} + \$3,758,900 \text{ (penalties for}$
 25 $\text{inaccurate wage statements)} + \$795,053 \text{ (waiting time penalties)} = \mathbf{\$7,366,618}.$
 26 Further, to the extent Plaintiff is seeking to represent non-California employees
 27 included in his overly broad class definition, the amount in controversy does not
 28 address the claims of any non-California putative class members. *Id.* ¶ 20.

25. The amount in controversy is also satisfied without addressing potential attorneys' fees, which are provided by statute and in the Ninth Circuit typically are 25% of any judgment in favor of the plaintiff. *See Altamirano v. Shaw Industries, Inc.*, 2013 WL 2950600, at *13 (N.D. Cal., June 14, 2013) (for CAFA amount in controversy, adding 25% of the amount in controversy on the claims for relief to account for attorneys' fees). Including potential attorneys' fees would increase the amount in controversy by an additional **\$1,841,655**, totaling **\$9,208,273**. (\$7,366,618 amount in controversy x 0.25 = \$1,841,655). CAFA's amount-in-controversy requirement is satisfied.¹

VENUE

26. Venue lies in the Central District of California pursuant to 28 U.S.C. §§ 1441(a), 1446(a), and 84(c)(2). This action was originally brought in the Superior Court of the State of California, County of Los Angeles, which is embraced by the Central District of California.

NOTICE OF REMOVAL

27. This Notice of Removal shall be served promptly on Plaintiff's Counsel of Record and filed with the Clerk of the Superior Court of the State of California in and for the County of Los Angeles.

¹ Although current Ninth Circuit law does not permit the CAFA amount in controversy to include amounts at issue on a PAGA claim, *Yocupicio v. PAE Group, LLC*, 795 F.3d 1057 (9th Cir. 2015), relying on *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117 (9th Cir. 2014), US Foods respectfully believes these authorities are incorrect. *Baumann's* holding that PAGA is not a "class action" for CAFA purposes (CAFA defines a "class action" as "a similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action", 28 U.S.C. § 1332(d)(1)(B)) is incorrect because it is based on a selective reading of *Arias v. Superior Court*, 46 Cal. 4th 969 (2009). *Baumann* entirely ignores footnote 5 of *Arias*, in which the California Supreme Court stated that a PAGA action "may" be brought as a class action. If a PAGA action "may" be brought as a class action, then PAGA is a "State statute ... authorizing an action to be brought by 1 or more representative persons as a class action." While *Arias* does not mandate that a PAGA action be brought as a class action, it surely "authorizes" a PAGA action to be brought as a class action. And that is all that is required under CAFA. In any event, because the amount in controversy is satisfied without reference to Plaintiff's claim for relief for PAGA penalties, US Foods raises this point only to preserve the issue that the PAGA claim increases the amount in controversy.

1 In compliance with 28 U.S.C. § 1446(a), attached hereto as **Exhibits 1-8** are
2 copies of Plaintiff's state-court papers served herein, including the summons and
3 Complaint.

4 Dated: January 8, 2021.

JOSEPH C. LIBURT
KATIE E. BRISCOE
ALEXANDRA GUERRA
Orrick, Herrington & Sutcliffe LLP

7
8 By: /s/ Joseph C. Liburt
JOSEPH C. LIBURT
9 Attorneys for Defendant
US FOODS, INC.
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EXHIBIT 1

LOYR, APC

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Attorneys for Plaintiff, FELIPE OSORIO

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

FELIPE OSORIO, individually and on
behalf of all individuals similarly situated,

Plaintiff,

vs.

US FOODS, INC. WHICH WILL DO
BUSINESS IN CALIFORNIA AS U.S.
FOODSERVICE, INC., a Delaware
corporation; and DOES 1 through 25,
inclusive,

Defendants.

