1 CHRIS BAKER, State Bar No. 181557 2016 MAR 10. AM 11: 17 cbaker@bakerlp.com 2 MIKE CURTIS, State Bar No. 252392 mcurtis@bakerlp.com GBSSC CGURTHOUSE SUPERIOR COURT OF CALIFORNIA SAGRAMENTO COUNTY 3 BAKER & SCHWARTZ, P.C. 44 Montgomery Street, Suite 3520 4 San Francisco, CA 94104 Telephone: (415) 433-1064 5 Fax: (415) 520-0446 6 Attorney for Plaintiff RICHARD SMIGELSKI 7 8 9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA 10 BY FAX COUNTY OF SACRAMENTO 11 12 RICHARD SMIGELSKI, in his representative Case No. 34-2015-00186855 capacity and on behalf of others similarly situated 13 CLASS ACTION REPRESENTATIVE ACTION 14 Plaintiff, FIRST AMENDED COMPLAINT VS. 15 (1) OVERTIME 16 (2) LABOR CODE 226 PENNYMAC FINANCIAL SERVICES, INC.; (3) WAITING TIME PENALTIES PENNYMAC MORTGAGE INVESTMENT 17 (4) UNFAIR BUSINESS PRACTICES TRUST; PRIVATE NATIONAL MORTGAGE (5) PAGA ACCEPTANCE CO. (aka "PENNYMAC"), and 18 Does 1-50, inclusive, DEMAND FOR JURY TRIAL 19 Defendants. 20 21 Plaintiff Richard Smigelski, in his representative capacity and on behalf of similarly 22 situated former and current employees, complains as follows: 23 INTRODUCTION 24 1. Plaintiff brings this action against defendants PennyMac Financial Services, Inc., 25 PennyMac Mortgage Investment Trust, and Private National Mortgage Acceptance Co. 26 (collectively "PennyMac") to recover damages, restitution, penalties and other appropriate relief. 27 Defendants do not include all of their non-exempt employees' compensation in calculating the 28 regular rate of pay for overtime purposes. Defendants also do not provide their employees with

wage statements that comply with California law (or provide wage statements at all). Finally, Defendants do not pay employees their bonuses on a timely basis, and do not pay employees all wages owed at the time of their termination. Plaintiff brings this action pursuant to the Labor Code, the relevant IWC wage orders, and the Private Attorneys General Act of 2004 ("PAGA"), Labor Code Section 2698 *et seq*. With respect to PAGA, Plaintiff brings this case, not as class action, but on behalf of the state of California and on a representative basis and on behalf of other aggrieved employees.

PARTIES

- Plaintiff Richard Smigelski worked for Defendants from November 2014 to April
 30, 2015 as an account executive in Defendants' Sacramento-based call center.
- 3. Defendants Private National Mortgage Acceptance Co., PennyMac Financial Services, Inc., and PennyMac Mortgage Investment Trust are an integrated enterprise, single employer, or joint employer of Plaintiff. All of the defendants are headquartered in Moorpark, California. They all have essentially the same C-level executives. All defendants exercise common control over labor relations. According to its website, PennyMac has sales offices in California, Minnesota, Nevada, Hawaii, Missouri and Texas.
- 4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does 1 through 50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the acts or omissions herein alleged.
- 5. At all times mentioned herein, Defendants and Does 1 through 50, inclusive, were the employees, agents, or representatives of each other defendant and were acting with the knowledge and consent of each other defendant and within the purpose and scope of such employment, agency, or representation in doing or failing to do the things alleged in this complaint.

JURISDICTION & VENUE

6. This Court has jurisdiction over Plaintiff's claims. Plaintiff worked in Sacramento and Defendants employed Plaintiff, other aggrieved employees, and similarly situated employees in Sacramento, as well as in other locations.

