

1 Timothy G. Williams
California State Bar No. 193810
2 *williams@popeberger.com*
Stephanie Reynolds
3 California State Bar No. 220090
reynolds@popeberger.com
4 **POPE, BERGER,**
WILLIAMS & REYNOLDS, LLP
5 401 B Street, Suite 2000
San Diego, California 92101
6 Telephone: (619) 595-1366
Facsimile: (619) 236-9677

7 Attorneys for Plaintiffs NEAL PATAKY,
8 JESSICA CLEEK, and
LAUREN MICHELSON, individually,
9 and on behalf of others similarly situated

10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13
14 NEAL PATAKY, JESSICA CLEEK,
and LAUREN MICHELSON,
15 individually, and on behalf of others
similarly situated,

16 Plaintiffs,

17 v.

18 THE BRIGANTINE, INC., a
19 California corporation,

20 Defendant.

Case No.: '17CV352 GPC AGS
Class Action

**PLAINTIFFS' COMPLAINT FOR
DAMAGES, RESTITUTION, AND
OTHER RELIEF**

Demand for Jury Trial

21
22 Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN MICHELSON,
23 individually, and on behalf of others similarly situated, file this Complaint against
24 THE BRIGANTINE, INC., a California corporation:

25 **I. GENERAL ALLEGATIONS**

26 1. Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN
27 MICHELSON, are each individuals who reside, and at all times relevant hereto have
28 resided in the State of California, County of San Diego. Plaintiffs NEAL PATAKY,

1 JESSICA CLEEK, and LAUREN MICHELSON allege that the work performed
2 which is the subject of this action was performed by each of them in the State of
3 California, County of San Diego, within the four years before the filing of this
4 Complaint. Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN
5 MICHELSON further allege that they each earned tip income for such work
6 performed which is the subject of this action in the State of California, County of San
7 Diego, within the four years before the filing of this Complaint. Plaintiffs NEAL
8 PATAKY, JESSICA CLEEK, and LAUREN MICHELSON further allege that the
9 damages owed to each of them in this action, arising under federal and California
10 laws, were as a result of work performed and tip income earned in the State of
11 California, County of San Diego, within the four years before the filing of this
12 Complaint. Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN
13 MICHELSON bring this action to recover damages they allege are owed to each of
14 them, as described herein.

15 2. Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN
16 MICHELSON allege that at all times relevant hereto, the other similarly situated
17 individuals on whose behalf they also bring this Complaint performed work which
18 is the subject of this action in the State of California, County of San Diego, within the
19 four years before the filing of this Complaint. Plaintiffs NEAL PATAKY, JESSICA
20 CLEEK, and LAUREN MICHELSON further allege that at all times relevant hereto,
21 the other similarly situated individuals on whose behalf they also bring this
22 Complaint earned tip income for such work performed which is the subject of this
23 action in the State of California, County of San Diego, within the four years before
24 the filing of this Complaint. Plaintiffs NEAL PATAKY, JESSICA CLEEK, and
25 LAUREN MICHELSON further allege that the damages owed to the other similarly
26 situated individuals on whose behalf they also bring this Complaint, arising under
27 federal and California laws, were as a result of work performed and tip income earned
28 in the State of California, County of San Diego, within the four years before the filing

1 of this Complaint. Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN
2 MICHELSON bring this action to recover damages they allege are owed to each of
3 the other similarly situated individuals on whose behalf they also bring this
4 Complaint, as described herein.

5 3. Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN
6 MICHELSON individually, and on behalf of others similarly situated (collectively,
7 “Plaintiffs”) are informed and believe and thereon allege that Defendant THE
8 BRIGANTINE, INC., a California corporation (“Brigantine”) is, and at all times
9 relevant hereto was, a corporation organized and existing under and by virtue of the
10 laws of the State of California. Plaintiffs are informed and believe and thereon allege
11 that Brigantine is, and at all times relevant hereto was, qualified to transact and
12 conduct business in the State of California, County of San Diego. Plaintiffs further
13 allege that at all times relevant hereto Brigantine did and still does transact and
14 conduct business in the State of California, County of San Diego. Plaintiffs are
15 informed and believe and thereon allege that at all times relevant hereto Brigantine
16 did and still does maintain offices and transact business in the State of California,
17 County of San Diego; specifically, Plaintiffs are informed and believe, and thereon
18 allege that Brigantine maintains its corporate office and headquarters at 7889 Ostrow
19 St., San Diego, California 92111.