CASE NO. **20STCV46858**

CLASS ACTION COMPLAINT

1. **FAILURE TO COMPENSATE ALL HOURS WORKED IN VIOLATION OF INDUSTRIAL WELFARE COMMISSION ORDER NO. 4 AND CAL. LABOR CODE §§ 200, 226, 500, 510, 1194, 1197, AND 1198;**
2. **FAILURE TO PAY MINIMUM WAGES IN VIOLATION OF LABOR CODE §§ 1182.12, 1194, 1194.2, 1197;**
3. **FAILURE TO PAY OVERTIME COMPENSATION IN VIOLATION OF CAL. LABOR CODE § 1194, ET SEQ.;**
4. **FAILURE TO PROVIDE PROPER WAGE STATEMENT IN VIOLATION OF CAL. LABOR CODE § 226;**
5. **VIOLATION OF LABOR CODE §§ 2698, ET SEQ. (“PAGA”); AND**
6. **VIOLATIONS OF CAL. B&P CODE §§ 17200, ET SEQ.;**

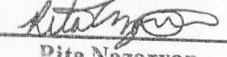
DEMAND FOR JURY TRIAL

Plaintiff FELIPE OSORIO, an individual and on behalf of all individuals similarly situated

FILED
Superior Court of California
County of Los Angeles

DEC 08 2020

Sherri K. Carter, Executive Officer/Clerk

By  Rita Nazaryan, Deputy

12/08/2020

1 (“Plaintiff”), hereby brings this Class Action Complaint for Damages against US FOODS, INC.
2 WHICH WILL DO BUSINESS IN CALIFORNIA AS U.S. FOODSERVICE, INC., a Delaware
3 corporation; and DOES 1 through 25, inclusive, (collectively, “Defendants”) and states and alleges as
4 follows:

5
6 **THE PARTIES**

7 1. Plaintiff was, at all times relevant to this Complaint, an adult individual living and
8 working in Los Angeles County, California.

9 2. At all times relevant to this Complaint, Defendant US FOODS, INC. WHICH WILL
10 DO BUSINESS IN CALIFORNIA AS U.S. FOODSERVICE, INC., a Delaware corporation (“US
11 FOODS”) is and was a Delaware corporation, with its principal place of business in California in 1201
12 Park Center Drive, Vista, CA 92081.

13 3. Plaintiff is unaware of the true names or capacities of Defendants sued herein under the
14 fictitious names DOES 1–25 but prays for leave to amend and serve such fictitiously named Defendants
15 pursuant to California Code of Civil Procedure section 474 once their names and capacities become
16 known.

17 4. Plaintiff is informed and believes, and thereon alleges, that DOES 1–25 are the partners,
18 agents, owners, shareholders, managers, principals or employees of Defendants and/or were acting on
19 behalf of Defendants.

20 5. Plaintiff is informed and believes, and thereon alleges, that each and all of the acts and
21 omissions alleged herein was performed by or is attributable to Defendants and/or DOES 1–25, each
22 acting as the agent for the other, with legal authority to act on the other’s behalf. The acts of any and
23 all Defendants were in accordance with, and represent the policy of, all Defendants.

24 6. At all times herein mentioned, Defendants, and each of them, ratified each and every
25 act or omission complained of herein. At all times herein mentioned, Defendants, and each of them,
26 aided and abetted the acts and omissions of each and all of the other Defendants in proximately causing
27 the damages herein alleged.

28 7. Plaintiff is informed and believes, and thereon alleges, that each of said Defendants is

1 in some manner intentionally, negligently or otherwise responsible for the acts, omissions, occurrences
2 and transactions alleged herein.

3 4 JURISDICTION

5 8. This action is properly filed in Los Angeles County because the acts and omissions that
6 give rise to Plaintiff's claims took place in Los Angeles County, California, as Plaintiff was employed
7 by Defendants in Los Angeles County, California, and Defendants transact business in this County.

8 9. This Court has jurisdiction over Defendants because Defendants have sufficient
9 minimum contacts with and regularly conduct business within the State of California. Moreover,
10 Defendants' principle place of business is located in Los Angeles, California.

11 12 FACTUAL ALLEGATIONS

13 10. Plaintiff has worked for Defendants since on or around March 19, 2000 until the present
14 day.

15 11. Beginning in or around April 21, 2020, and during their employment with Defendants,
16 Plaintiff and the Class Members were regularly required to wait in line for temperature checks at
17 Defendants' warehouses located in La Mirada, California, and elsewhere in the State.

