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Superior Court of California
County of Los Angeles

JUL 12 2017

Shawn R. Carter, Executive Officer/Clerk
By: Charletta Robinson, Deputy

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

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MARCEL GOLDMAN, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

THE CHEESECAKE FACTORY
INCORPORATED, a Delaware Corporation,

Defendant.

CASE NO. _____

COMPLAINT FOR:

- (1) Breach of the Covenant of Good Faith and Fair Dealing;
- (2) Reformation Based on Unilateral Mistake (Cal. Civ. Code § 3399);
- (3) Willful Failure to Correct Billing Error (Cal. Civ. Code § 1747.60);
- (4) Negligent Misrepresentation (in the alternative);
- (5) Mistaken Receipt;
- (6) Money Had and Received; and
- (7) Unfair, Unlawful, or Fraudulent Business Practices (Cal. Bus. & Prof. Code § 17200 *et seq.*).

DEMAND FOR JURY TRIAL

By Fax

1 Plaintiff Marcel Goldman (“Plaintiff”), on behalf of herself and all others similarly situated,
2 complains and alleges the following:

3 **INTRODUCTION**

4 1. This is a class action against The Cheesecake Factory Incorporated (“Defendant” or “The
5 Cheesecake Factory”), brought on behalf of Plaintiff and its other customers who were essentially duped
6 by Defendant into paying double gratuity, and sometimes even more than double.

7 2. Upon information and belief, beginning at least four years prior to the filing of this
8 Complaint, when a party of two or more purchases food and/or drink at The Cheesecake Factory or
9 other restaurants owned by Defendant and uses two or more credit or debit cards to pay for the charges,
10 the combined bill is divided between the credit/debit cards and Defendant presents each diner/consumer
11 with a separate sales draft for a portion of the bill (a “split bill”). On each of the sales drafts, Defendant
12 includes suggested gratuity amounts to facilitate customers in calculating and leaving a gratuity for
13 service. Defendant represents the suggested gratuity to be 15%, 18%, 20% or 22% of the check amount
14 reflected on the sales draft, but, in reality, it calculates the suggested gratuity on the combined bill and
15 the suggested gratuity amounts are actually 30%, 36%, 40%, or 44% of the amounts shown on the
16 separate sales drafts.

17 3. Fully expecting Defendant to deal fairly and honestly with its customers and/or to
18 perform accurate mathematical calculations, Plaintiff and Class Members relied on the accuracy of the
19 preprinted suggested gratuity amounts on their sales drafts and paid one of those suggested amounts,
20 while intending only to pay half (or less than half) of those amounts.

21 4. Whether or not The Cheesecake Factory or its agents or employees who carried it out at
22 restaurant locations were aware of this unscrupulous practice at the time they presented separate sales
23 drafts to diners/customers including Class Members, Plaintiff alleges on information and belief that such
24 awareness is attributable to The Cheesecake Factory and its managers and agents because the practice
25 has been going on for at least the last four years and at over 200 restaurant locations operated under The
26 Cheesecake Factory mark and at 13 locations operated under the Grand Lux Café mark, and customers
27 have complained of the practice on the internet. That is, even if the Defendant cannot be shown to have
28 actually intended to perpetrate fraud on its customers in this manner during the entire Class Period, and
even in the unlikely event that Defendant did not receive complaints from some or numerous customers
about its deceptive practice, Defendant should be held accountable to have known about the practices
which resulted in the misrepresentations to and fraud against its customers.

1 5. As a result of those practices, which are described in more detail below, Plaintiff brings
2 this class action, pursuant to California Code of Civil Procedure § 382, for damages, restitution,
3 reformation, reasonable attorneys' fees and costs, and injunctive and/or other equitable relief pursuant to
4 California Civil Code § 1021.5, common counts, California Business & Professions Code §§ 17200 *et*
5 *seq.*, and California Civil Code § 3399, on behalf of herself and all other individuals whose combined
6 bill at one of Defendant's restaurants was divided by Defendant between two or more credit or debit
7 cards, who were presented by Defendant with a split bill and who paid a suggested gratuity amount by
8 credit or debit card, on which they accepted suggested amounts printed on the sales draft, during the last
9 four years prior to the filing of this Action ("Class Period"). Those persons are the "Class Members"
Plaintiff seeks to represent in this action.

10 6. Plaintiff also brings this class action for damages, treble damages, attorneys' fees and
11 costs, pursuant to California Civil Code § 1747.60, on behalf of herself and all members of the Class
12 who paid one of the gratuity amounts suggested by Defendant on their split bills sales drafts by credit
13 card ("Billing Error Subclass").

