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10 Attorneys for Plaintiff BRANDON HARVEY,
11 individually and on behalf of all others
12 similarly situated

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

15 BRANDON HARVEY, individually and on
16 behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 MORGAN STANLEY SMITH BARNEY
20 LLC,

21 Defendant.

Case No. 3:18-cv-02835-WHO

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR:**

1. California Bus. & Prof. Code § 17200
2. California Labor Code §§ 221, 223,
400-410, 2802 and Cal. Code Reg. tit. 8,
§ 11040(8)
3. California Labor Code §§ 226, 1174,
1174.5
4. PAGA (Labor Code § 2699)

JURY TRIAL DEMANDED

INTRODUCTION

1
2 1. Plaintiff Brandon Harvey (“Plaintiff”), by and through his attorneys, make the
3 following allegations upon personal knowledge as to himself and his own acts, and upon
4 information and belief as to all other matters.

5 2. Plaintiff brings this lawsuit as a class action pursuant to Federal Rule of Civil
6 Procedure 23 on behalf of current and former employees of Defendant Morgan Stanley Smith
7 Barney LLC (“Morgan Stanley” or “Defendant”) employed as Financial Advisors, or the
8 functional equivalent, however titled, (which position includes the titles “Financial Consultant,”
9 “Securities Broker,” “Stockbroker,” “Investment Advisor,” and/or “Investment Representative”)
10 (collectively referred to as “Financial Advisor”) who worked in California at any time within the
11 last four years of the filing of this action and who suffered damages as a result of Defendant’s
12 violations of California labor laws, including: (1) unlawful pay deductions; (2) failure to
13 reimburse reasonable and necessary business expenses; and, (3) failure to provide accurate
14 itemized wage statements.

PARTIES

15
16 3. Plaintiff Harvey is a citizen of the State of California. Harvey is a former Morgan
17 Stanley Financial Advisor who worked in San Francisco, California within the three years
18 preceding the filing of this action.

19 4. During the statutory period covered by this action, Defendant Morgan Stanley
20 was and is a Delaware corporation with its principal place of business in New York. Morgan
21 Stanley transacts business in this judicial district.

22 5. The true names and capacities of persons or entities, whether individual,
23 corporate, associate, or otherwise, who may be responsible for some of the claims alleged herein
24 are currently unknown to Plaintiff. Plaintiff will seek leave of court to amend this complaint to
25 reflect the true names and capacities of such other responsible parties when their identities
26 become known.

27 6. All of Plaintiff’s claims stated herein are asserted against Defendant and any of its
28 owners, predecessors, successors, subsidiaries, and/or assigns.

VENUE AND JURISDICTION

1
2 7. Venue is proper in this Court because Plaintiff was employed in this judicial
3 district and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred
4 in this judicial district.

5 8. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d) because this is
6 a class action, there is diversity of citizenship between Plaintiff and Defendant and the amount in
7 controversy exceeds \$5,000,000, exclusive of interest and costs. Furthermore, none of the
8 exceptions in 28 U.S.C. § 1332(d) applies.

9 **CLASS ALLEGATIONS**

10 9. Plaintiff brings this action on behalf of himself and on behalf of the class pursuant
11 to Federal Rule of Civil Procedure 23.

12 10. Plaintiff Harvey seeks certification of the following class:

13 All individuals employed by Defendant as a Financial Advisor or the
14 functional equivalent however titled in California at any time from four
15 years prior to the filing of this complaint to the time the case is certified as
a class action.

16 11. As a result of Defendant's violation of California law, Plaintiff and the other
17 members of the class were unlawfully under-compensated for their work and damaged thereby.

18 12. Numerosity. Plaintiff is informed and believes and thereon alleges that the
19 members of the class are so numerous that joinder is impractical.

20 13. Typicality and Adequacy. There are questions of law and fact common to Plaintiff
21 and the other members of the proposed class he represents, and therefore, Plaintiff is similarly
22 situated to the other members of the proposed class he represents and is an adequate
23 representative of the class. Plaintiff's claims are typical of the claims of the other members of the
24 class he represents. Plaintiff suffered similar injuries as those suffered by the other members of
25 the class as a result of Defendant's common policies and practices regarding the reimbursement
26 of business expenses. In addition, Plaintiff will fairly and adequately protect the interests of the
27 members of the class. Plaintiff has no interest that is adverse to the interests of the other class
28 members. Plaintiff has retained attorneys who are competent and experienced in the prosecution

1 of wage and hour class action litigation.