20 4. Plaintiffs are informed and believe and thereon allege that at all times
21 relevant hereto Brigantine has owned and operated, and still does own and operate
22 restaurants in the State of California, County of San Diego, advertised as “The
23 Brigantine Family of Restaurants,” including but not limited to: six restaurants
24 operated under the name “Brigantine Seafood” in Coronado, Escondido, Point Loma,
25 Del Mar, La Mesa and Poway; and six restaurants operated under the name “Miguel’s
26 Cocina” in 4S Ranch, Carlsbad, Coronado, Eastlake, Old Town, and Point Loma.
27 Plaintiffs are further informed and believe and thereon allege that at all times relevant
28 hereto Brigantine has employed all of its employees who work at all of its restaurants,

1 whether “Brigantine Seafood” or “Miguel’s Cocina,” under the corporation “The
2 Brigantine, Inc.” Plaintiffs are further informed and believe and thereon allege that
3 at all times relevant hereto Brigantine has paid all of its employees who work at all
4 of its restaurants, whether “Brigantine Seafood” or “Miguel’s Cocina,” through
5 payroll by “The Brigantine, Inc.” Plaintiffs are further informed and believe and
6 thereon allege that at all times relevant hereto Brigantine has implemented common
7 or identical employment policies and procedures related to its employees at
8 “Brigantine Seafood” and “Miguel’s Cocina” restaurants, including but not limited
9 to one or more “Employee Handbooks” that are identified as applying to all
10 employees of both restaurants (among others) and certain policies and procedures
11 related to “tip pooling” among employees.

12 5. Plaintiffs are informed and believe and thereon allege that at all times
13 relevant hereto Plaintiffs’ employment for Brigantine has been subject to the federal
14 Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (“FLSA”), because Plaintiffs had
15 and have an employment relationship with Brigantine; because Plaintiffs and
16 Brigantine satisfy both the “individual coverage” and “enterprise coverage” criteria
17 of the FLSA; and because the work performed by Plaintiffs for Brigantine which is
18 the subject of this action occurred in the State of California, County of San Diego.
19 Therefore, at all times relevant hereto Brigantine had, and still has, an obligation to
20 comply with the FLSA as it relates to Plaintiffs’ employment.

21 6. Plaintiffs are informed and believe and thereon allege that at all times
22 relevant hereto Plaintiff’s employment for Brigantine has also been subject to the
23 California Labor Code, the California Business & Professions Code, and the
24 California Code of Regulations as contained in California Industrial Welfare
25 Commission Wage Order No. 5-2001, originally and as amended, because the work
26 performed by Plaintiffs for Brigantine which is the subject of this action occurred in
27 the State of California, County of San Diego. Therefore, at all times relevant hereto
28 Brigantine had, and still has, an obligation to comply with these California laws as

1 it relates to Plaintiffs' employment.

2 7. Plaintiffs are informed and believe and thereon allege that Brigantine is,
3 and was at all times relevant hereto, each and every Plaintiffs' employer for purposes
4 of the federal and California employment laws at issue in this action. Plaintiffs are
5 further informed and believe and thereon allege because of the work performed and
6 damages owed to Plaintiffs in this action, that this Court is the proper Court for
7 adjudication of Plaintiffs' claims because, among other factors, Brigantine's
8 obligations and liabilities to Plaintiffs arose from acts committed in violation of
9 federal law in the State of California, County of San Diego. Plaintiffs are further
10 informed and believe and thereon allege that Brigantine is subject to the jurisdiction
11 of the United States District Court for the Southern District of California, and
12 specifically may be sued by Plaintiffs in this Court for the violations of the FLSA and
13 California laws alleged herein.

14 8. Plaintiffs are informed and believe and thereon allege that at all times
15 relevant hereto Brigantine did employ and/or still does employ Plaintiffs as "servers,"
16 who provided and still provide direct table service to Brigantine's customers at
17 "Brigantine Seafood" restaurants and at "Miguel's Cocina" restaurants under job
18 titles such as "food servers," "cocktail servers," and similar titles with similar job
19 descriptions and responsibilities. In the course of Plaintiffs' work for Brigantine as
20 servers, they have earned and been paid tips from Brigantine's customers. As part of
21 Plaintiffs' employment for Brigantine, Brigantine imposed mandatory "tip pooling"
22 policies requiring Plaintiffs to "tip out" part of their earned tip income to other
23 employees of Brigantine, including to other employees of Brigantine who do not
24 provide "direct table service" to customers such as Brigantine's kitchen staff.
25 Brigantine has, at times, made efforts to disguise its tip pooling policy as "voluntary"
26 or "suggested," but in reality Brigantine's tip pooling policy was and is mandatory
27 because, among other reasons, Brigantine and its agents and employees verbally
28 directed Plaintiffs to follow its tip pooling guidelines and tip out to kitchen staff,

1 Brigantine kept records of Plaintiffs' tips, Brigantine collected tips from Plaintiffs to
2 distribute to kitchen staff, Brigantine coerced and intimidated Plaintiffs into
3 following its tip pooling guidelines and tip out to kitchen staff, and/or Brigantine
4 retaliated against Plaintiffs who refused to follow its tip pooling guidelines and tip
5 out to kitchen staff. Under Brigantine's tip pooling policies and practices, Plaintiffs
6 tipped out significant portions of their earned tip income to other employees,
7 including kitchen staff, who did not provide direct table service.