18 12. Defendants agreed to compensate for time spent waiting in line at temperature checks
19 at the rate of one minute at their regular hourly wage. However, these required temperature checks
20 forced Plaintiff and the Class Members to wait up to five minutes, due to the long lines which formed
21 outside of the temperature check station, and/or due to the amount of time it took to conduct
22 temperature checks on each individual employee.

23 13. Additionally, despite recognizing that the time waiting in line was a principal activity
24 for which Plaintiff and the Class Members would be paid, Defendants did not pay Plaintiff and the
25 Class Members for time between the temperature checks and the start of their shifts. Plaintiff and the
26 Class Members had to walk for up to fifteen minutes from the temperature check station to their work
27 stations before they could begin to be paid for their time.

1 14. Despite these violations, Defendants did not provide Plaintiff and the Class Members
2 with compensation for the actual amount of time spent waiting in line as required by Labor Code §§
3 200, 226, 226.7, 500, 510, 558, 1197, 1194, and 1198. To date, these wages remain uncompensated.

4 15. Due to the amount of time that Plaintiff and the Class Members worked during their
5 shifts, this unpaid time should have been compensated at the overtime rate.

6 16. As a result of Defendants' failure to pay all hours worked, and overtime wages,
7 Defendants maintained inaccurate payroll records, and issued inaccurate wage statements to Plaintiff
8 and the Class Members.

9 17. Defendants have engaged in, and continue to engage in, unfair business practices in
10 California by practicing, employing and utilizing the employment practices and policies outlined
11 above.

12 18. Defendants' utilization of such unfair business practices constitutes unfair competition
13 and provides an unfair advantage over Defendants' competitors. Defendants' utilization of such unfair
14 business practices deprives Plaintiff of the general minimum working standards and entitlements due
15 him under California law and the Industrial Welfare Commission wage orders as described herein.

16 19. As a direct result of the wage and hour violations herein alleged, Plaintiff has suffered,
17 and continues to suffer, substantial losses related to the use and enjoyment of wages, lost interest on
18 such wages, and expenses and attorney's fees in seeking to compel Defendants to fully perform their
19 obligations under state law, all to their respective damage in amounts according to proof at the time of
20 trial.

21
22 **CLASS ACTION ALLEGATIONS**

23 20. Plaintiff brings this action as a class action on behalves of the following defined Class:
24 The Class: All individuals who have been, or currently are, employed by Defendants
25 as "non-exempt employees" during the Class Period. Excluded from the Class are
26 employees who work only administrative and managerial functions as exempt
27 employees.
28

1 21. “Class Period” is defined as the time from April 21, 2020 through the date that judgment
2 is entered. Plaintiff and members of Class herein reserve the right to amend this Complaint to reflect
3 a different Class Period as discovery in this matter proceeds.

4 22. Numerosity: Plaintiff is informed and believes, and on that basis alleges, that during the
5 Class Period, hundreds of Class members have been employed by Defendants as non-exempt
6 employees in the State of California. Because so many persons have been employed by Defendants in
7 this capacity, the members of the Plaintiffs’ Class are so numerous that joinder of all members is
8 impossible and/or impracticable.

9 23. Commonality: Common questions of law, in fact, exist as to all members of the
10 Plaintiffs’ Class *and predominate over any questions affecting solely individual members of the*
11 *Plaintiffs’ Class. Among the questions of law and fact, that are relevant to the adjudication of Class*
12 *members claims are as follows:*

13 (a) Whether Defendants had/have policies and/or practices that result in hours worked not
14 being properly compensated;

15 (b) Whether Defendants unlawfully failed to properly calculate and pay overtime and
16 double time compensation due and owing to the Plaintiff and members of the Class in violation
17 of Labor Code § 1194;

18 (c) Whether Defendants’ policy and/or practice of failing to accurately pay overtime to
19 Plaintiff and members of the Class violates applicable provisions of California Law, including
20 Labor Code sections, applicable Industrial Welfare Commission Orders, and applicable State
21 Regulations;

22 (d) Whether Defendants had/have a policy and/or practice that results in the presentation of
23 inaccurate wage statements to Plaintiff and the Class;

24 (e) Whether Defendants unlawfully and/or willfully failed to furnish Plaintiff and Class
25 members with accurate, itemized wage statements upon payment of wages in violation of Labor
26 Code § 226;

27 (f) Whether Defendants had/have policies and/or practices that result in hours worked not
28 being properly compensated;

1 (g) Whether Plaintiff and Class members sustained damages, and if so, the proper measure
2 of such damages, as well as interest, penalties, costs, attorneys' fees, and equitable relief; and,

3 (h) Whether Defendant violated the Unfair Competition Law of California, §17200, *et seq.*,
4 by violating the above-cited provisions, and treating Plaintiff and Class members unfairly by
5 failing to pay all wages due and for all hours worked, failing to furnish an accurate, itemized
6 wage statement upon payment of wages.