2 14. Ascertainability. The class is ascertainable in that its members can be identified
3 and located using information contained in Defendant's payroll and personnel records.

4 15. Commonality. There are common questions of law and fact that predominate
5 over questions which may affect only individual members of the class, including, but not limited
6 to, the following:

7 a. whether Defendant's policies and procedures for deducting from
8 commissions or other wages is unlawful;

9 b. whether class members incurred business related expenses that were
10 reasonably necessary and whether Defendant had a policy and practice of not reimbursing class
11 members for such expenses; and,

12 c. whether Defendant's wage statements complied with California law.

13 16. Superiority. A class action is superior to other available means for the fair and
14 efficient adjudication of this controversy since individual joinder of all members of the proposed
15 class is impractical. Class action treatment will permit a large number of similarly situated
16 persons to prosecute their common claims in a single forum simultaneously, efficiently, and
17 without the unnecessary duplication of effort and expense that numerous individual actions
18 would engender. Furthermore, as the damages suffered by each individual member of the
19 proposed class may be relatively small, the expenses and burden of individual litigation would
20 make it difficult or impossible for individual members of the class to redress the wrongs done to
21 them while an important public interest will be served by addressing the manner as a class
22 action. The cost to the court system of adjudication of such individualized litigation would be
23 substantial. Individualized litigation would also present the potential for inconsistent or
24 contradictory judgments.

25 **FACTUAL ALLEGATIONS COMMON TO ALL COUNTS**

26 17. Defendant sold and sells securities and other financial products with offices
27 nationwide and in this judicial district.

28 18. Plaintiff and other Financial Advisors were primarily engaged in sales of

1 investments and financial products to individuals.

2 19. Plaintiff and all Financial Advisors were covered by Defendant's Compensation
3 Plan. The Compensation Plan sets forth Defendant's compensation policies and procedures
4 applicable to all Financial Advisors.

5 20. Defendant willfully, intentionally and knowingly did not provide Plaintiff and
6 other Financial Advisors with accurate itemized statements showing all of the information
7 required pursuant to Labor Code §§ 226 and 1174 and Plaintiff and other Financial Advisors
8 were injured thereby.

9 21. Defendant has maintained company-wide policies and/or practices that require
10 Financial Advisors to pay the ordinary business expenses of Defendant without reimbursement.
11 Defendant's policy and practice of having class members pay for Defendant's ordinary business
12 expenses causes class members to forfeit their wages to Defendant.

13 **FIRST CAUSE OF ACTION**

14 **Bus. & Prof. Code § 17200 *et seq.***

15 22. Plaintiff incorporates the allegations contained in the foregoing paragraphs as
16 though repeated here.

17 23. California Labor Code §§ 221, 223, 400-410, 2802, and Title 8 of the California
18 Code of Regulations, § 11040(8) generally state that an employer may not deduct from or reduce
19 an employee's wages for the purpose of shifting the employer's ordinary cost of doing business
20 to the employee.

21 24. Plaintiff and all Morgan Stanley Financial Advisors in California routinely incur
22 reasonable and necessary business expenses without reimbursement by Morgan Stanley. For
23 example, Plaintiff and other California Financial Advisors incur travel, parking, mileage,
24 education, client and prospect entertainment, and marketing expenses, as well as ticket charges,
25 equipment costs, licensing fees, subscriptions, losses due to trading errors, and wages paid to
26 support staff, without reimbursement by Morgan Stanley. Many of these expenses are paid
27 through deductions from the Financial Advisors' wages. Section 2802(a) requires a California
28 employer to indemnify an employee for "all necessary expenditures or losses incurred by the

1 employee in direct consequence of the discharge of his or her duties....” In addition, Labor Code
2 sections 221-224, 400-410 and 1198 (which incorporates Wage Order 4-2001, section 8) prevent
3 an employer from taking unauthorized or improper deductions from wages. Morgan Stanley’s
4 conduct violates these Labor Code sections.

5 25. Defendant has committed an act of unfair competition by failing to reimburse
6 these amounts to Plaintiff and the members of the class and/or deducting these amounts from the
7 compensation of Plaintiff and the class.

8 26. Pursuant to Business & Professions Code § 17203, Plaintiff requests an order
9 requiring Defendant to make restitution of all unreimbursed business expenses due to him and
10 the class in an amount to be proven at trial.

11 **SECOND CAUSE OF ACTION**

12 **Labor Code §§ 221, 223, 400-410, 2802 and Cal. Code Reg. tit. 8, § 11040(8)**

13 27. Plaintiff incorporates the allegations contained in the foregoing paragraphs as
14 though repeated here.