PARTIES

14 7. Plaintiff Marcel Goldman is an individual residing in Los Angeles, California. During the
15 Class Period, Plaintiff was subject to Defendant's unfair, deceptive, and unlawful conduct described
16 herein.

17 8. Defendant The Cheesecake Factory, Incorporated is a corporation organized and existing
18 under the laws of the State of Delaware, with its headquarters located at 26901 Malibu Road, Calabasas
19 Hills, California. Defendant owns and operates a restaurant chain of almost 200 locations throughout
20 the United States under The Cheesecake Factory mark, a restaurant chain of 13 locations throughout the
21 United States under Grand Lux Café mark, and one restaurant under Rock Sugar Pan Asian Kitchen
22 mark in California.

JURISDICTION

23 9. This Court has jurisdiction over Plaintiff and Class Members' claims for breach of the
24 covenant of good faith and fair dealing, reformation based on unilateral mistake, alternative claim for
25 negligent misrepresentation, mistaken receipt, and money had and received under Code of Civil
26 Procedure § 410.10.

27 10. This Court has jurisdiction over Plaintiff and Subclass Members' claims for damages,
28 treble damages, and reasonable attorneys' fees and costs pursuant to Civil Code § 1747.60.

1 11. This Court has jurisdiction over the Plaintiff and Class Members' claims for restitution
2 and injunctive relief arising from Defendant's unfair, unlawful, and/or fraudulent business practices,
3 under Business & Professions Code §§ 17203 and 17204.

4 **VENUE**

5 12. Venue is proper in the County of Los Angeles pursuant to California Code of Civil
6 Procedure §§ 395(a) and 395.5. The Cheesecake Factory, Incorporated is a Delaware corporation,
7 headquartered in Calabasas Hills, California, which is located in the Los Angeles County. Substantial
8 portions of the acts and transactions that constitute violations of law complained of herein occurred in
9 Los Angeles and Defendant conducts substantial business throughout Los Angeles County. The
10 particular billing practices that form the factual basis for Plaintiff's claims were conceived, designed,
11 implemented and/or perpetuated throughout the United States at Defendant's headquarters in Los
12 Angeles County.

13 **FACTUAL BACKGROUND**

14 13. Defendant offers onsite dining with waiter service, as well as take out. As of June 2017,
15 Defendant owned and operated 208 restaurants throughout the United States and Puerto Rico including
16 numerous locations in California operating, including 193 restaurants under The Cheesecake Factory
17 mark, 20 of which are located in California, 13 restaurants under the Grand Lux Café mark, which are
18 located outside California, and one restaurant under Rock Sugar Pan Asian Kitchen mark located in
19 California. Those restaurants are located in approximately 41 states.

20 14. Defendant reported revenues of over \$2.27 billion for fiscal year 2016. On information
21 and belief, a vast majority of this revenue was charged to debit and credit cards.

22 15. As mentioned above, and as discussed in detail below, when customers use credit or
23 debit cards to settled their dining bill, Defendant provides them with sales drafts that contain suggested
24 gratuity amounts, and when Defendant divides the total bill between two or more credit/debit cards, the
25 sales drafts contain suggested gratuity amounts which do not accurately represent the total of each sales
26 draft. Plaintiff estimates that over 80% of restaurant charges are paid by credit or debit cards and that
27 approximately 10% or more of those charges (which represents many thousands of consumers) are
28 divided between two or more credit/debit cards and are affected by The Cheesecake Factory's wrongful
suggested gratuity practices.

16. During the Class Period, Defendant utilized, and, upon information and belief, continues
to utilize, a customizable point of sale software system called POSitouch to manage customer orders,
print dining bills, including split bills sales drafts, and to process credit card/debit cards. Through its use

1 of POSitouch, Defendant has control over what information to provide customers on the bills and sales
2 drafts including, but not limited to, suggested gratuity percentages and amounts.

3 17. On information and belief, during the Class Period, Defendant has maintained a policy
4 and/or practice to include on all its bills and credit/debit card sales drafts a line item referred to as
5 “Suggested Gratuity” and/or “Suggested Gratuity Percentages” of “15%”, “18%”, “20%”, and “22%”
(hereinafter “Suggested Gratuity Policy”).

6 18. The Suggested Gratuity Policy was adopted and implemented at Defendant’s
7 headquarters in Calabasas Hills. Defendant directed its IT department, also located at Defendant’s
8 headquarters in Calabasas Hills, to configure the form and content of the bills and sales drafts, including
9 suggested gratuity information, via the POSitouch system.

