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18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF NEVADA**

20 **BRIAN SMITH; and ROSEANN**
21 **MIRACOLA, SCOTTY POARCH, and**
22 **MARK YOUNG, on behalf of themselves**
23 **and those similarly situated persons,**

24 **Plaintiffs,**

25 **v.**

26 **KELLOGG COMPANY and KELLOGG**
27 **SALES COMPANY,**

28 **Defendants.**

FAIR LABOR STANDARDS ACT
COLLECTIVE ACTION COMPLAINT

JURY DEMAND

Plaintiff BRIAN SMITH on behalf of himself only, and Plaintiffs ROSEANN MIRACOLA, SCOTTY POARCH, and MARK YOUNG, on behalf of themselves and all others similarly situated, by and through their counsel, upon personal knowledge as to themselves and their actions, alleges upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

- 1
2 1. This case is brought to remedy the failure of Defendant KELLOGG COMPANY and
3 Defendant KELLOGG SALES COMPANY (collectively, “Kellogg”) to pay Plaintiffs and
4 other employees who were required to visit retail stores and merchandise Kellogg
5 products on shelves and displays and who were paid on a salary basis without
6 compensation at the rate of time and one-half for all hours worked more than 40 in a
7 workweek as required by the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*,
8 including without limitation Retail Sales Representatives (“RSRs”), Territory Managers
9 (“TMs”), Retail Sales Managers (“RSMs”), and Kellogg Sales Representatives (“KSRs”)
10 (together referred to as “RSRs”).
- 11 2. Kellogg employed Smith from approximately April 2014 until August 2017. He began
12 working as an RSR in approximately August 2014.
- 13 3. Kellogg employed Miracola from approximately August 2001 until June 2016. She began
14 working as an RSR in approximately 2003.
- 15 4. Kellogg employed Poarch from approximately July 2011 until November 2017 as an RSR.
- 16 5. Kellogg employed Young from June 2006 until March 2017. He began working as an
17 RSR in approximately September 2007.
- 18 6. The job responsibilities of an RSR include loading product onto a cart; bringing product
19 from backroom to the store floor; pulling, facing, and rotating product on the shelves;
20 noting what inventory to bring out on the floor; organizing the back stock area; hanging
21 signs on shelves; placing coupons on product; transferring product from shelf to display;
22 building, relocating, and removing displays; recording inventory levels; in some cases
23 replenishing inventory and processing returns; interacting with Kellogg personnel; and
24 cleaning up trash and disposing of it.
- 25 7. Smith, Miracola, Poarch, Young and the other RSRs regularly worked in excess of 40
26 hours in a week for which Kellogg did not pay them overtime premium wages.
- 27 8. By the conduct described in this Complaint, Kellogg has violated the FLSA by failing to
28

1 pay its employees proper overtime compensation. These violations arose out of Kellogg's
2 company-wide policies and pattern or practice of violating wage and hour by not paying
3 RSRs overtime premium pay at the rate of time and one-half the regular rate.

4 9. Smith brings individual claims, and, Miracola, Poarch, and Young bring individual claims
5 and representative claims to remedy these overtime violations. Miracola, Poarch, and
6 Young bring FLSA claims as a nationwide collective action, on their own behalf and on
7 behalf of other similarly situated employees, under 29 U.S.C. §§ 201 *et seq.*, and
8 specifically, the collective action provision, 29 U.S.C. § 216(b).

9 10. This case seeks to compel Kellogg to pay Smith, Miracola, Poarch, Young, and similarly
10 situated Plaintiffs all the wages it wrongfully withheld from them, plus damages under
11 federal law, penalties, and fees and costs as prescribed by law.

12 **JURISDICTION AND VENUE**

13 11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337.

14 12. In addition, the Court has jurisdiction over the Smith's claims under the FLSA pursuant to
15 29 U.S.C. § 216(b). In addition, Plaintiffs herein attach their consents to joinder as
16 Exhibits A-D.

17 13. Upon information and belief, Kellogg is subject to personal jurisdiction in Nevada.

18 14. Upon information and belief, Kellogg also is subject to personal jurisdiction in Michigan.

19 15. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201
20 and 2202.

21 16. Venue is proper in the District of Nevada pursuant to 28 U.S.C. § 1391(b) and (c) because
22 a substantial part of the events or omissions giving rise to the claim occurred in this
23 District and Kellogg is subject to personal jurisdiction here.

24 17. Kellogg has employed Smith and other RSRs in this District since at least 2007.

25 18. Kellogg conducts business in the District of Nevada.

