

1 Matthew C. Helland, CA State Bar No. 250451
helland@nka.com

2 Daniel S. Brome, CA State Bar No. 278915
dbrome@nka.com

3 NICHOLS KASTER, LLP
4 235 Montgomery St., Suite 810
5 San Francisco, CA 94104
6 Telephone: (415) 277-7235
7 Facsimile: (415) 277-7238

8 *Attorneys for Plaintiffs and Others Similarly Situated*

9 **IN THE UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 Sandra Medina, individually and on
12 behalf of others similarly situated, and on
13 behalf of the general public,

14 Plaintiff,

15 v.

16 Evolve Mortgage Services, LLC,

17 Defendant.

Case No. 8:21-cv-01338

**CLASS AND COLLECTIVE
ACTION COMPLAINT FOR
DAMAGES, RESTITUTION, AND
INJUNCTIVE RELIEF**

**(1) Failure to Pay Overtime
Compensation in Violation of the
Fair Labor Standards Act (29 U.S.C.
§ 201, *et seq.*)**

**(2) Failure to Pay Overtime
Compensation in Violation of
California Law (Lab. Code §§ 510,
1194, and 1198, and IWC Wage
Order(s))**

**(3) Failure to Pay Proper Meal
Period Premiums (Cal. Lab. Code §§
226.7, 512, and IWC Wage Order)**

**(4) Failure to Provide Itemized
Wage Statements (Lab. Code § 226)**

**(5) Failure to Pay Earned Wages
Upon Discharge, Waiting Time
Penalties in Violation of Labor Code
§§ 201-203;**

(6) Violation of California Business and Professions Code § 17200 *et seq.*

PRELIMINARY STATEMENT

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4 1. This is a putative class and collective action brought by individual and
5 representative Plaintiff Sandra Medina, on behalf of herself and the proposed
6 California Class and nationwide FLSA Collective. Plaintiff and the putative class
7 members are or were employed by Defendant Evolve Mortgage Services, LLC
8 (“Defendant”) as non-exempt employees eligible for commission or other non-
9 discretionary incentive pay and were denied proper compensation as required by
10 federal and state wage and hour laws. These employees are similarly situated under
11 the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216(b) and Rule 23 of the
12 Federal Rules of Civil Procedure.

13 2. The FLSA Collective is made up of all persons who Defendant
14 employed as non-exempt employees eligible for commission or other non-
15 discretionary incentive pay, at any time within three years prior to this action’s
16 filing date through the trial of this action (the “Collective Period”).

17 3. The California Class is made up of all persons who Defendant
18 employed as non-exempt employees eligible for commission or other non-
19 discretionary incentive pay, in the state of California at any time within four years
20 prior to this action’s filing date through the trial of this action (the “California Class
21 Period”).

22 4. During the Collective Period, Defendant improperly calculated non-
23 exempt employees’ regular rate of pay, and therefore failed to pay proper overtime
24 compensation to Plaintiff and each member of the FLSA Collective as required by
25 federal law. Plaintiff seeks relief for herself and for the FLSA Collective under the
26 FLSA to remedy Defendant’s failure to pay appropriate overtime compensation.

27 5. During the California Class Period, Defendant improperly calculated
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1 non-exempt employees' regular rate of pay, and therefore failed to pay overtime
2 compensation and meal period premiums to Plaintiff and each member of the
3 California Class as required by California law. As a result of this failure to pay
4 proper overtime and meal period premiums, Defendant failed to pay all wages due
5 at separation. Defendant also failed to provide complete and accurate wage
6 statements. Plaintiff seeks relief for herself and the California Class under
7 California law to remedy Defendant's failure to pay appropriate overtime and
8 premium pay, to promptly pay all wages at the time of separation, and to provide
9 accurate wage statements, in addition to equitable and injunctive relief.

10 **THE PARTIES**

11 6. Individual and representative Plaintiff Sandra Medina ("Plaintiff") is
12 an individual residing in California. Defendant employed her as a mortgage
13 underwriter from approximately August of 2020 until approximately February of
14 2021. Plaintiff worked remotely from her home in Orange County, California.

15 7. Evolve Mortgage Services, LLC is a full-service, onshore provider of
16 outsourced mortgage services and technologies. It provides origination and post-
17 closing services, institutional, whole loan, and servicing acquisition due diligence,
18 collateral recovery, HMDA and forensic compliance reviews, whole loans sales,
19 agency deliveries, and securitizations.

20 8. Defendant's gross annual sales made or business done has been
21 \$500,000.00 or greater at all times relevant herein. Defendant operates in interstate
22 commerce by performing its services throughout the United States.

