

Fill in this information to identify the case:

Debtor 1 FMP-Ovation Payroll, LLC

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: Northern District of Texas, Dallas Division

Case number 21-30733-11

E-Filed on 08/25/2021
Claim # 322

Official Form 410

Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?		<u>Armando Sarmento as Class Claimant</u> Name of the current creditor (the person or entity to be paid for this claim)	
		Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent? Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Where should notices to the creditor be sent?		Where should payments to the creditor be sent? (if different)
	<u>Robert David Baker, Inc.</u> Name <u>80 South White Rd</u> Number Street <u>San Jose</u> <u>CA</u> <u>95127</u> City State ZIP Code Contact phone _____ Contact email <u>rbaker@rdblawnet</u>		_____ Name _____ Number Street _____ City State ZIP Code Contact phone _____ Contact email _____
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____			
4. Does this claim amend one already filed?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?		<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? ☒ No
☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____

7. How much is the claim? \$_____ 0.01. Does this amount include interest or other charges?
☒ No
☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as health care information.

Employment Litigation

9. Is all or part of the claim secured? ☒ No
☐ Yes. The claim is secured by a lien on property.
- Nature of property:**
☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
☐ Motor vehicle
☐ Other. Describe: _____
- Basis for perfection:** _____
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)
- Value of property:** \$_____
Amount of the claim that is secured: \$_____
Amount of the claim that is unsecured: \$_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)
- Amount necessary to cure any default as of the date of the petition:** \$_____
- Annual Interest Rate** (when case was filed) _____ %
☐ Fixed
☐ Variable

10. Is this claim based on a lease? ☒ No
☐ Yes. Amount necessary to cure any default as of the date of the petition. \$_____ 0.00

11. Is this claim subject to a right of setoff? ☒ No
☐ Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☒ No

☐ Yes. Check one:

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

Amount entitled to priority

\$ 0.00

\$ 0.00

\$ 0.00

\$ 0.00

\$ 0.00

\$ 0.00

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 08/25/2021
MM / DD / YYYY

April Kimm
Signature

Print the name of the person who is completing and signing this claim:

Name April Kimm
First name Middle name Last name

Title Director

Company Dundon Advisers LLC
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 440 Mamaroneck Ave, Ste 507
Number Street

Harrison NY 10528
City State ZIP Code

Contact phone (914) 341-1188 Email ak@dundon.com

Attachment 1 - Sarmento Complaint Buffets.pdf

Description -

ROBERT DAVID BAKER, INC.
Robert David Baker, Esq. (87314)
80 South White Road
San Jose, CA 95127
Telephone: (408) 251-3400
Facsimile: (408) 251-3401
rbaker@rdblawnet

Attorney for Plaintiffs
ARMANDO SARMENTO;
MERCEDES TEJADA-URENA;
JOSHUA SILVA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARMANDO SARMENTO; MERCEDES
TEJADA-URENA; JOSHUA SILVA, on behalf
of themselves and those similarly situated
individuals,

Plaintiffs,
vs.

F&P, INC. - OVATION PAYROLL, LLC;
BUFFETS, LLC; THOMAS W. SADBERRY,
JR; F&P LLC; HOMETOWN BUFFETS;
VITANOVA BRANDS,

Defendants.

CASE NUMBER:

**COMPLAINT FOR DAMAGES AND
DEMAND FOR JURY TRIAL:**

- 1.) Violation of FLSA, section 207 (overtime wages);
- 2.) Violation of California Labor Code § 510 (overtime);
- 3.) Violation of Labor Code §§ 226.7, 512 (meal and rest breaks)
- 4.) Violation of Labor Code § 201 (wages at termination)
- 5.) Failure to Provide Accurate Wage Statements - Labor Code § 226
- 6.) For Restitution of Unpaid Wages in Violation of California Unfair Trade Practices Act under Business and Professions Code §§ 17200, et seq.