26 19. Venue is proper in the Western District of Michigan pursuant to 28 U.S.C. § 1391(b), (c),
27 and (d) because Kellogg is subject to personal jurisdiction in Michigan, and because

1 Kellogg's headquarters and principal place of business is located within the Western
2 District of Michigan.

3 **THE PARTIES**

4 **Plaintiffs**

5 **A. Brian Smith**

6 20. Brian Smith's written consent to be a party to this action is attached as Exhibit A.

7 21. Smith resides in North Las Vegas, Nevada.

8 22. Smith was employed by Kellogg in Nevada from approximately April 2014 until August
9 2017. Smith worked for Kellogg as an RSR from approximately August 2014 until August
10 2017.

11 23. Pursuant to Kellogg's policy and pattern or practice, Smith regularly worked more than 40
12 hours per week as an RSR for Kellogg's benefit without receiving overtime compensation
13 at the rate of time and one-half his regular rate.

14 24. Smith was engaged in commerce in his work for Kellogg.

15 **B. Roseann Miracola**

16 25. Roseann Miracola's written consent to be a party to this action was filed on October 23,
17 2017 as Docket number 76. It is attached hereto as Exhibit B.

18 26. Miracola resides in Colorado Springs, Colorado.

19 27. Miracola was employed by Kellogg in Colorado from approximately August 2001 to June
20 2016 as an RSR.

21 28. Pursuant to Kellogg's policy and pattern or practice, Miracola regularly worked more than
22 40 hours per week as an RSR for Kellogg's benefit without receiving overtime
23 compensation at the rate of time and one-half her regular rate.

24 29. Miracola was engaged in commerce in her work for Kellogg.

25 **C. Scotty Poarch**

26 30. Scotty Poarch filed his written consent to sue in this action on August 10, 2017 as Docket
27 number 18. It is attached hereto as Exhibit C.

1 31. Poarch resides in Lewisburg, Tennessee.

2 32. Poarch was employed by Kellogg in Tennessee from approximately July 2011 until
3 November 2017 as an RSR.

4 33. Pursuant to Kellogg's policy and pattern or practice, Poarch regularly worked more than
5 40 hours per week as an RSR for Kellogg's benefit without receiving overtime
6 compensation at the rate of time and one-half his regular rate.

7 34. Poarch was engaged in commerce in his work for Kellogg.

8 **D. Mark Young**

9 35. Mark Young filed his consent to sue in this action on December 22, 2017 as Docket
10 number 93. It is attached hereto as Exhibit D.

11 36. Young resides in Champions Gate, Florida.

12 37. Young was employed by Kellogg in Florida from approximately June 2006 to March
13 2017. Young worked as an RSR from approximately September 2007 to March 2017.

14 38. Pursuant to Kellogg's policy and pattern or practice, Young regularly worked more than
15 40 hours per week as an RSR for Kellogg's benefit without receiving overtime
16 compensation at the rate of time and one-half his regular rate.

17 39. Young was engaged in commerce in his work for Kellogg.

18 **E. Represented Parties under the FLSA**

19 40. The term "Plaintiffs" as used in this Complaint refers to Miracola, Poarch, Young, and any
20 additional represented class members pursuant to the collective action provision of 29
21 U.S.C. § 216(b), as well as Smith.

22 41. Miracola, Poarch, and Young bring FLSA claims on behalf of themselves and the "FLSA
23 Collective Action Class" defined as:

24 All persons who have worked for Kellogg between three years prior to the
25 filing of this case and the date of final judgment in this matter and were
26 required to visit retail stores and merchandise Kellogg products on retail
27 store shelves and displays and were paid on a salary basis without

1 compensation at the rate of time and one-half for all hours worked more
2 than 40 in a workweek. Job positions within this class include without
3 limitation RSRs (Retail Sales Representatives), TMs (Territory Managers),
4 KSRs (Kellogg Sales Representatives), and RSMs (Retail Sales Managers)

5 42. Miracola, Poarch, and Young bring this case as a collective action for class members
6 throughout the United States as defined in the preceding paragraph, under the collective
7 action provision of the FLSA as set forth in 29 U.S.C. § 216(b).

8 43. Kellogg is liable under the FLSA for failing to properly compensate Miracola, Poarch,
9 Young, and the FLSA Collective Action Class. Upon information and belief, there are
10 many similarly situated current and former employees of Kellogg who have been
11 underpaid in violation of the FLSA who would benefit from the issuance of a court-
12 supervised notice of the present lawsuit and the opportunity to join the present lawsuit.
13 Those similarly situated employees are known to Kellogg, are readily identifiable, and can
14 be located through Kellogg's records. Notice should be sent to the FLSA Collective
15 Action Class pursuant to 29 U.S.C. § 216(b).

