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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JESSICA JAHN WEBER and BRIAN
KURTH, on their own behalf and on the behalf
of all others similarly situated,

Plaintiffs,

v.

KASA DELIVERY, LLC,

Defendant.

No. 16-2-13761-0 SEA

**THIRD AMENDED CLASS ACTION
COMPLAINT**

Plaintiffs Brian Kurth and Jessica Jahn Weber (“Plaintiffs”), individually and on behalf of all others similarly situated, by and through their attorneys of record, for their Complaint against Defendant Kasa Delivery, LLC (“Defendant”) hereby state and allege as follows:

I. INTRODUCTION

1.1 Defendant operates delivery services for restaurants in and around King County, Washington, including in Seattle, Washington.

1.2 Defendant engaged in a common scheme of wage and hour violations against its delivery employees. Defendant employs delivery drivers who use their own vehicles to deliver food and other food items to customers. Instead of compensating delivery drivers for the reasonably-approximate costs of the business use of their vehicles, Defendant uses a flawed

1 method to determine reimbursement rates that fail to accurately track the number of miles driven
2 by delivery drivers and provides such an unreasonably low rate beneath any reasonable
3 approximation of the expenses they incur that the drivers' unreimbursed expenses cause their
4 wages to fall below the wage rate required by state and city minimum wage laws during some or
5 all workweeks. In addition, Defendant has required drivers to share their tips with other
6 employees who have little to no contact with customers and thus are not "customarily and
7 regularly" tipped, in violation of wage and hour laws.
8

9 1.3 Defendant imposes an automatic service charge on its customers. Defendant does
10 not disclose the allocation of the service charge. The service charge is a separately designated
11 amount collected by Defendant from its customers and is described in such a way that customers
12 might reasonably believe that the amounts are for services provided by employees. Defendant
13 does not make any direct payment of the service charge to its driver employees.
14

15 1.4 Plaintiffs and Class members are current and former delivery employees of
16 Defendant in the State of Washington who have been victimized by Defendant's unlawful
17 practices. This lawsuit is brought as a class action under Washington wage laws to recover
18 unpaid wages owed to Plaintiffs and all other similarly situated employees.
19

20 II. JURISDICTION AND VENUE

21 2.1 Venue is proper in King County because Plaintiffs Kurth and Weber have worked
22 for Defendant in King County, where some of the violations alleged herein occurred. In addition,
23 Defendant transacts business in King County and many of the acts, as well as the course of
24 conduct alleged herein, occurred in King County.

25 2.2 Defendant is within the jurisdiction of this Court. Defendant conducts business in
26 the State of Washington and have operations in Washington State, including within the City of

1 Seattle and King County. Defendant had obtained the benefits of the laws of the State of
2 Washington and the Washington labor market.

3 **III. PARTIES**

4 3.1 Defendant is a Minnesota limited liability company.

5 3.2 Plaintiffs Kurth and Weber have been employed by Defendant as delivery drivers
6 within the last three years. Plaintiffs Weber and Kurth have been residents of Washington for the
7 duration of their employment. Plaintiff Weber has worked in Seattle and King County for
8 Defendant on a regular basis. Plaintiff Kurth has worked for Defendant in Bellevue, Seattle and
9 King County, Washington.
10

11 **IV. CLASS ACTION ALLEGATIONS**

12 4.1 Plaintiffs bring this case as a class action pursuant to Civil Rule 23(b)(3) on behalf
13 of a class consisting of:
14

15 All individuals employed by Defendant as delivery drivers of motor
16 vehicles in the State of Washington at any time from three years prior to
17 the filing of this complaint through the date of final disposition of this
18 action.

19 Excluded from this Class is Defendant, any entity in which Defendant has a controlling
20 interest or which have controlling interest in Defendant, and Defendant's legal representatives,
21 assignees and successors. Also excluded are any judges to whom this case is assigned and any
22 member of an assigned judge's immediate family.

23 4.2 Plaintiffs believe there are at least 120 current and former employees in the Class.

24 4.3 Plaintiffs' claims are typical of the claims of the members of the Class because
25 Plaintiffs are delivery drivers who, like the members of the Class, sustained damages arising out
26 of Defendant's common course of wage and hour violations.