7 24. Typicality: Plaintiff's claims are typical of the members of the Plaintiff's Class.
8 Plaintiff, like other members of the Class working for Defendant in California, were subjected to
9 Defendant's policies and/or practices set forth above. Plaintiff's job duties were, and are, typical of
10 those of other Class members.

11 25. Adequacy of Representation: Plaintiff will fairly and adequately protect the interests of
12 the members of the Class and have retained counsel competent and experienced in both class action
13 and employment litigation.

14 26. Questions of law or fact common to Class members predominate over any questions
15 solely affecting individual Class members and class action is superior to other available methods for
16 the fair and efficient adjudication of this controversy.

17 27. Class action treatment will allow a large number of similarly situated Class members to
18 simultaneously and efficiently prosecute his common claims in a single forum without the needless
19 duplication of effort and expense that numerous individual actions would entail.

20 28. In addition, a class action will serve the important public interest of permitting Class
21 members harmed by Defendant's unlawful policies and/or practices to effectively pursue recovery of
22 the sums owed to them.

23 29. Plaintiff knows of no difficulty which will be encountered in the management of this
24 litigation which would preclude its maintenance as a class action.

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FIRST CAUSE OF ACTION

**FAILURE TO COMPENSATE ALL HOURS WORKED IN VIOLATION OF
INDUSTRIAL WELFARE COMMISSION ORDER NO. 9 AND LABOR CODE §§200, 226,
500, 510, 1194, 1197, AND 1198**

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

31. At all times relevant herein, Defendants were required to compensate its non-exempt employees for all hours worked, pursuant to Industrial Welfare Commission Order 16, and Labor Code §§ 200, 226, 500, 510, 1197, 1194 and 1198.

32. As alleged above, Plaintiff and the Class were not paid the correct minimum wage, overtime wage or double time rate for all hours worked.

33. Under the aforementioned wage orders and regulations, Plaintiff and the Class are entitled to recover compensation for all hours worked, but not paid, during the Class Period, plus reasonable attorneys' fees and costs of suit pursuant to Labor Code §§ 218.5, 1194, and penalties pursuant to Labor Code §§ 203 and 226.

34. In violation of state law, Defendants have knowingly and willfully refused to perform their obligations to compensate Plaintiff and the Class for all wages earned and all hours worked. As a direct result, Plaintiff and the Class have suffered, and continue to suffer, substantial losses related to the use and enjoyment of such wages, lost interest on such wages, and expenses and attorneys' fees in seeking to compel Defendants to fully perform their obligations under state law, all to their respective damage in amounts according to proof at time of trial.

35. Plaintiff and the Class are thus entitled to recover nominal, actual and compensatory damages in amount according to proof at time of trial, but in amounts in excess of the jurisdiction of this Court.

36. As a proximate result of the aforementioned violations, Plaintiff and the Class have been damaged in an amount according to proof at time of trial.

37. Defendants' conduct described herein violates Industrial Welfare Commission Order 16, and Labor Code §§ 200, 203, 218.5, 226, 558, 1194, and 1198. Therefore, pursuant to 12 CCR §

1 11040 and Labor Code §§ 203, 218.5, 226, 558, 1194 and 1198, Plaintiff and the Class are entitled to
2 recover damages for the nonpayment of wages of all hours worked that were improperly deducted
3 and/or not counted as a result of Defendants' policies, liquidated damages for underpayment of
4 minimum wages, penalties, reasonable attorneys' fees, expenses, and costs of suit.

5 38. WHEREFORE, Plaintiff requests relief as hereinafter provided.