16 **Defendants**

17 44. Defendant Kellogg Company is a publicly held company.

18 45. Defendant Kellogg Company and its subsidiaries are engaged in the manufacturing and
19 marketing of ready-to-eat cereal and convenience foods.

20 46. Defendant Kellogg Company's headquarters are located at One Kellogg Square, P.O. Box
21 3599, Battle Creek, Michigan 49016-3599.

22 47. Defendant Kellogg Sales Company is a subsidiary of Defendant Kellogg Company.

23 48. Upon information and belief, Defendant Kellogg Sales Company's headquarters are
24 located at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan 49016-3599.

25 49. Plaintiff Smith performed work on behalf of Kellogg in Nevada.

26 50. Plaintiff Miracola performed work on behalf of Kellogg in Colorado.

27 51. Plaintiff Poarch performed work on behalf of Kellogg in Tennessee.

1 52. Plaintiff Young performed work on behalf of Kellogg in Florida.

2 53. Upon information and belief, Kellogg Company and Kellogg Sales Company individually
3 and collectively grossed more than \$500,000 in each of the last ten calendar years.

4 54. Kellogg Company and Kellogg Sales Company individually and collectively are an
5 enterprise engaged in interstate commerce for the purposes of the FLSA.

6 55. Kellogg employed Smith, Miracola, Poarch, Young, and members of the FLSA Collective
7 Action Class, and Kellogg participated directly in employment decisions regarding the
8 rights for which Smith, Miracola, Poarch, Young, and the FLSA Collective Action Class
9 Plaintiffs seek redress in this case. All actions and omissions described in this Complaint
10 were made willfully by Kellogg directly or through its supervisory employees and agents.

11 **FACTS**

12 56. Smith was employed by Kellogg in Nevada from approximately April 2014 to August
13 2017. He worked for Kellogg as an RSR from approximately August 2014 to August
14 2017.

15 57. Miracola was employed by Kellogg in Colorado from approximately August 2001 to June
16 2016 as an RSR.

17 58. Poarch was employed by Kellogg in Tennessee from approximately July 2011 until
18 November 2017 as an RSR.

19 59. Young was employed by Kellogg in Florida from June 2006 until March 2017. He worked
20 for Kellogg as an RSR from approximately September 2007 until March 2017.

21 60. Kellogg employs RSRs throughout the country.

22 61. RSRs, including Smith, Miracola, Poarch, and Young, are responsible for loading product
23 onto a cart; bringing product from backroom to the sales floor; pulling, facing, and
24 rotating product on the shelves; noting what inventory to bring out on the floor; organizing
25 the back stock area; hanging signs on shelves; placing coupons on product; transferring
26 product from shelf to display; building, relocating, and removing displays; recording
27 inventory levels; in some cases replenishing inventory and processing returns; interacting

1 with Kellogg personnel; cleaning up the trash and disposing of it.

2 62. Kellogg established the job responsibilities for Smith, Miracola, Poarch, Young, and other
3 RSRs.

4 63. Kellogg regularly studies RSRs' job performance and responsibilities.

5 64. Kellogg uses its regular studies of RSR job performance to model RSR workloads.

6 65. Upon information and belief, job responsibilities for Smith, Miracola, Poarch, Young, and
7 other RSRs were and are jointly established, controlled, and implemented by Kellogg
8 Company and Kellogg Sales Company.

9 66. Upon information and belief, the method by which Smith, Miracola, Poarch, Young, and
10 other RSRs were paid was established jointly by Kellogg Company and Kellogg Sales
11 Company.

12 67. Kellogg did not pay Smith, Miracola, Poarch, Young, and other RSRs overtime premium
13 pay at the rate of time and one-half the regular rate for all hours worked more than forty in
14 a work week. For example, (a) Kellogg failed to pay Smith overtime wages for work
15 during the weeks of March 20, 2017 to April 2, 2017, during which Smith worked in
16 excess of forty hours per week; (b) Kellogg failed to pay Miracola overtime wages for
17 work during the weeks of March 21, 2016 to April 3, 2016, during which Miracola
18 worked in excess of forty hours per week; (c) Kellogg failed to pay Poarch overtime
19 wages for work during the weeks of November 14, 2016 to November 27, 2016, during
20 which Poarch worked in excess of forty hours per week; (d) Kellogg failed to pay Young
21 overtime wages for work during the weeks of February 6, 2017 to February 19, 2017,
22 during which Young worked in excess of forty hours per week. *See* redacted paystubs
23 attached hereto as Exhibits E-H, respectively.

24 68. Kellogg failed to record daily work start and stop times, and failed to record daily and
25 weekly hours worked by Smith, Miracola, Poarch, Young, and other RSRs.