8 9. It is unlawful under the FLSA for an employer to compel an employee
9 to "pool" their tips and pay any part of earned tip income to any other employee who
10 does not "customarily and regularly receive tips." 29 U.S.C. §§ 203(m), 206. The
11 federal Department of Labor, and the Ninth Circuit Court of Appeals have declared
12 that under the FLSA, Sections 203(m) and 206, employees cannot be forced to share
13 tips with employees who do not provide "direct table service" to customers, such as
14 "kitchen staff," in places where the kitchen staff does not customarily and regularly
15 receive tips. See, e.g., *Oregon Restaurant and Lodging Ass'n v. Perez* (9th Cir. 2016)
16 816 F.3d 1080, 1090, reh'g. den. and reh'g. en banc den., 843 F.3d 355, pet. for cert.
17 filed *sub nom.* Aug. 1, 2016, No. 16-163, *Wynn Las Vegas, LLC, et al. v. Joseph*
18 *Cesarz, et al.*; see also pet. for cert. filed *sub nom.* Jan. 19, 2017, No. 16-920,
19 *National Restaurant Association, et al. v. Department of Labor, et al.*

20 In 2011, . . . the DOL promulgated new rules to make it clear that tips
21 are the property of the employee. *Id.* at 18, 841-42; 29 C.F.R. §§ 531.52,
22 531.55, 531.59. Specifically, the DOL revised 29 C.F.R. § 531.52 by
23 replacing the sentence:

24 In the absence of an agreement to the contrary between the
25 recipient and a third party, a tip becomes the property of
26 the person in recognition of whose service it is presented
27 by the customer.

28 with the following language:

1 Tips are the property of the employee whether or not the
2 employer has taken a tip credit under section [20]3(m) of
3 the FLSA. The employer is prohibited from using an
4 employee's tips, whether or not it has taken a tip credit, for
5 any reason other than that which is statutorily permitted in
6 section [20]3(m): As a credit against its minimum wage
7 obligations to the employee, or in furtherance of a valid tip
8 pool.

9 Compare 32 Fed.Reg. 13,575, 13,580 (Sept. 28, 1967), with 29 C.F.R.
10 § 531.52 (2011). The 2011 rule expressly prohibits the use of a tip pool
11 that violates section 203(m) regardless of whether an employer uses a tip
12 credit.

13 *Oregon Restaurant and Lodging Ass'n*, supra, 816 F.3d at p. 1085. Therefore,
14 Plaintiffs bring this action as an employment "collective action" under the FLSA, 29
15 U.S.C. Sections 203(m), 206, and 216(b), against Brigantine to recover tip monies
16 owed under federal law, as a result of Brigantine's unlawful employment policies of
17 requiring Plaintiffs to tip out their earned tip income to other employees of Brigantine
18 who did not and do not provide "direct table service" to customers, e.g., Brigantine's
19 kitchen staff. Plaintiffs seek all remedies to which they are entitled under federal law,
20 and reserve the right to name additional potential representatives.

21 10. A violation of the FLSA serves as a "predicate violation" of California
22 Business & Professions Code Section 17200, et seq., meaning that a defendant's
23 violations of the FLSA triggers separate liability under Section 17200, et seq.,
24 because the FLSA contains a "savings clause" that allows states to provide more
25 protection than federal law. See *Williamson v. General Dynamics* (9th Cir. 2000) 208
26 F.3d 1144, 1150, citing 29 U.S.C. § 218(a), cert. den. (2000) 531 U.S. 929; see also
27 *Pacific Merchant Shipping Ass'n v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1418, cert.
28 den. (1992) 504 U.S. 979 (the FLSA does not preempt California from applying its