6
7 **SECOND CAUSE OF ACTION**

8 39. **FAILURE TO PAY MINIMUM WAGES IN VIOLATION OF**

9 40. **LABOR CODE §§ 1182.12, 1194, 1194.2, 1197**

10 41. Plaintiff re-alleges and incorporates by reference all preceding paragraphs as though set
11 forth fully herein.

12 42. Pursuant to Labor Code § 1197, payment of less than the minimum wage fixed by law
13 is unlawful. An employer violates the minimum wage statute even if the average rate for paid and
14 unpaid hours exceeded the minimum wage.

15 43. At all relevant times, Defendants failed and refused to pay Plaintiff and the Class the
16 legal minimum wage in the State of California, as set forth in Labor Code § 1182.12. Under California
17 law, Plaintiff and the Class are entitled to at least the minimum wage for every hour worked.

18 44. Defendants' failure to pay the legal minimum wage to Plaintiff and the Class as alleged
19 herein is unlawful and creates entitlement, pursuant to Labor Code § 1197, to recovery by Plaintiff and
20 the Class in a civil action for the unpaid balance of the full amount of the unpaid wages owed, calculated
21 as the difference between the straight time compensation paid and applicable minimum wage, including
22 interest thereon.

23 45. As a direct result, Plaintiff and the Class have suffered, and continue to suffer,
24 substantial losses related to the use and enjoyment of such wages, lost interest on such wages, and
25 expenses and attorneys' fees in seeking to compel Defendants to fully perform their obligations under
26 state law, all to his damage in amounts according to proof at time of trial, but in amounts in excess of
27 the minimum jurisdiction of this Court.
28

1 46. Defendants have committed the acts alleged herein knowingly and willfully, with the
2 wrongful and deliberate intention of injuring Plaintiff and the Class, from improper motives amounting
3 to malice, and in conscious disregard of Plaintiff and the Class' rights. Plaintiff and the Class are thus
4 entitled to recover nominal, actual and compensatory damages in amounts according to proof at time
5 of trial, but in amounts in excess of the minimum jurisdiction of this Court.

6 47. Pursuant to Labor Code § 1194, Plaintiff requests that the court award reasonable
7 attorneys' fees and costs incurred by Plaintiff in this action.

8 48. In addition, pursuant to Labor Code §1194.2, Plaintiff and the Class are entitled to
9 recover liquidated damages in an amount equal to the minimum wages unlawfully unpaid and interest
10 thereon.

11
12 **THIRD CAUSE OF ACTION**

13 **FAILURE TO PAY FULL OVERTIME AND DOUBLE TIME COMPENSATION**

14 **IN VIOLATION OF CAL. LABOR CODE SECTION 1194, *et seq.***

15 49. Plaintiff hereby re-alleges, and incorporates by reference as though set fully forth herein,
16 all preceding paragraphs.

17 50. Pursuant to the applicable Industrial Welfare Commission Order and Labor Code
18 §§ 200, 226, 500, 510, 1194, and 1198, Defendants were required to compensate Plaintiff and the Class
19 for all overtime work performed for the benefit of Defendants, which is calculated at one and one-half
20 (1-1/2) times the regular rate of pay for hours worked in excess of eight (8) hours per day and/or forty
21 (40) hours per week, and for the first eight (8) hours on the seventh consecutive work day; with double
22 time after eight (8) hours on the seventh day of any work week, or after 12 hours in any work day.

23 51. Plaintiff and the Class were non-exempt employees entitled to the protections of the
24 Industrial Welfare Commission and Labor Code §§ 200, 226, 500, 510, 1194, and 1198. During the
25 course of Plaintiff's and the Class' employment, Defendants failed to compensate Plaintiff and the
26 Class for all overtime and double-time hours worked as required under the aforementioned labor codes
27 and regulations.
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1 an itemized statement in writing showing (1) gross wages earned; (2) total hours worked by the
2 employee . . . (8) the name and address of the legal entity that is the employer..."

3 Section (e) provides: "An employee suffering injury as a result of a knowing and intentional failure
4 by an employer to comply with subdivision (a) shall be entitled to recover the greater of all actual
5 damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred
6 dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate
7 penalty of four thousand dollars (\$4000), and shall be entitled to an award of costs and reasonable
8 attorneys' fees."