26 69. Kellogg records the daily start and stop times and the daily and weekly hours worked by
27 other non-exempt employees.

1 70. The hours worked by Smith are discernible through Kellogg's records and/or testimony.
2 The hours worked by Miracola, Poarch, Young, and other RSRs are discernible through
3 Kellogg's records and/or representative testimony of the Plaintiffs.

4 71. Kellogg's failure to pay Smith, Miracola, Poarch, Young, and the Plaintiffs the proper
5 wages required by law was willful.

6 **FIRST CAUSE OF ACTION**

7 **Fair Labor Standards Act: Unpaid Overtime Wages on behalf of Smith**

8 72. Smith re-alleges and incorporates by reference all allegations in all preceding paragraphs.

9 73. Kellogg did not compensate Smith at a rate of one and one-half times his regularly hourly
10 rate for pay for all time worked in excess of forty (40) hours in individual workweeks.

11 74. Kellogg's failure to pay overtime premium wages to Smith is a violation of the FLSA, 29
12 U.S.C. §§ 201 *et seq.*, and its implementing regulations.

13 75. Kellogg's failure to pay proper wages to Smith for each hour worked more than 40 per
14 week was willful within the meaning of the FLSA.

15 76. As a result of Kellogg's violations of the FLSA, Smith has suffered damages by being
16 denied overtime wages in accordance with the FLSA and is entitled to recovery of such
17 amounts, as well as liquidated damages, prejudgment interest, attorneys' fees, costs, and
18 other compensation pursuant to 29 U.S.C. § 201 *et seq.*

19 **SECOND CAUSE OF ACTION**

20 **Fair Labor Standards Act: Unpaid Overtime Wages**

21 **on behalf of Miracola, Poarch, Young, and the FLSA Collective Action Class**

22 77. Miracola, Poarch, and Young re-allege and incorporate by reference all allegations in all
23 preceding paragraphs.

24 78. Kellogg did not compensate Miracola, Poarch, Young, and the FLSA Collective Action
25 Class at a rate of one and one-half times their regularly hourly rate for pay for all time
26 worked in excess of forty (40) hours in individual workweeks.

27 79. Kellogg's failure to pay overtime premium wages to Miracola, Poarch, Young, and the

1 FLSA Collective Action Class is a violation of the FLSA, 29 U.S.C. §§ 201 *et seq.* and its
2 implementing regulations.

3 80. Kellogg's failure to pay proper wages to Miracola, Poarch, Young, and the FLSA
4 Collective Action Class for each hour worked more than 40 per week was willful within
5 the meaning of the FLSA.

6 81. As a result of Kellogg's violations of the FLSA, Miracola, Poarch, Young, and the FLSA
7 Collective Action Class have suffered damages by being denied overtime wages in
8 accordance with the FLSA, and are entitled to recovery of such amounts, liquidated
9 damages, prejudgment interest, attorneys' fees, costs, and other compensation pursuant to
10 29 U.S.C. § 201 *et seq.*

11 **DEMAND FOR JURY TRIAL**

12 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Smith, Plaintiffs, and their
13 Class demand a trial by jury.

14 **PRAYER FOR RELIEF**

15 **WHEREFORE**, Smith individually, as well as Miracola, Poarch, and Young, individually
16 and on behalf of the FLSA Collective Action Class, pray the Court grant the following relief:

17 A. Allow, at the earliest possible time, Miracola, Poarch, and Young to give notice of this
18 collective action and that Kellogg provide them with names, addresses, telephone
19 numbers, and other contact information for all persons who are presently, or have at any
20 time during the three years immediately preceding the filing of this suit been employed by
21 Kellogg and who fall within the FLSA Collective Action Class described in this
22 Complaint. Such notice shall inform them that this civil action has been filed, of the nature
23 of the action, and of their right to join this lawsuit if they believe they were denied proper
24 wages; and

25 B. Toll the FLSA statute of limitations for FLSA Collective Action Class until they have
26 received notice of their right to join this lawsuit;

27 C. Declare that Kellogg violated the FLSA;

- 1 D. Declare that Kellogg's violations of the FLSA were willful;
2 E. Grant judgment to Plaintiffs for their claims of unpaid wages as secured by the FLSA, as
3 well as an equal amount in liquidated damages and interest;
4 F. Award Plaintiffs their reasonable attorneys' fees and costs of suit including expert fees
5 and interest; and
6 G. Award Miracola, Poarch, and Young a service payment for serving as Named Plaintiffs.

7
8 Dated this ____ day of August, 2018.

9
10 Respectfully submitted,

11 By: /s/ Matthew Dunn

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