23 **JURISDICTION AND VENUE**

24 9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331
25 as this case is brought under the FLSA, 29 U.S.C. §§ 201 *et seq.* Plaintiff has
26 signed a consent form to join this lawsuit, which is attached as Exhibit A. As this
27 case proceeds, it is likely that other individuals will file consent forms and join as
28 opt-in plaintiffs. This Court also has supplemental jurisdiction over Plaintiff's

1 California state law claims pursuant to 28 U.S.C. § 1367.

2 10. Venue is proper in the United States District Court, Central District of
3 California pursuant to 28 U.S.C. § 1391, because Plaintiff worked and resides in
4 Orange, California (Orange County), and because a substantial part of the events
5 giving rise to the claims occurred in this district. This case is properly assigned to
6 the Southern Division of the Central District.

7 **FACTUAL ALLEGATIONS**

8 11. During the applicable statutory period, Plaintiff, the FLSA Collective,
9 and California Class worked as non-exempt employees for Defendant. Defendant
10 employed Plaintiff within the meaning of the FLSA and California law.

11 12. Plaintiff, the FLSA Collective, and California Class are or were non-
12 exempt employees eligible for overtime pay. Defendant paid Plaintiff a per file
13 production payment using a points-based schedule (e.g., \$55 per file for the first 5
14 files completed per day and \$75 per file for additional files completed in a day).
15 Defendant extracted Plaintiff's \$13.00 hourly rate payment from the production
16 payment, and paid the rest of the production payment as commission earnings.
17 Defendant described Plaintiff's pay as follows:

18 **Compensation**

19 As an hourly employee, your compensation will be at an hourly rate of \$13.00, paid bi-weekly. You
20 will be paid a per file production, as outlined in the Compensation Schedule. Your hourly rate
21 earnings will be extracted from your total file production logged during the pay period and paid
as "regular earnings" and remaining file production will be paid as "commission".

22 13. The FLSA and California law require covered employers, such as
23 Defendant, to compensate all non-exempt employees such as Plaintiff, and others
24 similarly situated, at a rate of not less than 1.5 times their regular rate of pay, for
25 work performed in excess of 40 hours per workweek (state and federal law) and/or
26 eight (8) hours per day (state law).

27 14. Under state and federal law, an employee's "regular rate" of pay is not
28 limited to an employee's hourly rate. The "regular rate" also includes an hourly rate

1 derived from non-discretionary incentive compensation (i.e., a “commission”
2 payment).

3 15. For purposes of federal law, the regular rate on non-discretionary
4 incentive compensation is determined by dividing the payment by the total number
5 of hours worked during the period in which that compensation was earned.

6 Overtime is due at one-half that rate for all overtime hours worked that period. This
7 overtime pay is in addition to the overtime pay based on the employee’s hourly rate.

8 16. For purposes of California state law, the regular rate on additional non-
9 discretionary incentive compensation is determined by dividing the payment by the
10 total number of non-overtime hours worked during the period in which that
11 compensation was earned. Overtime is due at one and one-half times that rate for
12 overtime hours worked (and twice that rate for double-time hours worked). This
13 overtime pay is in addition to the overtime pay based on the employee’s hourly rate.

14 17. Defendant paid overtime pay to Plaintiff, the FLSA Collective and the
15 California Class based on employees’ hourly rate only, without calculating the
16 regular rate based on all non-discretionary incentive pay. Because Defendant
17 miscalculated the regular rate, Defendant suffered and permitted Plaintiff, the
18 FLSA Collective, and California Class to work more than 40 hours per week and/or
19 eight (8) hours per day without receiving proper overtime pay.

20 18. For example, in the pay period ending November 13, 2020, Defendant
21 paid Plaintiff \$5,363.03 in commissions. During this same pay period, Plaintiff
22 worked 10.87 hours of overtime. Defendant paid Plaintiff 1.5 times her \$13 hourly
23 rate for these overtime hours, but did not include any additional overtime pay
24 resulting from the commission payment. *See Exhibit B p. 7.*

25 19. Plaintiff sometimes worked more than 5 hours without an
26 uninterrupted 30 minute meal period. When this occurred, Defendant paid Plaintiff
27 her regular hourly rate for missed meal period occurrences. *See Exhibit B p. 11*

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1 (pay period ending Sept. 18, 2020). Defendant did not include commission earnings
2 in the regular rate for purposes of calculating missed meal period premiums.

3 20. Defendant's policy and practice of failing to include non-discretionary
4 incentive earnings when calculating the regular rate of pay deprived Plaintiff, and
5 others similarly situated, of the proper overtime wages guaranteed by law.