1 own overtime laws); *Burden v. SelectQuote Ins. Services* (N.D.Cal. 2012) 2012 WL
2 2119405, at *4 (California Business & Professions Code Section 17200, et seq.
3 claims “ ‘borrow’ the provisions of the FLSA. In other words, the alleged violations
4 of the FLSA are tantamount to violations of California law.”); *Tomlinson v. Indymac*
5 *Bank* (C.D.Cal. 2005) 359 F.Supp.2d 898, 900 (finding that while non-opt-in
6 claimants “are procedurally barred from bringing a claim under the FLSA[,] . . . they
7 nevertheless may pursue their independent UCL claim.”). Accord, *Thorpe v. Abbott*
8 *Labs., Inc.* (N.D.Cal. 2008) 534 F.Supp.2d 1120, 1125; *Takacs v. A.G. Edwards and*
9 *Sons, Inc.* (S.D.Cal. 2006) 444 F.Supp.2d 1100, 1116-18; *Bahramipour v. Citigroup*
10 *Global Markets, Inc.* (N.D.Cal. 2006) 2006 WL 449132, *4-*5; *Barnett v.*
11 *Washington Mut. Bank, FA* (N.D.Cal. 2004) 2004 WL 2011462, *6-*7; *Harris v.*
12 *Investors Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 28-31. Therefore, Plaintiffs
13 are entitled to seek restitutionary relief under California Business & Professions Code
14 Section 17200, et seq., and also bring this action as an employment “class action”
15 under Federal Rules of Civil Procedure, Rule 23, against Brigantine to recover tip
16 monies owed under California law as a result of Brigantine’s unlawful employment
17 policies of requiring Plaintiffs to tip out their earned tip income to other employees
18 of Brigantine who did not and do not provide “direct table service” to customers, e.g.,
19 Brigantine’s kitchen staff. Plaintiffs seek all remedies to which they are entitled under
20 such California law, and reserve the right to name additional potential representatives.
21 This Court may exercise supplemental jurisdiction over Plaintiffs’ state law claims
22 governed by Rule 23 “opt out” provisions, because the case is predicated on federal
23 question jurisdiction of a federal claim requiring an “opt in” class under the FLSA,
24 as the two claims are not mutually exclusive. See, e.g., *Busk v. Integrity Staffing*
25 *Solutions, Inc.* (9th Cir. 2013) 713 F.3d 525, 528, judgment revd. on other grounds
26 *sub nom., Integrity Staffing Solutions, Inc. v. Busk* (2014) 135 S.Ct. 513.

27 11. At all relevant times alleged herein, Plaintiffs were employed by
28 Brigantine under employment agreements that were partly written, partly oral, and

1 partly implied. In perpetrating the acts and omissions alleged herein, Brigantine acted
2 pursuant to and in furtherance of policies and practices of unlawfully requiring
3 servers to tip out to other employees, such as kitchen staff, who did not provide direct
4 table service to Brigantine's customers, and who did not customarily and regularly
5 receive tips. Such acts were, and are, in violation of the FLSA, 29 U.S.C. Sections
6 203(m) and 206, and the California Business and Professions Code, Sections 17200,
7 et seq. As a direct and proximate result of the unlawful actions of Brigantine,
8 Plaintiffs have suffered and continue to suffer from loss of their tips in amounts not
9 yet ascertained, but subject to proof at trial.

10 **II. COLLECTIVE ACTION AND CLASS ACTION ALLEGATIONS**

11 12. Plaintiffs hereby reallege, and incorporate by reference in this Section
12 as though set forth fully herein, the allegations above.

13 13. Plaintiffs allege this action is appropriately suited for an "opt in"
14 collective action under the FLSA, 29 U.S.C. § 216(b), for violations of 29 U.S.C.
15 Sections 203(m) and 206 (a "Collection Action") against Brigantine, because:

16 A. NEAL PATAKY, JESSICA CLEEK, and LAUREN
17 MICHELSON (the "Named Plaintiffs") propose to represent themselves
18 and all other servers who have worked at Brigantine within the three
19 years before the filing of this Complaint, for violations of the FLSA (i.e.,
20 the Collective Action Plaintiffs). The potential group of such Collective
21 Action Plaintiffs includes a significant number of such individuals,
22 because the Named Plaintiffs are informed and believe, and thereon
23 allege that within the three years before the filing of this Complaint,
24 Brigantine has employed hundreds of people as servers at its various
25 restaurants who are eligible to comprise the group of Collective Action
26 Plaintiffs. Named Plaintiffs further allege that Collective Action
27 Plaintiffs are a group of numerous current and former employees who
28 were each subjected to the same or similar unlawful practices and

1 policies alleged herein. Each member of this potential group of
2 Collective Action Plaintiffs must affirmatively consent to join in this
3 action to pursue FLSA remedies.

4 B. This Collective Action involves common questions of law
5 and/or fact which predominate over individual issues, because the action
6 focuses on Brigantine’s common tip pooling practices and policies in
7 California applied to the Collective Action Plaintiffs in violation of the
8 FLSA.