1 Plaintiffs Armando Sarmiento, Mercedes Tajada-Urena, Joshua Silva (hereinafter,
2 “Plaintiffs”) allege as follows:

3 JURISDICTION AND VENUE

4 This action is brought pursuant to 29 U.S.C. §§ 201, et seq., and this court has jurisdiction
5 pursuant to 29 U.S.C. § 216(b) and the doctrines of pendent and supplemental jurisdiction.
6

7 1. Plaintiffs are individuals who have their place of residence in the Northern District of
8 California;

9 2. Defendants F&P LLC - Ovation Payroll, LLC; Buffets, LLC; Thomas W. Sudberry, Jr;
10 F&P LLC; Hometown Buffets; Vitanova Brands (collectively hereinafter, “Defendants”) are business
11 entities operating in Northern California, and under the various names were the employers of
12 Defendants in the wrongful conduct hereinafter alleged. Plaintiffs are informed and believe that F&P
13 LLC is the alter ego of Defendant Thomas W. Sudberry, and that F&P LLC was formed, among other
14 reasons, to defraud workers like Plaintiffs by purportedly erecting a corporate shield to protect
15 Defendants’ wrongful conduct, including but not limited to, the violation of State and Federal wage
16 laws. F&P LLC is not properly capitalized to respond in damages to workers’ wage and hour
17 complaints, such as Plaintiffs herein. There is such a unity of interest between F&P LLC and Thomas
18 W. Sudberry that it would be unfair and inequitable to honor the corporate shield in the instant case
19 because the result would be to unjustly deprive Plaintiffs in this action of money lawfully owing to
20 them for their earnest labor, and such a result would be inequitable. There is a unity of interest and
21 ownership between F&P LLC and Thomas W. Sudberry such that the separate personalities of the
22 corporation and the individuals no longer exist, *inter alia*, to wit: money and assets are comingled
23 between Defendants and F&P LLC.; the formalities of the corporate structure are disregarded by
24 Defendants; the corporation acts as a conduit to avoid the payment of state and federal taxes, and
25 compulsory withholding for state and federal taxation purposes; Defendants otherwise ignore the
26
27
28

1 corporate separateness between themselves and F&P LLC, and; the corporation is set up, *inter alia*,
2 as a shield to defraud its employees through its flagrant violation of California wage and hour laws;

3 3. Plaintiffs are informed and believe that each employee, agent, or manager of
4 Defendants personally participated, directed, authorized, and ratified the conduct set forth hereinafter.
5 The conduct of those individuals was done in the course and scope of their agency and employment
6 with Defendants and managers unknown were employers within the meaning of the FLSA;
7

8 4. Plaintiffs allege that those present and former employees similarly situated to
9 themselves were subject to a plan, scheme, and policy of Defendants to deprive them of their lawfully
10 earned overtime compensation. The putative class is defined as those hourly, nonexempt "managers,"
11 waiters, and cooks, et al., who worked at Defendants buffet restaurants throughout Northern
12 California;
13

14 5. Plaintiff Armando Sarmento began working at Hometown Buffet, Southland Mall,
15 Hayward, California within four years of the filing of this Complaint, and worked at Hometown Buffet
16 until March 20, 220. Mercedes Tejada-Urena worked at the Southland Mall Hometown Buffet until
17 July 2020. Jose Silva worked at the Southland Mall Hometown Buffet until October 2018;

18 6. From on or after the date of their hire, Plaintiffs were required to work and did work in
19 excess of eight hours per day and forty hours per week without the required overtime compensation;
20

21 7. During their employment at Hometown Buffet, Plaintiffs were paid an hourly rate per
22 hour;

23 8. During all times relevant herein, Plaintiffs were denied meal breaks and rest breaks;

24 9. During all times relevant herein, Plaintiffs were not exempt from overtime
25 compensation pursuant to California or Federal law;

26 10. Defendants conceived of a plan, scheme, and policy, whereby they would increase
27 profits and gain competitiveness over similarly situated businesses by depriving Plaintiffs and other
28

1 similarly situated hourly workers of earned overtime compensation through the scheme described
2 above, and Plaintiffs are bringing this action as a class action pursuant to the Fair Labor Standards
3 Act, 29 U.S.C. § 216(b), to redress this uniform plan, scheme, and company policy with respect to the
4 failure to pay overtime and minimum wage compensation;

5
6 11. Because Defendants did not provide its workers with complete and accurate time
7 records for the days that they worked, Plaintiffs do not have precise calculations of their overtime
8 compensation losses. However, notwithstanding the foregoing, each Plaintiff worked greater than
9 forty hours per week during their employment with Hometown Buffet without overtime hours over 40
10 hours per week.