1 4.4 Plaintiffs will fairly and adequately protect the interests of the Class members.
2 Plaintiffs have retained counsel competent and experienced in complex class action litigation,
3 including employment law.

4 4.5 Common questions of law and fact exist as to Plaintiffs and all members of the
5 Class and predominate over any questions solely affecting individual members of the Class.
6 Among the questions of law and fact common to the Plaintiffs and the Class are:

7 a. Whether Defendant engaged in a common course of failing to reasonably
8 approximate and pay vehicle expenses to Plaintiffs and Class members;
9

10 b. Whether Defendant engaged in a common course of failing to pay Plaintiffs and
11 Class members the minimum wage required by Washington and the City of Seattle minimum
12 wage laws;

13 c. Whether Defendant engaged in a common course of requiring Plaintiffs and Class
14 members to kick back a portion of their wages to Defendant;

15 d. Whether Defendant engaged in a common course of requiring Plaintiffs and Class
16 members to share their tips with other employees who are not customarily and regularly tipped;

17 e. Whether Defendant's conduct, above, was willful;

18 f. Whether Defendant violated RCW 49.46.020 as to Plaintiffs and Class members;

19 g. Whether Defendant violated RCW 49.46.090 as to Plaintiffs and Class members;

20 h. Whether Defendant violated RCW 49.48.030 as to Plaintiffs and Class members;

21 i. Whether Defendant violated RCW 49.52.050 as to Plaintiffs and Class members;

22 j. Whether Defendant violated RCW 49.52.070 as to Plaintiffs and Class members;

23 k. Whether Defendant violated RCW 49.46.160 as to Plaintiffs and Class members;

24 and
25
26

1 l. The nature and extent of class-wide injury and the measure of compensation for
2 such injury.

3 m. Whether Defendant has engaged in a common course of failing to provide Class
4 members with a ten-minute rest break for every four hours of work;

5 n. Whether Defendant has engaged in a common course of requiring Class members
6 to work more than three consecutive hours without a rest break;

7 o. Whether Defendant has engaged in a common course of failing to ensure Class
8 members have taken the rest breaks to which they are entitled;

9 p. Whether Defendant has engaged in a common course of failing to pay Class
10 members an additional ten minutes of compensation for each missed rest break;

11 q. Whether Defendant has violated RCW 49.12.020;

12 r. Whether Defendant has violated WAC 296-126-092;

13 s. The nature and extent of Class-wide injury and the measure of compensation for
14 such injury.
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16
17 4.6 Class action treatment is superior to the alternative for the fair and efficient
18 adjudication of the controversy alleged herein. Such treatment will permit a large number of
19 similarly situated persons to prosecute their modest, purely economic, common claims in a single
20 forum simultaneously, efficiently and without duplication of effort and expense that numerous
21 individual actions would entail. No difficulties are likely to be encountered in the management
22 of this class action that would preclude its maintenance as a class action, and no superior
23 alternative exists for the fair and efficient adjudication of this controversy. The Class is readily
24 identifiable from Defendant's records.
25
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1 does not disclose how the charge is allocated. Drivers are not directly paid any portion of the
2 charge.

3 5.4 Delivery drivers have the same primary job duty—to deliver food and other food
4 items to customers’ addresses.

5 5.5 Defendant provides customers the opportunity to tip employees for the delivery
6 service. Customers regularly provide tips for the delivery services they receive. Customers
7 generally only interact with Defendant’s drivers and no other employees of Defendant. However,
8 Defendant requires drivers to share these tips with dispatcher employees, who work in Minnesota
9 and rarely have contact with Defendant’s customers or otherwise engage in customer service
10 functions. Dispatchers are thus not customarily and regularly tipped employees. Customer tips
11 are also required to be shared with “the Squadron members responsible for routing orders,
12 customer service, restaurant/driver support and acquisition, & the systems that make the magic
13 happen behind the scenes.” Additionally, Defendant has failed to provide a written notice to
14 Plaintiffs and other drivers that they are required to share their tips in this manner.
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17 5.6 Taking into account the effect of Defendant’s reimbursement policy that applies
18 to Plaintiffs and all class members, Defendant has paid Plaintiffs and members of the Class an
19 hourly wage below the applicable minimum wage in the State of Washington and the City of
20 Seattle.