10 19. During the Class Period, Plaintiff and Class Members ordered food and/or drinks from
11 one or more of Defendant’s restaurants. As part of the transactions between Defendant and its
12 customers, Plaintiff and each Class Member entered into a contract with Defendant, whereby Plaintiff
13 and each Class Member made offers to Defendant to purchase food, drink, and/or services by ordering
14 items at prices specified on menus and/or price lists and Defendant accepted their offers by having its
15 employees take the orders, prepare the food or drink items ordered, and serve them to Plaintiff and Class
16 Members. In consideration of Defendant providing Plaintiff and Class Members with food/drink items
17 and related service, Plaintiff and Class Members promised to pay Defendant for their orders at the prices
18 listed on the menu or price list (hereinafter “first contract”).

19 20. At the end of each meal, Defendant provided Plaintiff and Class Members with a written
20 statement and/or bill containing the TOTAL amount owed under the first contract (hereinafter “debt”).

21 21. During the Class Period, instead of performing the first contract, and paying off the debt
22 directly, Plaintiff and Class Members entered into a second contract with Defendant, whereby
23 Defendant, in order to attract more business, agreed to allow Plaintiff and Class Members to enjoy the
24 convenience of using their credit/debit cards in exchange for their promising to pay the credit card issuer
25 the TOTAL amount listed on the sales draft. In exchange for Plaintiff and Class Members making the
26 promise to pay the TOTAL amount to the credit card issuers and allowing the credit card issuer to post a
27 charge on their accounts, Defendant agreed to release Plaintiff and each Class Members from their
28 debt(s). By allowing the use of credit/debit cards, Defendant guaranteed that it would receive the
TOTAL amount, less service fees, from the credit/debit card issuers, who, for the service fees, took on
the risk of nonpayment by Plaintiff and Class Members and devoted resources to processing the
transaction.

1 22. Plaintiff and Class Members then provided Defendant with their credit and/or debit
2 cards, authorizing charges against them, and Defendant processed the credit/debit cards through its point
3 of sale system, and generated a written statement containing the terms of the second contract
4 (hereinafter “sales draft”).

5 23. Defendant then presented Plaintiff and Class Members with the sales draft. The sales
6 drafts provided to Plaintiff and Class Members contained the following information:

- 7 (i) “CHECK:” and the amount representing a portion of the combined bill;
- 8 (ii) Suggest Gratuity percentages of 15%, 18%, 20%, and 22%, and corresponding dollar
9 amounts;
- 10 (iii) “TIP:” followed by a blank;
- 11 (iv) “TOTAL:” followed by a blank line;
- 12 (v) A signature line; and
- 13 (vi) The following statement in all caps “Cardholder will pay card issuer above amount
14 pursuant to cardholder agreement . . .”

15 24. Defendant, in order to facilitate Plaintiff’s and Class Members’ decisions and actions in
16 determining and paying the TIP, caused the sales draft, through its point of sale system, to contain line
17 items with different suggested gratuity percentages (i.e., 15%, 18%, 20%, 22%) of the total CHECK
18 amount and dollar amounts purportedly corresponding to the suggested gratuity’s percentage of the
19 CHECK amount (hereinafter “suggested gratuity representation”).

20 25. However, the suggested gratuity amounts did not accurately reflect the corresponding
21 suggested gratuity percentages of the CHECK amounts. Instead, they were a greater percentage of the
22 CHECK amount than the listed percentage amount on the sales draft (hereinafter “mathematical error”).
23 The presentation of the CHECK including the mathematical error is shown by the following true and
24 correct (redacted) copy of Plaintiff’s sales draft for her split bill charge at one of The Cheesecake
25 Factory restaurants:

26 ///
27 ///
28 ///



26. Defendant expected and intended Plaintiff and Class Members to rely on the Suggested Gratuity percentages and dollar amounts in calculating the TIP and TOTAL.

27. Plaintiff and Class Members did reasonably rely on the Suggested Gratuity percentage and dollar amounts, and were induced to enter into, and did enter into, one of the suggested gratuity amounts in the TIP line, and used it to calculate the TOTAL.

28. As a result, the TOTAL was based on the mathematical error perpetrated by Defendant.

29. Unaware of the mathematical error in the suggested gratuity amount, Plaintiff and Class Members signed their sales drafts, thus accepting the terms presented by Defendant and creating an enforceable contract.

30. As a result of the suggested gratuity representation, which contained the mathematical error, the sales drafts did not reflect the true intent of at least one the parties to the second contract. Plaintiff and Class Members entered into the second contract based on a unilateral mistake on their part consisting of their belief, based on Defendant's representation, that the suggested gratuity amounts in

1 dollars were 15%, 18%, 20%, or 22% of the CHECK amount, i.e. only of their individual split bill
2 portions of the combined bill. Defendant knew or should have known that the suggested gratuity
3 amounts incorporated the mathematical error on sales drafts that it presented to Plaintiff and Class
4 Members when it split their bill between two or more credit/debit cards.