9 C. The claims of each of the three Named Plaintiffs (and as yet
10 other unnamed Class Representatives) are also typical of the claims of
11 the Collective Action Plaintiffs because Brigantine subjected all of their
12 servers to similar and/or identical violations of the FLSA.

13 D. Each of the Named Plaintiffs (and as yet other unnamed
14 Class Representatives) are able to fairly and adequately protect and
15 advance the interests of all members of the Collective Action in one
16 action, because it is in their best interests to prosecute the claims alleged
17 herein to obtain full compensation due to Collective Action Plaintiffs for
18 all tips they were unlawfully forced to distribute under Brigantine’s tip
19 pooling policies and procedures that violated the FLSA.

20 14. Plaintiffs allege this action is also appropriately suited for an “opt out”
21 class action under Fed. R. Civ. P. 23, for violations of 29 U.S.C. Sections 203(m) and
22 206, and by extension, California Business & Professions Code Section 17200, et seq.
23 (a “Class Action”) against Brigantine, because:

24 A. The Named Plaintiffs propose to represent themselves and
25 all other servers who have worked at Brigantine within the four years
26 before the filing of this Complaint, for violations of the California
27 Business & Professions Code Section 17200, et seq. (i.e., the Class
28 Action Plaintiffs). The potential group of such Class Action Plaintiffs

1 includes a significant number of such individuals, because the Named
2 Plaintiffs are informed and believe, and thereon allege that within the
3 four years before the filing of this Complaint, Brigantine has employed
4 hundreds of people as servers at its various restaurants who will
5 comprise the group of Class Action Plaintiffs. Named Plaintiffs further
6 allege that Class Action Plaintiffs are a group of numerous current and
7 former employees who were each subjected to the same or similar
8 unlawful practices and policies alleged herein. The Class Action class
9 may consist of several hundred members, and joinder of all such current
10 and former employees to pursue the Class Action claims would be
11 impracticable.

12 B. This Class Action involves common questions of law
13 and/or fact which predominate over individual issues, because the action
14 focuses on Brigantine's common tip pooling practices and policies in
15 California applied to the Class Action Plaintiffs in violation of the
16 FLSA, which establish violations of the California Business and
17 Professions Code.

18 C. The claims of each of the three Named Plaintiffs (and as yet
19 other unnamed Class Representatives) are also typical of the claims of
20 the Class Action Plaintiffs because Brigantine subjected all of their
21 servers to similar and/or identical violations of the FLSA, which
22 establish violations of the California Business and Professions Code.

23 D. Each of the Named Plaintiffs (and as yet other unnamed
24 Class Representatives) are able to fairly and adequately protect and
25 advance the interests of all members of the Class Action in one action,
26 because it is in their best interests to prosecute the claims alleged herein
27 to obtain full compensation due to Class Action Plaintiffs for all tips
28 they were unlawfully forced to distribute under Brigantine's tip pooling

1 policies and procedures that violated the FLSA, which establish
2 violations of the California Business and Professions Code.

3 E. An opt out class action would be a superior means to
4 adjudicate the Class Action Plaintiffs' claims and Brigantine's defenses
5 to the alleged violations of the FLSA, which establish violations of the
6 California Business and Professions Code.

7 **III. PLAINTIFFS' COUNTS**

8 **COUNT ONE:**

9 **VIOLATIONS OF THE FEDERAL FAIR LABOR STANDARDS ACT,**
10 **29 U.S.C. SECTIONS 203(M) AND 206**

11 **(By Named Plaintiffs and All Collective Action Plaintiffs, Against Brigantine)**

12 15. Plaintiffs hereby reallege, and incorporate by reference in this Count, as
13 though set forth fully herein, the allegations contained above. This Count is pled by
14 the Named Plaintiffs and all Collective Action Plaintiffs, against Brigantine.

15 16. Within the three years before the filing of this Complaint, Brigantine
16 employed Named Plaintiffs and Collective Action Plaintiffs as servers in the State of
17 California, to conduct and transact Brigantine's restaurant business. Specifically,
18 Named Plaintiffs and Collective Action Plaintiffs serve food and drinks to
19 Brigantine's customers, for which they have received tips from customers.

20 17. Named Plaintiffs and Collective Action Plaintiffs' employment for
21 Brigantine is covered and governed by the FLSA, 29 U.S.C. Sections 201, et seq.,
22 inclusive of Sections 203(m) and 206 which regulate employee tips. Tips are the
23 property of the employee under the FLSA. Employers are prohibited from using an
24 employee's tips for any reason other than that which is statutorily permitted, and may
25 not compel an employee to share his or her tips in a tip pool unless the employer's tip
26 pool meets the FLSA's criteria. Under the FLSA, a tip pool is unlawful if it forces
27 employees to pool their tips and pay any part of earned tip income to any other
28 employee who does not customarily and regularly receive tips, such as employees

1 who do not provide direct table service to customers, like kitchen staff.