GENERAL ALLEGATIONS

- 7. In or around August 2014, Plaintiff signed an offer letter from PennyMac to work as an account executive in one of its call centers. His job, in essence, was to cold call individuals and attempt to sell them mortgages. PennyMac offered to pay Plaintiff \$14.42 per hour for his work. PennyMac also agreed to pay Plaintiff an additional \$1500 per month for his first three months of work, wages that it termed a "draw." PennyMac also agreed to pay Plaintiff a referral bonus of \$1,000 for referring other persons to work for PennyMac. PennyMac also agreed to pay Plaintiff a monthly bonus based on its variable pay plan. PennyMac also agreed to pay Plaintiff a benefit stipend of \$125.00 per month.
- 8. Plaintiff worked a considerable amount of overtime. PennyMac calculated Plaintiff's overtime rate based on an hourly rate of \$14.42 an hour. PennyMac did not include the "draw," referral bonus, variable pay bonus, or benefit stipend in calculating Plaintiff's hourly rate for overtime purposes.
- 9. Moreover, PennyMac did not pay Plaintiff the "draw" as it was earned. Rather, it paid the "draw" one time a month. In addition, pursuant to PennyMac's variable pay plan, Plaintiff earned certain monthly bonuses. PennyMac did not pay these bonuses once they were earned, but rather delayed paying such bonuses until the second regular pay period following the month in which the bonus was earned.
- 10. In addition, as a general rule, PennyMac did not furnish Plaintiff with an accurate itemized statement explaining his pay. PennyMac simply deposited monies into his bank account. On information and belief, these itemized statements existed (though they were not provided to Plaintiff). Regardless, these statements did not include all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate.

For example, the itemized statements included neither the number of hours nor the hourly rate for pay termed "bonus overtime."

- On April 30, 2015, PennyMac terminated Plaintiff's employment. However, consistent with its general practice, it did not provide him with a final paycheck until May 6, 2015 (the next regular payroll date). The final paycheck that was provided to Plaintiff did not include his April bonus. This payment was not made until June 2015. Moreover, the itemized statement that accompanied the final paycheck did not include the inclusive dates of the pay period. The itemized statement also did not include the rate of pay or hours worked for his "bonus overtime."
- 12. Plaintiff was paid pursuant to PennyMac's company-wide policies and practices. Accordingly, Plaintiff is similarly situated to the Classes he seeks to represent.
- 13. The Sacramento Superior Court has declared the arbitration agreement signed by Plaintiff unenforceable in its entirety.

CLASS ACTION ALLEGATIONS

14. With respect to Plaintiff's Class Action Allegations, Plaintiff brings this action on behalf of the following classes (collectively the "Smigelski Class"):

The "Rate of Pay" Class

a. All California-based current and former employees whom Defendants classified as "non-exempt" and whose rate of pay calculation for overtime purposes did not include: (1) a draw; (2) referral bonus; (3) variable pay bonus; or (4) benefit stipend, including, but not limited to, account executives, loan officers, and loan processors within the applicable limitations period.

The "Rate of Pay" Subclass

b. All California-based former employees whom Defendants classified as "non-exempt" and whose rate of pay calculation for overtime purposes did not include: (1) a draw; (2) referral bonus; (3) variable pay bonus; or (4) benefit stipend, including, but not limited to, account executives, loan officers, and loan processors within the applicable limitations period.

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SECOND CAUSE OF ACTION

LABOR CODE § 226 ON BEHALF OF THE RATE OF PAY CLASS

- 29. Plaintiff incorporates paragraphs 1 through 28 of this First Amended Complaint as if fully set forth here.
- 30. Under California law, an employer must provide employees with an accurate wage statement. Among other things, the wage statement must include the gross wages earned, the total hours worked, and the wage rate worked for each hour. An employee suffers injury when this law is violated if the employee cannot (among other things) easily determine from the wage statement the gross or net wages paid or earned or the hours worked. The penalties for violating this law are set by statute. See California Labor Code sections 226.
- 31. As set forth above, Defendants knowingly and intentionally failed to provide Plaintiff and the Rate of Pay Class with accurate wage statements.
- 32. Plaintiff and the Rate of Pay Class suffered injury as a result of Defendants' conduct.