21 ***Defendant’s Flawed Reimbursement Policy***

22 5.7 Plaintiffs and members of the Class have delivered food and other food items to
23 Defendant’s customers in motor vehicles that Plaintiffs and Class members own and maintain.
24 Defendant has required Plaintiffs and the Class members to maintain these vehicles in a safe,
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1 legally-operable, and insured condition to use in delivering the food and food items to
2 Defendant's customers.

3 5.8 Plaintiffs and members of the Class have incurred costs for gasoline, vehicle parts
4 and fluids, vehicle repair and maintenance services, vehicle insurance, taxes, licenses,
5 depreciation and finance charges ("vehicle expenses") while delivering food and food items for
6 the primary benefit of Defendant.

7 5.9 Plaintiffs and members of the Class have been subject to similar driving
8 conditions, vehicle expenses, delivery distances, and delivery frequencies.

9 5.10 Plaintiffs and members of the Class have been subject to the same pay policies
10 and practices of Defendant. Specifically, they have been subject to the same delivery driver
11 reimbursement policy, which has been \$1.00 per delivery from December 2015 to the present,
12 which underestimates vehicle expenses per mile and fails to accurately track miles per delivery.
13

14 5.11 Despite the relative ease of tracking actual miles driven by its drivers, Defendant
15 does not do so. Instead, Defendant reimburses delivery drivers a set amount per delivery,
16 regardless of length.
17

18 5.12 Defendant's reimbursement rate does not take into consideration the actual miles
19 driven nor actual expenses incurred by drivers in order to maintain and provide vehicles that are
20 safe, legally operable, and insured, in the course of their delivering items to customers on behalf
21 of and for the primary benefit of Defendant.
22

23 5.13 Throughout her employment with Defendant, Plaintiff Weber has experienced an
24 average delivery distance of approximately nine (9) miles.
25
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1 5.14 The net result of Defendant's delivery driver reimbursement policy is
2 reimbursement of approximately \$.11 per mile (\$1.00 per delivery / 9 miles), which is well below
3 any reasonable approximation of the vehicle expenses of Defendant's delivery drivers.

4 5.15 During the applicable limitations period, the IRS business mileage reimbursement
5 rate has ranged between \$.54 and \$.575 per mile. Reputable companies that study the cost of
6 owning and operating a motor vehicle and/or reasonable reimbursement rates, including the
7 American Automobile Association ("AAA"), have determined that the average cost of owning
8 and operating a vehicle has ranged between \$.37 and \$.975 per mile during the same period.
9 These figures represent a reasonable approximation of the average cost of owning and operating
10 a vehicle for personal use of the vehicle.

11 5.16 The driving conditions associated with the food delivery business result in more
12 frequent routine maintenance costs, higher repair costs, and more rapid depreciation due to the
13 mileage and manner of driving for food delivery, including frequent starting and stopping of the
14 engine, frequent braking, driving short routes as opposed to highway driving, and driving under
15 time pressures. Defendant's delivery drivers thus experience lower gas mileage and higher repair
16 costs than factored into the IRS' and AAA's average cost of owning and operating a vehicle.
17

18 5.17 Insurance providers recognize the relative hazards of working as a food delivery
19 driver. Food delivery drivers pay significantly higher vehicle insurance rates than do regular
20 drivers, as personal auto insurance policies generally do not cover drivers while they are on the
21 job and delivery drivers are considered especially high-risk.
22

23 5.18 Defendant's reimbursement policy does not reimburse its delivery drivers for
24 even their out-of-pocket expenses, much less other costs they incur to own and operate their
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1 vehicles, and thus Defendant uniformly fails to reimburse its delivery drivers at any reasonable
2 approximation of the cost of owning and operating their vehicles for Defendant's benefit.

3 ***Defendant's Failure to Reimburse Vehicle Expenses Violates Wage Laws***

4 5.19 Before taking into account the effect of Defendant's reimbursement policy,
5 Defendant has paid Plaintiff Weber at or just under the City of Seattle minimum wage since
6 December 2015: from December 2015 to January 16, 2016, Defendant paid her \$10.00 per hour;
7 from January 17, 2016 to the present, Defendant paid her \$10.50 per hour. Washington State's
8 minimum wage during this period has been \$9.47 per hour.
9

10 5.20 Plaintiff Weber drives a 2009 Toyota Prius and drove a 2008 Chevy Trailblazer
11 delivering food for Defendant during times relevant to this action. She also delivered food using
12 Defendant's e-bikes for a portion of her employment.