2 18. As part of Named Plaintiffs and Collective Action Plaintiffs’
3 employment for Brigantine, and in violation of the FLSA, Brigantine imposed a
4 mandatory tip pooling policy requiring them to tip out part of their earned tip income
5 to other employees of Brigantine, including to other employees of Brigantine who do
6 not provide direct table service to customers, including but not limited to Brigantine’s
7 kitchen staff. Brigantine made efforts to disguise its tip pooling policy as “voluntary”
8 or “suggested,” but in reality Brigantine’s tip pooling policy was and is mandatory
9 because, among other reasons, Brigantine and its agents and employees verbally
10 directed Named Plaintiffs and Collective Action Plaintiffs to follow its tip pooling
11 guidelines and tip out to kitchen staff, Brigantine kept records of Plaintiffs’ tips,
12 Brigantine collected tips from Plaintiffs to distribute to kitchen staff, Brigantine
13 coerced and intimidated Named Plaintiffs and Collective Action Plaintiffs into
14 following its tip pooling guidelines and tip out to kitchen staff, and/or Brigantine
15 retaliated against Named Plaintiffs and Collective Action Plaintiffs who refused to
16 follow its tip pooling guidelines and tip out to kitchen staff. Under Brigantine’s tip
17 pooling policies and practices, Plaintiffs tipped out significant portions of their
18 earned tip income to other employees, including kitchen staff, who did not provide
19 direct table service. All such acts by Brigantine violated the FLSA, 29 U.S.C.
20 Sections 203(m), and 206.

21 19. As a direct and proximate result of Brigantine’s unlawful tip pooling
22 policy, Named Plaintiffs and Collective Action Plaintiffs have suffered and continue
23 to suffer substantial financial losses, all to their respective damage in amounts
24 according to proof at time of trial because they were compelled to pay tip income they
25 earned to other Brigantine employees in violation of the FLSA. Named Plaintiffs and
26 Collective Action Plaintiffs are entitled to recover all lost tip income, and/or nominal,
27 actual and compensatory damages in amounts according to proof at time of trial from
28 Brigantine.

1 20. Named Plaintiffs and Collective Action Plaintiffs allege that Brigantine’s
2 failure to comply with the FLSA regarding tip pooling was knowing and intentional,
3 and that Brigantine has refused to comply with the FLSA for false and fraudulent
4 reasons. Such acts were committed willfully, maliciously, oppressively, and
5 fraudulently, with the wrongful and deliberate intention of injuring Named Plaintiffs
6 and Collective Action Plaintiffs, and with a conscious disregard for their rights and
7 Brigantine’s obligations under the FLSA, all of which have deprived Named
8 Plaintiffs and Collective Action Plaintiffs of their property and legal rights.
9 Therefore, Named Plaintiffs and Collective Action Plaintiffs are entitled to recover
10 their lost tip income from Brigantine within the three years before the filing of this
11 Complaint, and within the three years before each Collective Action Plaintiff joins
12 this action, in amounts according to proof at time of trial, in addition to other relief
13 provided by the FLSA.

14 21. Named Plaintiffs and Collective Action Plaintiffs allege that Brigantine
15 will continue to apply the foregoing unlawful policies and practices to certain of them
16 who are still employed by Brigantine, and to certain individuals who will in the future
17 become employed by Brigantine. Such employees have been injured and damaged,
18 are threatened with further injury and damage, and are thus threatened with immediate
19 irreparable harm by the continuation of Brigantine’s unlawful actions as heretofore
20 alleged, and have no complete adequate remedy at law. Therefore, Named Plaintiffs
21 and Collective Action Plaintiffs request this Court enter an order reflecting
22 appropriate equitable relief to prevent Brigantine from committing such acts in the
23 future.

24 22. WHEREFORE, Named Plaintiffs and Collective Action Plaintiffs
25 request relief as herein provided.

26 ///

27 ///

28 ///

COUNT TWO:

**UNFAIR BUSINESS PRACTICES IN VIOLATION OF
CALIFORNIA BUSINESS AND PROFESSIONS CODE
SECTIONS 17200, ET SEQ.**

(By Named Plaintiffs and All Class Action Plaintiffs, Against Brigantine)

23. Plaintiffs hereby reallege, and incorporate by reference in this Count, as though set forth fully herein, the allegations contained above. This Count is pled by Named Plaintiffs and all Class Action Plaintiffs, against Brigantine.