6 21. Defendant's policy and practice of failing to include non-discretionary
7 incentive earnings when calculating the regular rate of pay deprived Plaintiff and
8 California Class Members of the proper meal period premiums guaranteed by law.

9 22. Plaintiffs and those similarly situated worked in excess of forty (40)
10 hours per week and/or eight (8) hours per day for Defendant on one or more
11 occasions without receiving proper overtime pay.

12 23. Because Defendant did not pay Plaintiff and other non-exempt
13 employees at the appropriate overtime and meal premium rates, Defendant's wage
14 statements did not accurately reflect all rates of pay, and did not correctly itemize
15 the hours worked at each rate of pay.

16 24. Plaintiff's employment with Defendant ended in February of 2021.
17 However, Defendant failed to pay all wages that were due at that time, including
18 legally required overtime and meal period premiums at the appropriate rate. More
19 than 30 days have passed since the end of Plaintiff's employment, and Defendant
20 still has not paid all wages that are due and owing.

21 25. Defendant's unlawful conduct has been widespread, repeated, and
22 consistent.

23 26. Defendant's conduct, as set forth in this Complaint, was willful,
24 knowing and intentional, and in bad faith. Defendant operated under a scheme that
25 has caused significant damages to Plaintiff and the similarly situated individuals.

26 **COLLECTIVE ACTION ALLEGATIONS**

27 27. Plaintiff brings this action on behalf of herself and other similarly
28 situated employees as authorized under the FLSA, 29 U.S.C. § 216(b). The

1 employees similarly situated are as follows:

2 **FLSA Collective:** All Persons who Defendant employed as non-exempt
3 employees eligible for commission or other non-
4 discretionary incentive pay within the United States
5 within the period starting three years prior to the filing
6 of the initial complaint in this action until trial of this
7 action.

8 28. Defendant operated under a scheme to deprive these employees of
9 overtime compensation by failing to properly compensate them for all hours
10 worked.

11 29. Defendant is liable under the FLSA for failing to properly compensate
12 Plaintiffs and the FLSA Collective, and as such, notice should be sent to the FLSA
13 Collective. There are numerous similarly situated current and former employees of
14 Defendant who have been denied overtime pay in violation of the FLSA who would
15 benefit from the issuance of Court-supervised notice of this lawsuit and the
16 opportunity to join. Those similarly situated employees are known to Defendant
17 and are readily identifiable through Defendant's records.

18 **CLASS ACTION ALLEGATIONS**

19 30. Plaintiff brings this action on behalf of herself and as a class action on
20 behalf of all similarly situated employees. The California Class is defined as
21 follows:

22 **California Class:** All current and former non-exempt employees eligible for
23 commission or other non-discretionary incentive pay
24 employed by Defendant in the state of California at any
25 time starting four years prior to the filing date of this
26 complaint, through the date of trial.

27 31. This action is properly brought as a class action pursuant to the class
28 action procedures of Rule 23 of the Federal Rules of Civil Procedure.

1 32. The class is so numerous that joinder of all members is impractical.
2 While the exact number and identities of class members are unknown at this time,
3 and can only be ascertained through appropriate discovery, Plaintiff believes that
4 there are more than forty (40) class members.

5 33. This litigation is properly brought as a class action because of the
6 existence of questions of fact and law common to Plaintiff and other members of
7 the class which predominate over any questions affecting only individual members,
8 including:

- 9 a. Whether Defendant is liable to members of the class described above
10 for violations of the applicable labor codes;
- 11 b. Whether Defendant improperly calculated the regular rate for purposes
12 of overtime payments to members of the class described above;
- 13 c. Whether Defendant improperly calculated the regular rate for purposes
14 of meal period premium payments to members of the class described above;
- 15 d. Whether Defendant knowingly and intentionally failed to provide
16 accurate wage statements;
- 17 e. Whether Defendant willfully failed to pay all wages due at
18 termination; and
- 19 f. Whether Defendant engaged in unfair competition.

20 34. This litigation is properly brought as a class action because Plaintiff's
21 claims are typical of the claims of the class members, inasmuch as all such claims
22 arise from Defendant's standard policies and practices, as alleged herein.

23 35. Like all class members, Plaintiff was damaged by Defendant's system-
24 wide policies and practices of improperly calculating the regular rate, failing to
25 provide compliant wage statements, and failing to pay all wages due at separation
26 from employment, thus giving rise to legal remedies under the California Labor
27 Code.