13 5.21 During Plaintiff Weber's employment with Defendant, Defendant's
14 reimbursement rate has been a straight \$1.00 per delivery amount when drivers use their own
15 motor vehicles to make deliveries on behalf of Defendant, regardless of the amount driven.
16

17 5.22 During Plaintiff Weber's employment with Defendant, Plaintiff Weber has
18 experienced an average delivery distance of approximately nine (9) miles when driving her motor
19 vehicles.

20 5.23 Thus, since December 2015, Defendant's average reimbursement rate for Plaintiff
21 Weber has been approximately \$.11 per mile (\$1.00 per delivery / 9 miles per delivery).
22

23 5.24 During this same time period, the IRS business mileage reimbursement rate has
24 ranged between \$.54 and \$.575 per mile, which was a reasonable approximation of the vehicle
25 expenses incurred in personal use of a vehicle, but is a low estimate of the vehicle expenses
26 incurred in delivering food in King County. Using the IRS rate as a conservative approximation

1 of Plaintiff Weber's vehicle expenses during her employment to date, every mile driven on the
2 job decreased Plaintiff's net wages by approximately \$.43 (\$.54 (IRS rate) - \$.11 (Defendant's
3 rate)) at a minimum, to at least \$.465 (\$.575 - \$.11), or between approximately \$3.87 per delivery
4 (\$.43 x 9 miles) and \$4.185 per delivery (\$.465 x 9 miles).

5 5.25 Defendant did not ask Plaintiff Weber to track her actual vehicle expenses.
6 However, an initial estimate indicates that Plaintiff Weber's vehicle expenses, not taking fully
7 into account the additional costs when using her vehicle for food delivery, have been at the very
8 least \$.41 per mile. Using even this extremely conservative measure of Plaintiff Weber's actual
9 expenses, as opposed to the IRS rate or other widely-accepted mileage rates, every mile driven
10 on the job decreased her net wages by between about \$.30 (\$.41 - \$.11), and every delivery
11 decreased her net wages by about \$2.70 (\$.30 x 9 miles).

12 5.26 During Plaintiff Weber's employment with Defendant to date, Plaintiff Weber has
13 worked approximately four hundred and fifty (450) hours making deliveries in her Prius and/or
14 Trailblazer. During Plaintiff Weber's employment with Defendant to date, Plaintiff Weber has
15 delivered approximately 863 orders using her Trailblazer and/or Prius. Thus, Plaintiff Weber has
16 averaged 1.92 deliveries per hour using her Prius and/or Trailblazer. Plaintiff Weber's frequency
17 of delivery during this time period is a reasonable estimate of the frequency at which Defendant's
18 other drivers make deliveries.
19
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21 5.27 Thus, during the time period relevant to this action, depending on whether
22 Defendant's reimbursement rate is compared to the IRS rate or to a very conservative estimate of
23 Plaintiff Weber's actual expenses, Plaintiff Weber "kicked back" to Defendant between
24 approximately \$5.16 per hour (\$2.70 per delivery x 1.92 deliveries per hour) and \$8.04 per hour
25 (\$4.185 per delivery x 1.92 deliveries per hour). Because Defendant has otherwise been paying
26

1 Plaintiff Weber at or just under Seattle’s minimum wage, and just above Washington’s minimum
2 wage, these kickbacks have resulted in Defendant compensating Plaintiff Weber between
3 approximately \$5.16 per hour to \$8.54 per hour less than the City of Seattle’s minimum wage,
4 and \$4.13 per hour to \$7.01 per hour less than Washington state’s minimum wage. This kickback
5 resulted in an effective hourly wage rate between approximately \$1.96 and \$4.84 in 2015 to
6 January 16, 2016 and \$2.46 and \$5.34 from January 17, 2016 to the present.

7
8 5.28 During some workweeks, Plaintiff Weber has worked in excess of forty (40) hours
9 per week for Defendant making deliveries. Defendant has paid Plaintiff Weber on an hourly
10 basis, including time and a half for the work she performs in excess of forty (40) hours per
11 workweek.