24. Brigantine engages in business practices, offers goods and services for sale, and advertises goods and services for sale within the State of California. As such, Brigantine has a duty to comply with the provisions of the Unfair Business Practices Act as set forth in California Business & Professions Code Sections 17200, et seq., which Act prohibits, inter alia, unlawful, unfair, and/or fraudulent business acts or practices and unfair, deceptive, untrue, or misleading advertising by any person, firm, corporation, or association within the jurisdiction of the State of California.

25. By violating the FLSA as alleged, and by failing to take immediate and appropriate measures to address these violations, Brigantine's acts constitute unfair business practices under California Business and Professions Code sections 17200, et seq. Brigantine's violations of the FLSA, and by extension, California Business and Professions Code sections 17200, et seq., constitute an unfair business practice because the acts have been done repeatedly over a significant period of time throughout the State of California, and in a systematic manner to the detriment of the Named Plaintiffs and Class Action Plaintiffs.

26. As a direct, foreseeable, and proximate result of Brigantine's acts and omissions alleged herein, for the four years preceding the filing of this action Named Plaintiffs and Class Action Plaintiffs have suffered damages, and Brigantine has also been unjustly enriched as a result of unfair business practices. Named Plaintiffs and

1 Class Action Plaintiffs therefore request restitution of all lost tip monies, and
2 potential profits Brigantine gained by its unfair actions, to be disgorged from
3 Brigantine in an amount according to proof at time of trial.

4 27. Brigantine has applied, is applying, and will apply the foregoing unfair
5 business policies and practices to certain of its employees who are still employed, and
6 to certain individuals who will in the future become employed by Brigantine. Such
7 employees have been injured and damaged, and are threatened with further injury and
8 damage by Brigantine's actions as alleged, and are thus threatened with immediate
9 irreparable harm by the continuation of Brigantine's actions as heretofore alleged, and
10 have no complete adequate remedy at law. Therefore, Named Plaintiffs and Class
11 Action Plaintiffs request the Court enter an order reflecting appropriate injunctive
12 relief to prevent Brigantine from committing such acts in the future.

13 28. WHEREFORE, Named Plaintiffs and Class Action Plaintiffs request
14 relief as herein provided.

15 **COUNT THREE:**

16 **UNLAWFUL BUSINESS PRACTICES IN VIOLATION OF**
17 **CALIFORNIA BUSINESS AND PROFESSIONS CODE**
18 **SECTIONS 17200, ET SEQ.**

19 **(By Named Plaintiffs and All Class Action Plaintiffs, Against Brigantine)**

20 29. Plaintiffs hereby reallege, and incorporate by reference in this Count, as
21 though set forth fully herein, the allegations contained above. This Count is pled by
22 Named Plaintiffs and all Class Action Plaintiffs, against Brigantine.

23 30. Brigantine engages in business practices, offers goods and services for
24 sale, and advertises goods and services for sale within the State of California. As
25 such, Brigantine has a duty to comply with the provisions of the Unfair Business
26 Practices Act as set forth in California Business & Professions Code Sections 17200,
27 et seq., which Act prohibits, inter alia, unlawful, unfair, and/or fraudulent business
28 acts or practices and unfair, deceptive, untrue, or misleading advertising by any

1 person, firm, corporation, or association within the jurisdiction of the State of
2 California.

3 31. By violating the FLSA as alleged, and by failing to take immediate and
4 appropriate measures to address these violations, Brigantine's acts constitute
5 unlawful business practices under California Business and Professions Code sections
6 17200, et seq. Brigantine's violations of the FLSA, and by extension, California
7 Business and Professions Code sections 17200, et seq., constitute an unlawful
8 business practice because the acts have been done repeatedly over a significant period
9 of time throughout the State of California, and in a systematic manner to the
10 detriment of the Named Plaintiffs and Class Action Plaintiffs.

11 32. As a direct, foreseeable, and proximate result of Brigantine's acts and
12 omissions alleged herein, for the four years preceding the filing of this action Named
13 Plaintiffs and Class Action Plaintiffs have suffered damages, and Brigantine has also
14 been unjustly enriched as a result of unlawful business practices. Named Plaintiffs
15 and Class Action Plaintiffs therefore request restitution of all lost tip monies, and
16 potential profits Brigantine gained by its unlawful actions, to be disgorged from
17 Brigantine in an amount according to proof at time of trial.