15 28. Labor Code § 221 provides, “It shall be unlawful for any employer to collect or
16 receive from an employee any part of wages theretofore paid by said employer to said
17 employee.”

18 29. Labor Code § 223 provides, “Where any statute or contract requires an employer
19 to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while
20 purporting to pay the wage designated by statute or by contract.”

21 30. Labor Code §§ 400-410 (“Employee Bond Law”) provide the limited
22 circumstances under which an employer can exact a cash bond from its employees. These
23 provisions are designed to protect employees against the very real danger of an employer taking
24 or misappropriating employee funds held by the employer in trust.

25 31. Labor Code § 2802 provides that “[a]n employer shall indemnify his or her
26 employee for all necessary expenditures or losses incurred by the employee in direct
27 consequence of the discharge of his or her duties.”

28 32. Title 8 of the California Code of Regulations, § 11040(8), states, “No employer

1 shall make any deduction from the wage or require any reimbursement from an employee for any
2 cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage,
3 or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.”

4 33. These and related statutes are designed to prevent employers from using secret
5 deductions or other accounting practices to drive down the wage scale or pay employees less
6 than the stated wage. They also reflect California’s fundamental and substantial public policy
7 protecting employee wages.

8 34. Plaintiff and the class were subject to deductions from their compensation by
9 Defendant which were not the result of dishonest, willful, or grossly negligent acts by those
10 employees, but instead were the ordinary costs of doing business. Defendant was obligated to
11 indemnify Plaintiff and the other members of the class for such expenses as the cost of travel,
12 parking, mileage, education, client and prospect entertainment, and marketing expenses, as well
13 as ticket charges, equipment costs, licensing fees, subscriptions, losses due to trading errors, and
14 wages paid to support staff. These expenses were reasonable and necessarily incurred by Plaintiff
15 and the class. Defendant’s policy and practice of having class members pay for Defendant’s
16 ordinary business expenses caused class members to forfeit their wages to Defendant.

17 35. Defendant unlawfully charged and failed to reimburse its Financial Advisors in
18 violation of Labor Code §§ 221, 223, 400-410, 2802 and Cal. Code Reg. Tit. 8, § 11040(8) and
19 Plaintiff and similarly situated members of the class are entitled to reimbursement for, and
20 repayment of, these deductions, plus interest and attorneys’ fees and costs.

21 36. As a result of Defendant’s violations of Labor Code § 2802, Defendant is also
22 liable for attorneys’ fees and costs under Labor Code § 2802(c).

23 **THIRD CAUSE OF ACTION**

24 **Labor Code §§ 226, 1174, and 1174.5**

25 37. Plaintiff incorporates the allegations contained in the foregoing paragraphs as
26 though repeated here.

27 38. Defendant, as a matter of corporate policy did not maintain or provide accurate
28 itemized pay statements in violation of Labor Code §§ 226 and 1174.

1 Defendant Morgan Stanley Smith Barney LLC of Plaintiff's intent to amend the complaint to add
2 a cause of action pursuant to Labor Code § 2699 *et seq.*

3 44. The LWDA did not respond to the notice within the time provided by Labor Code
4 § 2699.3.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff prays for judgment against Defendant, as follows:

- 7 1. For an order certifying the proposed Class and designating this action as a
8 class action pursuant to Fed.R.Civ.P. 23;
- 9 2. For an order appointing Plaintiff and his counsel to represent the proposed
10 subclasses, as defined herein;
- 11 3. For compensatory damages according to proof;
- 12 4. For an Order requiring Defendant to make restitution of all unreimbursed
13 business related expenses that Plaintiff and the class were required to incur
14 for Defendant's benefit;
- 15 5. For an order requiring Defendant to provide an accounting of all sums
16 unlawfully charged back and withheld from compensation due to Plaintiff
17 and the other members of the class;
- 18 6. For interest according to proof;
- 19 7. For penalties and liquidated damages alleged herein;
- 20 8. For reasonable attorneys' fees and costs; and,
- 21 9. For such other relief the Court deems just and proper.

22 DATED: July 12, 2018

WYNNE LAW FIRM
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COMPTON LLP
CLAPP & LAUINGER LLP

23
24
25 /s/Edward J. Wynne
By: Edward J. Wynne

26 Attorneys for Plaintiff BRANDON HARVEY
27 individually and on behalf of all others similarly
28 situated

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DEAMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial.

DATED: July 12, 2018

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/s/Edward J. Wynne
By: Edward J. Wynne

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individually and on behalf of all others similarly
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