12 5.29 However, the effect of Defendant’s reimbursement policy, as set forth above, has
13 also caused Plaintiff Weber to earn less than the statutory minimum wage rate for work she
14 performs in excess of (40) hours per week. For example, in early January 2016, Defendant paid
15 Plaintiff Weber \$15.00 per hour for the work she performed in excess of (40) forty hours in the
16 workweek (which is actually below Seattle’s minimum wage for overtime work at the time
17 (\$15.75 per hour), regardless of the kickbacks from Defendant’s reimbursement policy). As set
18 forth above, during this time frame, Defendant received kickbacks from Plaintiff Weber that
19 reduced her wages by approximately \$5.16 to \$8.04 per hour. Here, Plaintiff Weber therefore
20 only received \$6.96 per hour to \$11.06 per hour for her overtime work, when Seattle required a
21 minimum overtime wage rate of \$15.75 per hour and Washington State required \$14.21 per hour.
22
23

24 5.30 Under Washington law, employers may not use tips as credit towards minimum
25 wages owed to an employee. In addition, under wage and hour laws, once a tip is earned, it is the
26 property of that employee and it is not to be shared with other employees who are not “regularly

1 and customarily” tipped. Here, customers tip drivers who are generally the only employees of
2 Defendant with whom they interact. Yet, Defendant deducts a portion of drivers’ tips to dispatch
3 employees, who do not generally have contact with the customers. Additionally, Defendant has
4 failed to provide a written notice of its proposed tip pool to Plaintiffs and the drivers.

5 5.31 Upon information and belief, all of Defendant's other delivery drivers have had
6 similar experiences to those of Plaintiff Weber. They were subject to the same reimbursement
7 and tip pool policies; received similar reimbursements; incurred similar vehicle expenses;
8 completed deliveries of similar distances and at similar frequencies; and, because of this, were
9 paid hourly wages below the applicable state or city minimum wage and were required to kick
10 back a portion of their wages to employees who are not “regularly and customarily” tipped.
11

12 5.32 Based on the allegations set forth above, Defendant’s systematic under-
13 reimbursement of vehicle expenses over the prior three (3) years has resulted in company-wide
14 minimum wage violations under both state and local laws.
15

16 5.33 Upon information and belief, Defendant has been on notice that its reimbursement
17 and tip pooling policies are unlawful.

18 5.34 Based on the effect of Defendant’s flawed reimbursement policy, Plaintiffs and
19 members of the Class have been paid an hourly wage below the applicable state and Seattle
20 minimum wage; they have thereby been systematically deprived of reasonably-approximate
21 reimbursements, resulting in their wages falling below the state and city minimum wage in some
22 or all workweeks.
23

24 5.35 Plaintiffs and members of the Class have experienced under-reimbursements for
25 vehicle expenses, which have reduced their wages below the minimum wage rate of the State of
26 Washington and the City of Seattle.

1 ***Further Evidence of Defendant’s “Kickback” of Delivery Drivers’ Wages***

2 5.36 Delivery drivers are required to use their personal cell phones to access order
3 information from Defendant’s customers in order to pick up and deliver food orders. They are
4 also frequently required to use their phones to contact customers to complete deliveries. For
5 example, if the driver has to access a secure location that requires the customer to provide the
6 driver access when the driver arrives at a locked gate or door. Although usage of drivers’ personal
7 cell phones is required for the benefit of Defendant, Defendant only reimburses drivers
8 approximately \$.04 per hour for the use of their cell phones. Upon information and belief this
9 does not reasonably-approximate reimburse the drivers for the actual cost of using their cell
10 phones during work for the benefit of Defendant.
11

12 5.37 RCW 49.12.450 and Washington Department of Labor and Industries Admin.
13 Policy ES.C.8.1 require employers to pay the cost of employees’ uniforms. However, Defendant
14 automatically deducts \$25.00 from drivers’ initial wages for the cost of the uniforms Defendant
15 requires them to wear during their shifts.
16

17 5.38 RCW 49.46.160 applies to employers who impose an automatic service charge
18 related to food, beverages, or portorage provided to customers. Such employers are required to
19 disclose in an itemized receipt and in any menu provided to the customer the percentage of the
20 automatic service charge that is paid or payable directly to the employee serving the customer.
21 Defendant imposes a delivery fee charge, which ranges depending on the length of the delivery,
22 on their customers. Plaintiffs and members of the Class do not receive any portion of the service
23 charge.
24

25 ***Defendant Failed to Provide Rest Breaks***

26 5.39 Plaintiffs and Class Members do not receive uninterrupted rest breaks.