18 33. Brigantine has applied, is applying, and will apply the foregoing
19 unlawful business policies and practices to certain of its employees who are still
20 employed, and to certain individuals who will in the future become employed by
21 Brigantine. Such employees have been injured and damaged, and are threatened with
22 further injury and damage by Brigantine's actions as alleged, and are thus threatened
23 with immediate irreparable harm by the continuation of Brigantine's actions as
24 heretofore alleged, and have no complete adequate remedy at law. Therefore, Named
25 Plaintiffs and Class Action Plaintiffs request the Court enter an order reflecting
26 appropriate injunctive relief to prevent Brigantine from committing such acts in the
27 future.

28 34. WHEREFORE, Named Plaintiffs and Class Action Plaintiffs request

1 relief as herein provided.

2 **IV. PRAYER FOR RELIEF**

3 35. Plaintiffs reallege and incorporate by reference in this Section as though
4 set forth fully herein, the allegations above.

5 WHEREFORE, Plaintiffs pray for judgment as follows:

- 6 1. For nominal damages;
- 7 2. For actual damages;
- 8 3. For compensatory damages;
- 9 4. For restitution of all tips, monies and other damages due to all Plaintiffs;
- 10 5. For disgorged profits from the unfair and unlawful business practices of
11 Brigantine;
- 12 6. For interest accrued to date;
- 13 7. For costs of suit and expenses incurred;
- 14 8. For penalties pursuant to 29 U.S.C. section 216(b);
- 15 9. For reasonable attorneys' fees pursuant to 29 U.S.C. section 216(b) and
16 California Code of Civil Procedure section 1021.5;
- 17 10. For appropriate injunctive relief;
- 18 11. For appropriate equitable relief;
- 19 12. For all such other and further relief that the Court may deem just and
20 proper.

21 Respectfully submitted,

22
23 Dated: February 22, 2017

**POPE, BERGER,
WILLIAMS & REYNOLDS, LLP**

24
25 By: /s/ Timothy G. Williams
26 Timothy G. Williams
27 Stephanie Reynolds
28 Attorneys for Plaintiffs NEAL PATAKY,
JESSICA CLEEK, and LAUREN
MICHELSON, individually, and on behalf of
others similarly situated

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DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b) and CivLR38.1, Plaintiffs NEAL PATAKY, JESSICA CLEEK, and LAUREN MICHELSON, individually, and on behalf of others similarly situated, hereby demand a jury trial.

Respectfully submitted,

Dated: February 22, 2017

**POPE, BERGER,
WILLIAMS & REYNOLDS, LLP**

By: /s/ Timothy G. Williams
Timothy G. Williams
Stephanie Reynolds
Attorneys for Plaintiffs NEAL PATAKY,
JESSICA CLEEK, and LAUREN
MICHELSON, individually, and on behalf of
others similarly situated

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS NEAL PATAKY, JESSICA CLEEK, and LAUREN MICHELSON, individually, and on behalf of others similarly situated,</p> <p>(b) County of Residence of First Listed Plaintiff <u>SAN DIEGO</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Timothy G. Williams Pope, Berger Williams & Reynolds, LLP 401 B Street, Suite 2000, San Diego, CA 92101 (619) 595-1366</p>	<p>DEFENDANTS THE BRIGANTINE, INC., a California corporation,</p> <p>County of Residence of First Listed Defendant <u>SAN DIEGO</u> (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)

<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)</p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>TORTS</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Personal Injury - Medical Malpractice</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 365 Personal Injury - Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input checked="" type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Management Relations</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 751 Family and Medical Leave Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Employee Retirement Income Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 840 Trademark</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>	<p>OTHER STATUTES</p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 890 Other Statutory Actions</p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>
<p>REAL PROPERTY</p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p>	<p>CIVIL RIGHTS</p> <p><input type="checkbox"/> 440 Other Civil Rights</p> <p><input type="checkbox"/> 441 Voting</p> <p><input type="checkbox"/> 442 Employment</p> <p><input type="checkbox"/> 443 Housing/Accommodations</p> <p><input type="checkbox"/> 445 Amer. w/Disabilities - Employment</p> <p><input type="checkbox"/> 446 Amer. w/Disabilities - Other</p> <p><input type="checkbox"/> 448 Education</p>	<p>PRISONER PETITIONS</p> <p>Habeas Corpus:</p> <p><input type="checkbox"/> 463 Alien Detainee</p> <p><input type="checkbox"/> 510 Motions to Vacate Sentence</p> <p><input type="checkbox"/> 530 General</p> <p><input type="checkbox"/> 535 Death Penalty</p> <p>Other:</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Condition</p> <p><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement</p>		

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
29 USC section 201, et. seq.

Brief description of cause:
Fair Labor Standards Act Tip Pool Violations

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 02/22/2017 SIGNATURE OF ATTORNEY OF RECORD: /s/ Timothy G. Williams

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Workers File FLSA Class Action Against The Brigantine Over Tip Pooling](#)