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1 employees, including Plaintiff and each member of the FLSA Collective.

2 42. Plaintiff consents in writing to be a part of this action, pursuant to 29
3 U.S.C. § 216(b). As this case proceeds, it is likely that other individuals will sign
4 consent forms and join as plaintiffs.

5 43. The FLSA requires all covered employers, such as Defendant, to
6 compensate all non-exempt employees at a rate of not less than one and one-half
7 times their regular rate of pay for work performed in excess of forty hours per work
8 week.

9 44. The regular rate of pay is not limited to hourly pay, but also includes
10 the rate derived from non-discretionary incentive payments such as commissions.

11 45. Plaintiff and the FLSA Collective are entitled to be paid overtime
12 compensation, at the proper rate, for all hours worked. By miscalculating the
13 regular rate and failing to compensate Plaintiff and the FLSA Collective proper
14 overtime compensation, Defendant violated the FLSA, 29 U.S.C. §§ 201 *et seq.*

15 46. The foregoing conduct, as alleged, constitutes a willful violation of the
16 FLSA, within the meaning of 29 U.S.C. § 255(a).

17 47. Plaintiff, on behalf of herself and the FLSA Collective, seeks damages
18 in the amount of all unpaid overtime compensation owed to herself and the FLSA
19 Collective, liquidated damages as provided by the FLSA, 29 U.S.C. § 216(b),
20 interest, and such other legal and equitable relief as the Court deems just and
21 proper.

22 48. Plaintiff, on behalf of herself and the FLSA Collective, seeks recovery
23 of attorneys' fees and costs to be paid by Defendant, as provided by the FLSA, 29
24 U.S.C. § 216(b).

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1 overtime hours worked.

2 57. As a result of Defendant's failure to pay wages earned and due,
3 Defendant violated the California Labor Code.

4 58. As a direct and proximate result of Defendant's unlawful conduct, as
5 set forth herein, Plaintiff and the California Class have sustained damages,
6 including loss of earnings for hours of overtime worked on behalf of Defendant,
7 prejudgment interest, and attorneys' fees and costs.

8 **THIRD CLAIM FOR RELIEF**

9 **FAILURE TO PAY PROPER MEAL PERIOD PREMIUMS**

10 Cal. Wage Order No. 4; Cal. Labor Code §§ 226.7 et seq., 512

11 (On Behalf of Plaintiff and the California Class)

12 59. Plaintiff alleges and incorporates by reference the allegations in the
13 proceeding paragraphs.

14 60. California Labor Code § 512 and the Wage Order 4 prohibit an
15 employer from employing an employee for a work period of more than five hours
16 per day without providing the employee with a meal period of not less than 30
17 minutes, or for a work period of more than 10 hours per day without providing the
18 employee with a second meal period of not less than 30 minutes.

19 61. California Labor Code § 226.7 prohibits any employer from requiring
20 any employee to work during any meal period mandated by an applicable IWC
21 wage order, and provides that an employer that fails to provide an employee with a
22 required meal period shall pay that employee one additional hour of pay at the
23 employee's regular rate of compensation for each work day that the employer does
24 not provide a compliant meal period.

25 62. The regular rate of pay for meal period premium payments includes
26 the regular rate derived from non-discretionary incentive payments.

27 63. Defendant paid meal period premiums to Plaintiff and the California
28 Class at their hourly rate, without including non-discretionary incentive pay in its

1 calculation of the regular rate. Plaintiff and Class Members are therefore entitled to
2 payment of the meal period premiums at the proper regular rate, as provided by
3 law.

4 **FOURTH CLAIM FOR RELIEF**

5 **FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS**

6 Cal. Labor Code § 226

7 (On Behalf of Plaintiff and the California Class)

8 64. Plaintiff alleges and incorporates by reference the allegations in the
9 preceding paragraphs.

10 65. Defendant knowingly and intentionally failed to provide Plaintiff and
11 the California Class with timely, accurate, itemized wage statements showing all
12 items required pursuant to California Labor Code § 226(a), including, but not
13 limited to, the proper rates of pay and hours worked at each rate of pay.

14 66. Pursuant to Labor Code section 226(e)(2), Plaintiffs and members of
15 the California Class suffered injury because, due to Defendant's failure to provide
16 the required information, Plaintiffs and Class Members could not promptly and
17 easily determine, among other things, their rates of pay and hours worked at each
18 rate of pay.