5 31. Defendant subsequently presented the sales draft for payments, and Plaintiff's and Class
6 Members' credit card accounts were charged for the TOTAL, including a suggested gratuity amount to
7 be paid by them as a result of a mistake on their part. Defendant caused them to make that mistake by
8 the practices alleged herein.

9 32. Plaintiff and Class Members have fully performed their respective obligations under the
10 second contract. Defendant, however, has failed to uphold its end of the bargain entered into and
11 instead acted in a manner that can be reasonably described as unfair and in bad faith. Defendant
12 maintained a system of tracking gratuities paid to each server, including the order number, time of
13 transaction, payment method used, amount of combined bill on which the gratuity was paid, total sales,
14 and total suggested gratuity. From the information contained in this system, Defendant knew or should
15 have known that its suggested gratuity representations caused its customers to leave higher than typical
16 expected gratuity amounts. Despite having access to and, on information and belief, continuously and
17 carefully having reviewed information available on the system, Defendant continued to deal unfairly
18 and in bad faith with its split bill-paying customers by continuing to include incorrect suggested gratuity
19 and continuing to induce those customers to pay more money in gratuities than they would have paid
20 otherwise.

21 33. After the transactions alleged above, Plaintiff and Class Members received credit card
22 statements from their credit card issuers, which contained charges for the TOTAL they agreed to pay,
23 which also included a mathematical error as a result of the mathematically erroneous suggested gratuity
24 amounts being included in the TOTALs specified by Defendant in their sales drafts.

25 34. Upon discovering the error made in her sales draft, after having paid the TOTAL amount
26 to her credit card issuer, Plaintiff sent Defendant a letter on or about April 6, 2017 by certified mail to
27 its corporate office and headquarters at 26901 Malibu Hills Rd. Calabasas Hills, CA 91301. In the
28 letter, Plaintiff explained and put Defendant on notice concerning the billing errors. That letter
constituted an inquiry for purposes of Civil Code § 1747.60 (hereinafter "billing error inquiry").

35. Despite receipt of Plaintiff's billing error inquiry, Defendant has not corrected the billing
error within 60 days of the date on which Plaintiff's inquiry was mailed.

1 36. Defendant's failure to correct the billing error was willful. Defendant received Plaintiff's
2 billing error inquiry which plainly explained the billing error that was committed by Defendant in
3 Plaintiff's case and in the cases of other Class Members throughout the approximately four years
4 preceding the date of Plaintiff's dining experience. Upon information and belief, Defendant also knew,
5 suspected, or should have known previously of the billing errors caused by its credit card processing
6 system based on its system described above that tracked gratuities paid by customers.

7 37. As a result of the foregoing, Defendant is indebted to Plaintiff and Class Members who
8 paid money to Defendant as a result of a mistake of fact, specifically their mistaken belief based on
9 Defendant's representations that the suggested gratuity percentage listed on the sales draft accurately
10 represented a percentage of the CHECK amount of the sales draft. Defendant did not have the right to
11 the money paid to it by Plaintiff and Class Members.

12 38. Even though Plaintiff requested in her billing inquiry that Defendant return the money
13 paid by mistake, Defendant has not returned to Plaintiff and/or Class Members any of the money paid,
14 which are now due and owing.

15 39. Defendant has no right to the money paid to it by Plaintiff and Class Members in form of
16 higher suggested gratuity amounts and the money thereby paid rightfully belongs to Plaintiff and Class
17 Members.

18 40. As a result of ignoring Plaintiff's billing error inquiry and the request contained therein
19 to return the money, Defendant now wrongfully holds and has failed to return any of it to Plaintiff and
20 Class Members.

21 41. Defendant's actions in including suggested gratuity representations which were not true
22 and its inaction in failing to remove or correct the suggested gratuity representations, were willful, or at
23 the very least grossly negligent.

24 42. Defendant had no reasonable grounds for believing that its suggested gratuity
25 representations were accurate when it included them on Plaintiff's and Class Members' sales drafts.

26 43. The purpose of printing suggested gratuity amounts on sales drafts was to facilitate
27 Plaintiff and Class Members in calculating and paying gratuities and Defendant thus intended for
28 Plaintiff and Class Members to rely on its suggested gratuity amounts. As Defendant intended, Plaintiff
and Class Members did rely on the suggested gratuity amounts presented by Defendant because they
used those amounts in calculating the TOTAL of the sales draft and their reliance on the suggested
gratuity representation was a substantial factor in causing them harm.