9 59. Defendants failed to accurately record the regular and overtime hours worked by
10 Plaintiff and the Class, and total wages due.

11 60. Plaintiff and the Class were damaged by this failure to provide accurate wage statements
12 because, among other things, Plaintiff was unable to determine the proper amount of wages actually
13 owed to him, and whether he had received full compensation therefore.

14 61. Plaintiff requests recovery of Labor Code § 226(e) penalties according to proof, as well
15 as interest, attorneys' fees and costs pursuant to Labor Code §226(e), and all other damages, attorneys'
16 fees, costs, expenses and interest permitted by statute.

17
18 **FIFTH CAUSE OF ACTION**

19 **VIOLATION OF LABOR CODE §§ 2698, ET SEQ. ("PAGA")**

20 62. Plaintiff incorporates by reference and re-alleges as if fully stated herein each and every
21 allegation set forth above.

22 63. On August 17, 2020, Plaintiffs filed a notice with the Labor Workforce and
23 Development Agency ("LWDA") at their website pursuant to the Private Attorney General Act,
24 California Labor Code §§ 2698, *et seq.* ("PAGA") regarding Defendants. This notice was also sent to
25 the Defendants that same day via certified mail.

26 64. PAGA permits Plaintiffs to recover civil penalties for the violation(s) of the Labor Code
27 sections enumerated in Labor Code section 2699.5.

28 65. PAGA provides as follows: "[n]otwithstanding any other provision of law, a Plaintiff

1 may as a matter of right amend an existing complaint to add a cause of action arising under this part at
2 any time within 60 days of the time periods specified in this part.”

3 66. Defendants’ conduct, as alleged herein, violates numerous sections of the California
4 Labor Code including, but not limited to, the following:

5 (a) Failure to pay all hours in violation of Industrial Welfare Commission order no. 9 and
6 Labor Code §§ 200, 226, 500, 510, 1194, 1197, and 1198;

7 (b) Failure to pay the minimum wage in violation of Industrial Welfare Commission Order
8 No. 4 and Labor Code §§ 200, 226, 226.7, 500, 510, 1194, 1197, and 1198

9 (c) Failure to pay overtime compensation in violation of Labor Code §1194 et seq.;

10 (e) Violation of Labor Code section 226(a) for failure to provide accurate wage statements
11 to Plaintiff as alleged herein; and

12 67. California Labor Code section 1174 provides that “[e]very person employing labor in
13 this state shall ... [k]eep a record showing the names and addresses of all employees employed and the
14 ages of all minors” and “[keep, at a central location in the state or at the plants or establishments at
15 which employees are employed, payroll records showing the hours worked daily by and the wages paid
16 to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees
17 employed at the respective plants or establishments...”

18 68. California Labor Code section 210 provides: “In addition to, and entirely independent
19 and apart from, any other penalty provided in this article, every person who fails to pay the wages of
20 each employee as provided in Sections 201.3, 204, 204b, 204.1, 204.2, 205, 205.5, and 1197.5, shall
21 be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for
22 each failure to pay each employee. (2) For each subsequent violation, or any willful or intentional
23 violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the
24 amount unlawfully withheld.”

25 69. Labor Code section 558(a) provides “[a]ny employer or other person acting on behalf
26 of an employer who violates, or causes to be violated, a section of this chapter or any provision
27 regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject
28 to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid

1 employee for each pay period for which the employee was underpaid in addition to an amount sufficient
2 to recover underpaid wages. (2) For each subsequent violation, one hundred dollars (\$100) for each
3 underpaid employee for each pay period for which the employee was underpaid in addition to an
4 amount sufficient to recover underpaid wages. (3) Wages recovered pursuant to this section shall be
5 paid to the affected employee.” Labor Code section 558(c) provides “[t]he civil penalties provided for
6 in this section are in addition to any other civil or criminal penalty provided by law.”

7 70. Defendants, at all times relevant to this complaint, were employers or persons acting on
8 behalf of an employer(s) who violated Plaintiffs’ rights by violating various sections of the California
9 Labor Code as set forth above.

10 71. As set forth above, Defendants have violated numerous provisions of both the Labor
11 Code sections regulating hours and days of work as well as the applicable order of the IWC.
12 Accordingly, Plaintiff seeks the remedies set forth in Labor Code section 558 for himself, the State of
13 California, and all other aggrieved employees.