19 67. Plaintiff, individually and on behalf of the California Class, are
20 entitled to and do seek injunctive relief requiring Defendant to comply with Labor
21 Code § 226(a) and further seek the amount provided under Labor Code § 226(e),
22 including the greater of all actual damages or fifty dollars (\$50) for the initial pay
23 period in which a violation occurs and one hundred dollars (\$100) for each
24 violation in a subsequent pay period, plus attorneys' fees and costs.

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FIFTH CLAIM FOR RELIEF
WAITING TIME PENALTIES
California Labor Code §§ 201-203

(On Behalf of Plaintiff and the California Class)

68. Plaintiff alleges and incorporates by reference the allegations in the preceding paragraphs.

69. California Labor Code sections 201 and 202 require an employer to pay its employees all wages due within the time specified by law. Labor Code section 203 provides that if an employer willfully fails to pay such wages, the employer must continue to pay the subject employee’s wages until the back wages are paid in full or an action is commenced, up to a maximum of thirty days of wages.

70. Plaintiff and other Class Members who ceased employment with Defendant are entitled to unpaid compensation, but to date have not received such compensation, more than 72 hours after the cessation of their employment.

71. Defendant failed to pay the earned and unpaid wages of Plaintiff and Class members within 30 days from the time such wages should have been paid under Labor Code sections 201 and 202.

72. Defendant willfully failed to timely compensate Plaintiff and other Class Members at the proper overtime rate for overtime hours worked. As a result, Defendant is liable to Plaintiff and other Class members whose employment ended within the year prior to the initial filing of this suit for waiting time penalties under California Labor Code section 203.

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SIXTH CLAIM FOR RELIEF
CALIFORNIA UNFAIR COMPETITION LAW

Cal. Bus. & Prof. Code §§ 17200 et seq.

(On Behalf of Plaintiff and the California Class)

73. Plaintiff alleges and incorporates by reference the allegations in the preceding paragraphs.

74. The foregoing conduct, as alleged, violates the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.* The UCL prohibits unfair competition by prohibiting, *inter alia*, any unlawful or unfair business acts or practices.

75. Beginning at a date unknown to Plaintiff, at least as long ago as the year 2017, Defendant committed acts of unfair competition, as defined by the UCL, by, among other things, engaging in the acts and practices described herein. Defendant’s conduct as herein alleged has injured Plaintiff and Class Members by wrongfully denying them earned wages, and therefore was substantially injurious to Plaintiff and Class Members.

76. Defendant engaged in unfair competition in violation of the UCL by violating, *inter alia*, each of the following laws. Each of these violations constitutes an independent and separate violation of the UCL:

- A. Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*
- B. California Labor Code §§ 510, 1194, & 1198
- C. California Labor Code § 226.7 & 512
- D. IWC Wage Order 4

77. Defendant’s course of conduct, acts, and practices in violation of the California laws mentioned in the above paragraph constitute a separate and independent violation of the UCL. Defendant’s conduct described herein violates the policy or spirit of such laws or otherwise significantly threatens or harms competition.

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- F. An award to Plaintiff and those similarly situated for the amount of unpaid wages owed, liquidated damages and penalties where provided by law, and interest thereon, subject to proof at trial;
- G. An award of reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 216 and/or other applicable laws;
- H. An award of prejudgment interest to the extent liquidated damages are not awarded;
- I. Leave to add additional plaintiffs by motion, the filing of written consent forms, or any other method approved by the Court; and
- J. For such other and further relief, in law or equity, as this Court may deem appropriate and just.

WHEREFORE, Plaintiff, on behalf of herself and the California Class, prays for additional relief as follows:

- A. That the Court determine that this action may be maintained as a class action under Rule 23(b)(1) and (3) of the Federal Rules of Civil Procedure.
- B. That Plaintiff be designated as the representative of the Rule 23 California Class, and Plaintiff's Counsel be designated as Class Counsel.
- C. Unpaid overtime wages and meal period premiums, other due wages, and injunctive relief, pursuant to California law;
- D. Appropriate equitable relief to remedy Defendant's violations of state law;
- E. Appropriate statutory penalties;
- F. An award of damages and restitution to be paid by Defendant according to proof;

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- G. Attorneys' fees and costs of suit, including expert fees pursuant to Cal. Labor Code §§ 1194 and 226, and Cal. Code of Civil Procedure § 1021.5;
- H. That Defendant be further enjoined to cease and desist from the unlawful activities in violation of the state laws cited above;
- I. Pre-judgment and post-judgment interest, as provided by law; and
- J. Such other equitable relief as the Court may deem just and proper.

Dated: August 13, 2021

NICHOLS KASTER, LLP

By: s/ Matthew C. Helland
Matthew C. Helland

Attorney for Plaintiff and Others Similarly
Situated