1 44. Defendant's representations as to the suggested gratuity amounts ("representation") was
2 a substantial factor in causing Plaintiff and Class Members harm consisting of paying higher gratuity
3 amounts than they would otherwise have paid.

4 45. Defendant's actions and failures to act, including the willful failure to correct the billing
5 error and failure to deal fairly and in good faith with Plaintiff and Class Members, also constitutes a
6 violation of the UCL.

CLASS ACTION ALLEGATIONS

7 46. Plaintiff brings this class action pursuant to California Civil Procedure Code § 382.
8 Upon information and belief, there are at least 1,000 Class Members. Given Defendant's systematic
9 misrepresentations of the suggested gratuity amount on written agreements with its customers, the
10 members of the Class seeking relief for those violations are so numerous that joinder of all members is
11 impractical.

12 47. The identity of the members of the Class is ascertainable using the Defendant's credit
13 card charge and other billing records, and by other feasible and efficient means based on electronic
14 records.

15 48. Plaintiff's claims are typical of the claims of the members of the Class and the Subclass.
16 She dined at one of Defendant's locations in Los Angeles County with another customer. She and the
17 person she dined with used two credit/debit cards to settle their debt. Plaintiff used a credit card and the
18 other individual also used a credit or debit card. Defendant divided their combined bill between the
19 cards, processed the cards, and presented Plaintiff and the other customer each with a sales draft, each
20 for a CHECK amount that was only a portion of the combined bill. Plaintiff's sales draft contained
21 suggested gratuity amounts that were untrue and mathematically erroneous. Relying on the accuracy of
22 Defendant's suggested gratuity representation, Plaintiff by mistake used one of the printed suggested
23 gratuity amounts in calculating the TOTAL, while intending to only tip the suggested gratuity
24 percentage on the CHECK amount. Plaintiff then signed the sales draft and later received a credit card
25 bill containing a charge for the TOTAL, and paid that bill including the TOTAL.

26 49. Plaintiff will fairly and adequately represent the interests of the Class. Plaintiff has no
27 conflict of interest with any member of the Class. Plaintiff has retained competent and experienced
28 counsel in complex class action litigation. Plaintiff's counsel has the expertise and financial resources to
adequately represent the interests of the Class.

1 50. Common questions of law and fact exist as to all members of the Class and predominate
2 over any questions solely affecting individual members of the Class. Among the questions of law and
3 fact common to Plaintiff and the Class are the following:

- 4 a. Whether Plaintiff and Class Members and Defendant entered into a valid and binding
5 second contract.
- 6 b. Whether suggested gratuity amounts contained in the sales drafts were not true.
- 7 c. Whether Defendant dealt unfairly and acted in bad faith in including in the second
8 contract a representation that was untrue.
- 9 d. Whether Plaintiff and Class Members are entitled to reformation.
- 10 e. Whether Defendant represented to Plaintiff and Class Members on sales drafts that the
11 suggested gratuity amounts corresponding to 15%, 18%, 20%, and 22% were actually
12 15%, 18%, 20%, and 22% of the CHECK amount, not of the combined bill amount.
- 13 f. Whether Defendant's representation was untrue.
- 14 g. Whether Defendant knew or should have known that its representation was untrue or
15 inaccurate, or had no reasonable ground for believing that the representation was true.
- 16 h. Whether Defendant intended for Plaintiff and Class Members to rely on the suggested
17 gratuity representation.
- 18 i. Whether the Class Members reasonably relied on the suggested gratuity representation.
- 19 j. Whether reliance of Plaintiff and Class Members on Defendant's representation can be
20 proved by circumstantial evidence.
- 21 k. Whether Defendant made a billing error for purpose of Civil Code § 1747.60.
- 22 l. Whether the billing error inquiry letter Plaintiff sent to Defendant constitutes inquiry for
23 purpose of Civil Code § 1747.60.
- 24 m. Whether Defendant's failure to correct the billing error was willful.
- 25 n. Whether the second contract failed to reflect the true intent of the parties.
- 26 o. Whether such failure was due to a mistake of fact on the part of Plaintiff and Class
27 Members.
- 28 p. Whether part of the money paid by Plaintiff and Class Members to Defendant belongs to
Plaintiff and Class Members.
- q. Whether Defendant's actions or inactions constituted unlawful, unfair, or fraudulent
business practices in violation of Bus. & Prof. Code §§ 17200 et seq.