14 72. Pursuant to PAGA, and in particular California Labor Code sections 2699(a), 2699.3,
15 2699.5, Plaintiff, acting in the public interest as a private attorney general, seeks assessment and
16 collection of unpaid wages and civil penalties for Plaintiff, all other aggrieved employees, and the State
17 of California against Defendant, in addition to other remedies, for violations of the California Labor
18 Code.

19
20 **SIXTH CAUSE OF ACTION**

21 **VIOLATIONS OF CAL. B&P CODE §§ 17200, *et seq.***

22 73. Plaintiff re-alleges and incorporates herein by reference Paragraphs 1 through 39 above,
23 as though each such Paragraph were fully set forth herein

24 74. Section 17200 of the California Business and Professions Code prohibits any unlawful,
25 unfair or fraudulent business act or practice.

26 75. Plaintiff and the Class have suffered and continues to suffer injury in fact and monetary
27 damages as a result of Defendants’ actions. The actions by Defendants as herein alleged amount to
28 conduct which is unlawful and a violation of law. As such, said conduct amounts to unfair business

1 practices in violation of Business and Professions Code § 17200, *et seq.*

2 76. Defendants' conduct as herein alleged has damaged Plaintiff by denying him wages due
3 and payable, and by failing to provide proper wage statements. Defendants' actions are thus
4 substantially injurious to Plaintiff causing him injury in fact and loss of money.

5 77. As a result of such conduct, Defendants have unlawfully and unfairly obtained monies
6 due to Plaintiff.

7 78. The amount of wages due Plaintiff can be readily determined from Defendants' records.
8 Plaintiff is entitled to restitution of monies due and obtained by Defendants during the period of last 4
9 years as a result of Defendants' unlawful and unfair conduct.

10 79. Defendants course of conduct, acts, and practices in violation of the California law as
11 mentioned in each paragraph above constitutes a separate and independent violation of §17200 etc. of
12 the Business and Professions Code.

13 80. The harm to Plaintiff of being wrongfully denied lawfully earned and unpaid wages
14 outweighs the utility, if any, of Defendants' policies and practices and, therefore, Defendants' actions
15 described herein constitute an unfair business practice or act within the meaning of Business and
16 Professions Code § 17200.

17 81. Defendants' conduct described herein threatens an incipient violation of California's
18 wage and hour laws, and/or violates the policy or spirit of such laws, or otherwise significantly
19 threatens or harms competition.

20 82. Defendants' course of conduct described herein further violates Business and
21 Professions Code 17200 in that it is fraudulent, improper, and unfair.

22 83. The unlawful, unfair, and fraudulent business practices and acts of Defendants as
23 described herein above have injured Plaintiff in that he was wrongfully denied the timely and full
24 payment of wages due to him.

25
26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff prays for judgment as follows:

28 1. For nominal damages;

2. For compensatory damages;
3. For equitable relief in the nature of declaratory relief, restitution of all monies due to Plaintiffs, and disgorgement of profits from the unlawful business practices of Defendants, and accounting;
4. For penalties permitted by Labor Code §§ 200, 226, 226.7, 500, 510, 1194, 1197, and 1198 and all other applicable sections;
5. For interest accrued to date;
6. For costs of suit and expenses incurred herein pursuant to Labor Code §§ 226 and 1194;
7. For reasonable attorneys' fees pursuant to Labor Code §§ 226 and 1194; and
8. For all such other and further relief that the Court may deem just and proper.

DATED: December 7, 2020

LOYR, APC

By: 

Young W. Ryu, Esq.
Elizabeth M. Votra, Esq.
Alexander D. Wallin, Esq.
Sarah H. Cohen, Esq.
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury for themselves on all claims so triable.

DATED: December 7, 2020

LOYR, APC

By: 

Young W. Ryu, Esq.
Elizabeth M. Votra, Esq.
Alexander D. Wallin, Esq.
Sarah H. Cohen, Esq.
Attorneys for Plaintiff

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [US Foods Warehouse Workers Lost Wages on Time Spent on Temperature Checks, Class Action Says](#)