1 9.2 RCW 49.12.010 provides that “[t]he welfare of the state of Washington demands
2 that all employees be protected from conditions of labor which have a pernicious effect on their
3 health. The state of Washington, therefore, exercising herein its police and sovereign power
4 declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.”

5 9.3 RCW 49.12.020 provides that “[i]t shall be unlawful to employ any person in any
6 industry or occupation within the state of Washington under conditions of labor detrimental to
7 their health.”

8 9.4 Under RCW 49.12.005 and WAC 296-126-002, “conditions of labor” “means and
9 includes the conditions of rest and meal periods” for employees.
10

11 9.5 WAC 296-126-092 provides that employees shall be allowed certain paid rest
12 periods during their shifts. Under Washington law, Defendant has an obligation to provide
13 employees with the rest breaks to which they are entitled.

14 9.6 Under Washington law, Defendant has an obligation to ensure that employees
15 take the rest to which they are entitled.
16

17 9.7 Under Washington law, Defendant has an obligation to provide employees with
18 ten minutes of additional pay for each missed rest break.

19 9.8 By the actions alleged above, Defendant has violated the provisions of RCW
20 49.12.020 and WAC 296-126-092.

21 9.9 As a result of these unlawful acts, Plaintiffs and the Class have been deprived of
22 compensation in amounts to be determined at trial, and Plaintiffs and the Class are entitled to the
23 recovery of such damages, including interest thereon, attorneys’ fees under RCW 49.48.030, and
24 costs.
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X. PRAYER FOR RELIEF

Wherefore, Plaintiffs, on their own behalf and on behalf of the members of the Class, pray for judgment against Defendant as follows:

A. Certify the proposed Class;

B. Appoint Plaintiffs as Class representative;

C. Appoint the undersigned attorneys as Class counsel;

D. Declare that the actions complained of herein violate Washington’s statutes, Seattle’s ordinances, and administrative codes;

E. Award Plaintiffs and Class members compensatory, liquidated, and exemplary damages;

F. Award attorneys’ fees and costs to Plaintiffs’ attorneys, as allowed by law;

G. Award pre-judgment and post-judgment interest to Plaintiffs and Class members, as provided by law;

H. Grant and injunction against Defendant from engaging in the unlawful and wrongful conduct set forth herein; and,

I. Grant such other and further relief as this Court deems necessary.

1 DATED this 10th day of June, 2016.

2
3 **REKHI & WOLK, P.S.**

4 By: s/ Gregory A. Wolk

5 Gregory A. Wolk, WSBA #28946

6 Hardeep S. Rekhi, WSBA #34579

7 529 Warren Ave N., Suite 201

8 Seattle, Washington 98109

9 Telephone: (206) 388-5887

10 Facsimile: (206) 577-3924

11 Email: greg@rekhiwolk.com

12 hardeep@rekhiwolk.com

13
14 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I, Zoe Kahn, certify and declare that I am now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and am competent to testify as a witness. I am a Legal Assistant employed with Rekhi & Wolk, P.S. 529 Warren Ave N., Suite 201, Seattle, Washington 98109. On February 15, 2018, I served the within document(s):

- Third Amended Class Action Complaint


Attorneys for Defendant

Breanne S. Martell, WSBA No. 39632
Joanna M. Silverstein, WSBA No. 38577
Brigitte Gingold, WSBA No. 50630
600 University Street Suite 3200
Seattle, WA 98101
Telephone: (206) 623-3300
Fax: (206) 299-9598
E-Mail: bsmartell@littler.com
jsilverstein@littler.com
BGingold@littler.com

- Via Legal Messenger
- Via Facsimile
- Via Electronic Mail
- Via U.S. Mail
- Via E-service
- Via Hand Delivery

The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 15th day of February, 2018.

By: 

Zoe Kahn, Legal Assistant
E-Mail: zoe@rekhiwolk.com