- 1 r. Whether Plaintiff and Class Members are entitled to restitution under Bus. & Prof. Code
2 §§ 17200 et seq. and/or under the common cause(s) of action pled in this matter for the
3 portion of suggested gratuity erroneously paid.
- 4 s. The proper formula(s) for calculating damages, treble damages, interest, and restitution
5 owed to Plaintiff and Class Members for the violations alleged in this Complaint.
- 6 t. Whether Plaintiff and Class Members are entitled to injunctive relief.

7 51. Class action treatment is superior to any alternative to ensure the fair and efficient
8 adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly
9 situated persons to prosecute their common and small claims in a single forum simultaneously,
10 efficiently, and without duplication of effort and expense that numerous individuals would entail. If this
11 action is not certified as a Class Action, it will be impossible as a practical matter for many or most
12 members of the Class to bring individual actions to recover monies due from Defendant, due to the
13 relatively small amounts of such individual recoveries relative to the costs and burdens of litigation.

14 52. Defendant's actions are generally applicable to the entire Class. Prosecution of separate
15 actions by individual members of the Class creates the risk of inconsistent or varying adjudications of
16 the issues presented herein, which, in turn, would establish incompatible standards of conduct for
17 Defendant.

18 53. Because joinder of all members of the Class is impractical, a class action is superior to
19 other available methods for the fair and efficient adjudication of this controversy. Furthermore, the
20 amounts at stake for many members of the Class, while substantial, may not be sufficient to enable them
21 to maintain separate suits against Defendant.

22 **FIRST CAUSE OF ACTION**
23 **Breach of the Covenant of Good Faith and Fair Dealing**
24 **[Common Count]**

25 54. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
26 the preceding paragraphs.

27 55. A covenant of good faith and fair dealing is implied in all contracts, including those
28 contracts entered into by Plaintiff and Class Members with the Defendant, as alleged above.

56. Defendant offered to enter into valid and binding contracts with the Plaintiff and Class
Members by generating sales drafts and presenting them to Plaintiff and Class Members.

57. Plaintiff and Class Members entered into the contracts presented by Defendant in
designating specified gratuity amounts and agreeing to pay the TOTAL including those amounts.
Plaintiff and Class Members have performed all of the conditions, covenants, and promises required to

1 be performed by them in accordance with the terms and conditions of these contracts by authorizing and
2 directing their credit card issuers to settle the debts on their accounts with Defendant.

3 58. Defendant has failed to uphold its end of the bargains entered into and has breached its
4 implied duty of good faith and fair dealing owed to Plaintiff and Class Members by including in the
5 contracts suggested gratuity amounts and corresponding percentages, which it represented accurately
6 reflected corresponding percentages of each Class Members' CHECK amount, which it knew or should
7 have known were not true and accurate.

8 59. Relying on Defendant's representation that the listed gratuity amounts accurately
9 reflected the listed corresponding percentages of their portion of the combined bill, Plaintiff and Class
10 Members agreed to pay the total amounts reflected on the sales drafts, which included the incorrectly
11 calculated gratuity amounts.

12 60. As a result of Defendant's actions, as set forth above, Defendant has unfairly breached its
13 obligation pursuant to the covenant of good faith and fair dealing and interfered with Plaintiff's and
14 Class Members' right to receive the benefit of the contracts they had entered into in good faith.

15 61. As a result of Defendant's breach of the covenant of fair dealing, Plaintiff and Class
16 Members lost the benefit of their bargain by being induced to agree to pay an amount that was higher
17 than they would have agreed to pay had Defendant not acted unreasonably in making the suggested
18 gratuity misrepresentations.

19 62. As a result, Plaintiff and Class Members are entitled to damages to be determined
20 according to proof.

21 **SECOND CAUSE OF ACTION**
22 **Reformation Based on Unilateral Mistake**
23 **[Civil Code § 3399]**

24 63. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
25 the preceding paragraphs.

26 64. As alleged above, Defendant entered into valid and enforceable contracts with the
27 Plaintiff and Class Members.

28 65. The parties' contracts fail to reflect the true intent of the parties in that Plaintiff and Class
Members intended to pay 15%, 18%, 20%, or 22% of their respective CHECK amounts and not of the
combined bills whereas the contracts show an agreement to pay a percentage of the combined bills.

66. The above-described failure of the agreements to reflect the true intent of the parties
resulted from the unilateral mistake on the part of Plaintiff and Class Members in that in executing the
sales draft, Plaintiff and Class Members were not aware of the mathematical error made by Defendant

1 and did not intend to pay gratuity amounts that represented 15%, 18%, 20% or 22% of the combined
2 bill, but only those percentages of their split bill portion of the combined bill.

3 67. Upon information and belief, Defendant knew or suspected the above-described mistake
4 at the time of the execution of each agreement.