THIRD CAUSE OF ACTION

WAITING TIME PENALTIES ON BEHALF OF THE RATE OF PAY SUBCLASS AND THE LATE PAY CLASS

- 33. Plaintiff incorporates paragraphs 1 through 32 of this First Amended Complaint as if fully set forth here.
- 34. Under California law, an employer must pay an employee all wages due upon termination or resignation. The willful failure to do so results in waiting time penalties equal to 30 days of an employee's wage. *See* Labor Code section 203.
- 35. Defendants did not pay Plaintiff and the Rate or Pay Subclass and the Late Pay Class all wages due and owing upon their separation from Defendants' employ.
- 36. This conduct by Defendants was willful. It knew or should have known of the overtime wages incurred and not paid to Plaintiff and the Rate of Pay Subclass. It knew or should

- a. Failure to provide prompt payment of wages to employees upon termination and resignation in violation of Labor Code §§ 201, 202, 203;
- b. Failure to provide accurate itemized wage statements to employees in violation of Labor Code §§ 226 and 226.3;
- c. Failure to pay overtime wages at the appropriate rate of pay in violation of applicable wage orders and Labor Code §§ 510, 558, and 1194;
- d. Failure to pay earned wages bi-weekly in accordance with Labor Code §
 204.
- 44. With respect to violations of Labor Code § 204, Labor Code § 210 imposes a civil penalty (apart from other penalties) of \$100 for each initial violation, and \$200 for each subsequent violation, in addition to 25% of the amount unlawfully withheld.
- 45. With respect to violations of Labor Code § 226, Labor Code § 226.3 imposes a civil penalty in addition to any other penalty provided by law of two hundred fifty dollars (\$250) per aggrieved employee for the first violation, and one thousand dollars (\$1,000) per aggrieved employee for each subsequent violation of Labor Code § 226(a).
- 46. With respect to violations of Labor Code §§ 510, Labor Code § 558 imposes a civil penalty in addition to any other penalty provided by law of fifty dollars (\$50) for initial violations for each underpaid employee for each pay period in addition to an amount equal to the employee's underpaid wages, and one hundred dollars (\$100) for subsequent violations for each underpaid employee for each pay period in addition to an amount equal to the employee's underpaid wages. The statute of limitations with respect penalties under Labor Code § 558 is three years. Plaintiff seeks civil penalties in the amount of unpaid wages owed to aggrieved employees pursuant to Labor Code § 558(a)(3).
- 47. Labor Code § 2699 et seq. imposes a civil penalty of one hundred dollars (\$100) per pay period, per aggrieved employee for initial violations, and two hundred dollars (\$200) per pay period, per aggrieved employee for subsequent violations for all Labor Code provisions for which a civil penalty is not specifically provided.

1	48.	To the extent applicable, Plaintiff has satisfied the requirements of Labor Code	
2	section 2699.3.		
3		PRAYER FOR RELIEF	
4	WHE	EREFORE, Plaintiff prays individually and on behalf of the State, other aggrieved	
5	employees and persons similarly situated, for judgment against Defendants as follows:		
6	1.	An Order that this action may proceed on a class-wide basis;	
7	2.	Appropriate injunctive relief, including restitution;	
8	3.	An award of civil penalties pursuant to PAGA;	
9	4.	An award of reasonable attorneys' fees and costs;	
10	5.	Damages in the form of statutory penalties, unpaid wages, and other damages,	
11	according to proof;		
12	6.	Pre-judgment and post-judgment interest as provided by law;	
13	7.	Such other and further relief that the Court may deem just and proper.	
14	Dated: March 9, 2016 BAKER & SCHWARTZ, P.C.		
15	Dated. Mai	Cli 3, 2010 BAKLK & SCAWAK12, 1.C.	
16		By:	
17	Chris Baker Michael Curtis		
18		Attorneys for Plaintiff RICHARD SMIGELSKI	
19		JURY TRIAL DEMAND	
20			
21		tiff hereby demands a trial by jury.	
22	Dated: Mar	rch 9, 2016 BAKER & SCHWARTZ, P.C.	
23			
24		By: Chris Baker	
25		Michael Curtis Attorneys for Plaintiff RICHARD SMIGELSKI	
26		RICHARD SMIGELSKI	
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