5 68. Plaintiff and Class Members will suffer pecuniary loss unless the agreements are
6 reformed to correctly state the gratuity amounts that accurately represent the corresponding percentages
7 listed in the agreements.

8 69. The Court should award Plaintiff and Class Members relief on this Claim as specified in
9 the Prayer for Relief below.

10 **THIRD CAUSE OF ACTION**
11 **Willful Failure to Correct Billing Error**
12 **(On behalf of Billing Error Subclass)**
13 **[Civil Code § 1747.60]**

14 70. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
15 the preceding paragraphs.

16 71. Defendant is, and at all times herein mentioned was, a retailer for purposes of Civil Code
17 § 1747.60.

18 72. As alleged above, to the extent the suggested gratuity misrepresentation was a result of a
19 mathematical or similar error, Defendant committed a billing error by making a suggested gratuity
20 misrepresentation on sales drafts that, after it was accepted by Plaintiff and members of the Subclass
21 and included in the TOTAL on the sales draft, appeared on Plaintiff's and Subclass Members' credit
22 card statements.

23 73. Pursuant to Civil Code § 1747.60, Plaintiff mailed an inquiry to Defendant on April 6,
24 2017.

25 74. Defendant received Plaintiff's inquiry and more than 60 days have passed since the
26 mailing of the inquiry, but Defendant has not responded to the inquiry and did not correct the billing
27 error.

28 75. Plaintiff is informed and believes and thereon alleges that Defendant's failure to correct
the billing error was willful.

76. Defendant's failure to correct the billing error within 60 days of the mailing of the
inquiry also entitles Plaintiff and members of the Subclass to any interest, finance charges, service
charges, or other charges on the obligation giving rise to the billing error.

1 77. Defendant's willful failure to correct the billing error within 60 days of the mailing of the
2 inquiry additionally entitles Plaintiff and the members of the Subclass to treble damages, three times the
3 amount of actual damages assessed, and reasonable attorneys' fees and costs incurred in prosecuting this
4 action.

5 78. Therefore, Plaintiff and Subclass Members are entitled to damages and treble damages
6 according to proof, and attorneys' fees and costs.

7 **FOURTH CAUSE OF ACTION**

8 **Negligent Misrepresentation**

9 **(In the Alternative)**

10 **[Common Count]**

11 79. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
12 the preceding paragraphs.

13 80. Defendant made the suggested gratuity representation to Plaintiff and Class Members.

14 81. Defendant's suggested gratuity representation was not true.

15 82. Defendant had no reasonable grounds for believing its suggested gratuity representation
16 was true when it made it.

17 83. Defendant intended that Plaintiff and Class Members rely on its suggested gratuity
18 representation.

19 84. Plaintiff and Class Members reasonably relied on Defendant's suggested gratuity
20 representation in copying down on their receipts the suggested amounts and in paying those amounts.

21 85. Plaintiff's and Class Members' reliance on Defendant's representation was a substantial
22 factor in causing them harm.

23 86. Plaintiff and the Class Members are entitled to damages in the amount proved at trial and
24 prejudgment interest.

25 **FIFTH CAUSE OF ACTION**

26 **Mistaken Receipt**

27 **[Common Count]**

28 87. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
the preceding paragraphs.

88. Defendant has become indebted to Plaintiff and Class Members in that Plaintiff and
Class Members paid Defendant amounts by a mistake of fact, as alleged above, and Defendant did not
have the right to that money.

89. As alleged above, Plaintiff requested that Defendant return the money paid by mistake.
But, neither the whole nor any part of the mistakenly paid amounts has been returned to Plaintiff and

1 Class Members, and here is now due, owing and unpaid the amounts paid by mistake, to be determined
2 based on Defendants records, with interest at the legal rate through to the present.

3 90. Plaintiff, on behalf of herself and all other Class Members, request relief as specified in
4 the Prayer for Relief below.

5 **SIXTH CAUSE OF ACTION**

6 **Money Had and Received**

7 **[Common Count]**

8 91. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
9 the preceding paragraphs.

10 92. Defendant received money from Plaintiff and Class Members.

11 93. The monies belong to the Plaintiff and Class Members.

12 94. Defendant has not returned the money.

13 95. Plaintiff, on behalf of herself and all other Class Members, requests relief as specified in
14 the Prayer for Relief below.

15 **SEVENTH CAUSE OF ACTION**

16 **Violation of Unfair Competition Laws**

17 **[Bus. & Prof. Code §§ 17200 et seq.]**

18 96. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in
19 the preceding paragraphs.

20 97. The UCL prohibits any unlawful, unfair, and/or fraudulent business practices. Bus. Prof.
21 Code § 17204 allows “any person who has suffered injury in fact and has lost money or property” to
22 prosecute a civil action for violation of the UCL. Such a person may bring such an action on behalf of
23 themselves and other similarly situated who are affected by the unlawful, unfair, or fraudulent business
24 practice.

25 98. During the Class Period, Defendant has committed, and continues to commit, acts of
26 unfair, unlawful and/or fraudulent competition as defined by the UCL by engaging in the acts and
27 practices described above.

28 99. As a direct result of Defendant’s unlawful, unfair and/or fraudulent acts and practices
described herein, Plaintiff and Class Members have suffered significant injury in fact and have lost
money or property by paying higher gratuity amounts than they would have paid had Defendant not
made the billing error and failed to correct it in violation of Civil Code § 1747.60 and/or had Defendant
not induced Plaintiff and Class Members to include an erroneous and higher amount into their
agreement with Defendant and/or had Defendant not misrepresented the accuracy of the suggested
gratuity amounts in the parties’ agreement and refused to return the money Plaintiff and Class Members

1 overpaid as a result of its misrepresentation. Therefore, Defendant's actions described herein constitute
2 unfair, unlawful and/or fraudulent business practice or acts within the meaning of the UCL.

3 100. Plaintiff, and similarly situated Class Members, are entitled to restitution pursuant to
4 Bus. & Prof. Code §§ 17203 and 17208 for all monies paid by them as a result of Defendant's billing
5 error and/or negligent representation as to suggested gratuity amounts, together with interest at rates
6 specified by law.

7 **PRAYER FOR RELIEF**

8 **WHEREFORE**, Plaintiff, on behalf of herself and the members of the Class and the
9 members of the Subclass, prays for judgment against Defendant and requests the following relief:

10 A. That the Court order that this action may proceed and be maintained as a class action
11 under § 382 of the Code of Civil Procedure; and that the Court define the Class and the Subclass as
12 specified above and appoint Plaintiff as the Representative of the Class and of the Subclass and her
13 attorneys as Counsel for the Class and for the Subclass.

14 B. That the Court find and declare that Defendant has breached the covenant of good faith
15 and fair dealing, and order Defendant to pay Plaintiff and Class Members damages for that breach.

16 C. That the Court find that the parties' agreements do not reflect the parties' true
17 intent and reform the agreements to reflect parties' true intent, creating an enforceable obligation for
18 Defendant to pay Plaintiff and Class Members damages and/or restitution in the amount of the gratuities
19 that they unwittingly or mistakenly paid based on Defendant's representations.

20 D. That the Court find and declare pursuant to Civil Code § 1747.60 Defendant has
21 made a billing error and has failed to correct it within 60 days after inquiry was made.

22 E. That the Court find that (1) Plaintiff and Class Members paid money to Defendant by
23 mistake, Plaintiff requested that the money be returned, but Defendant has not returned the money; (2)
24 Defendant is in possession of money that belongs to Plaintiff and Class Members and Defendant has not
25 returned the money; (3) Defendant holds money wrongfully withheld from Plaintiff and Class Members
26 as a constructive trustee for the benefit of Plaintiff and Class Member; and that based on those findings
27 the Court order that Defendant return to Plaintiff and Class Members the money it wrongfully holds and
28 has not returned.

F. That the Court award to Plaintiff and the Class Members damages on the foregoing
causes of action in the amount of their actual losses together with pre-judgment interest.

G. That the Court award to Plaintiff and Subclass Members treble damages pursuant to Civil
Code § 1747.60.

1 H. That the Court find and declare that (1) Defendant has violated the UCL and committed
2 an unlawful business practice by making a billing error and failing to correct it; (2) Defendant has
3 violated the UCL and committed an unlawful business practice by making the suggested gratuity
4 misrepresentation; and that the based on those findings the Court order disgorgement and/or restitution
5 by Defendant to Plaintiff and Class Members of the amounts paid by them due to Defendant's practices
6 as alleged herein pursuant to Bus. & Prof. Code § 17603, in an amount to be proved at trial.

7 I. That Plaintiff and the Class Members be awarded attorneys' fees and costs pursuant to
8 Code of Civil Procedure § 1021.5 and/or other applicable law.

9 J. That the Court award such other and further relief as this Court may deem appropriate.

10 **JURY DEMAND**

11 Plaintiff, on behalf of herself and the Class and Subclass Members, hereby demands trial by jury
12 of all claims against Defendant alleged herein.

13 Dated: July 12, 2017

14 Respectfully submitted,

15 HAMMONDLAW, P.C.

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Julian Hammond

17 Attorneys for Plaintiff and Putative Class
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