11
12 **FIRST CAUSE OF ACTION**

13 (Violation of Fair Labor Standards Act – Overtime Compensation
14 29 U.S.C. § 207)

15 12. Plaintiffs incorporate paragraphs 1 through 11, inclusive, as if fully set forth herein;

16 13. At all times relevant herein, Plaintiffs were covered pursuant to the provisions of the
17 Fair Labor Standards Act of 1938, as amended, 29 U.S.C. A. § 201, *et seq.* (“FLSA”). Defendants
18 were employers within the meaning of the 29 U.S.C.A. § 203(d);

19 14. 29 U.S.C. § 207 requires all covered employees to be paid overtime for work
20 performed in excess of forty hours per week, unless specifically exempted by law;

21 15. Although Plaintiffs were not exempt from overtime compensation under the FLSA
22 during their employment with Defendants, and although Defendants had full knowledge of their duty
23 to pay overtime compensation to Plaintiffs, Defendants knowingly, through the scheme described
24 above caused, suffered, and permitted Plaintiffs to regularly work in excess of forty hours per week
25 without paying overtime wages, of one-and-one-half Plaintiffs’ regular hourly rate of pay;

26 16. By not paying overtime wages, Defendants violated Plaintiffs’ rights under the FLSA;
27
28

17. As a direct and proximate cause of Defendants' failure to pay overtime wages pursuant to the FLSA, Plaintiffs have incurred compensatory and economic damages in the form of lost overtime compensation;

18. Defendants willfully and intentionally, and with reckless disregard of their responsibilities under the FLSA, and without good cause, failed to pay Plaintiffs their overtime compensation, and thus Defendants are liable to Plaintiffs for liquidated damages in an amount equal to their lost overtime wages pursuant to 29 U.S.C. §216(b);

19. Plaintiffs have been compelled to retain an attorney to bring this action for relief and are entitled to an award of reasonable attorney fees pursuant to 29 U.S.C. §216(b). WHEREFORE, Plaintiffs pray for judgment as set forth below;

SECOND CAUSE OF ACTION

(Violation of California Labor Code Sections 510- Non Payment of Overtime Premiums)

20. Plaintiffs re-allege and incorporate the allegations of paragraphs 1- 19 as if fully set forth herein;

21. During the last four years from the filing of this complaint in the above-entitled action, Plaintiffs' employment was subject to California Labor Code Section 510, et. al, and the applicable Wage Orders promulgated by the California Industrial Welfare Commission pursuant to Labor Code Section 1173, which requires all covered employees to be paid overtime for work performed in excess of forty hours per week and/or eight hours per day, unless specifically exempted by the law;

22. At all times relevant herein, Plaintiffs regularly worked in excess of forty hours per week and/or in excess of eight hours per day. Plaintiffs were not paid the required overtime premium;

25. As a direct and proximate cause of Defendants' failure to pay Plaintiffs overtime wages under the California Labor Code and Wage Orders, Plaintiffs have incurred compensatory and economic damages in the form of lost overtime compensation in amounts to be proven at trial;

27. Plaintiffs have been compelled to retain an attorney for the purpose of redress of the Labor Code violations and is entitled to an award of attorneys fees and pre-judgment interest pursuant to California Labor Code Section 1194(a), and other applicable Code sections;

THIRD CAUSE OF ACTION

Labor Code §§ 226.7, 512)

29. At all times relevant herein, Plaintiffs' employment with Defendants was governed by the California Labor Code and applicable Wage Orders promulgated by the California Industrial Welfare Commission;

Complaint for Damages and Demand for Jury Trial

1 Defendants did not provide Plaintiffs meal breaks nor mandatory ten-minute rest breaks, and
2 compelled Plaintiffs to work through those meal and rest break periods;

3 31. By requiring Plaintiffs to work through their mandated meal and rest breaks,
4 Defendants violated Plaintiffs' rights under Labor Code Section 226.7;

5 32. As a direct and proximate cause of Defendants' failure to provide the mandated meal
6 and rest breaks under the California Labor Code and Wage Orders, Plaintiffs have incurred
7 compensatory damages in the form of lost meal and rest break premiums in amounts to be proven at
8 trial;
9

10 33. Defendants were aware of the existence and requirements of California Labor Code
11 Sections 226.7 and 512 and the Wage Orders, and Defendants willfully, knowingly, and
12 intentionally failed to provide Plaintiffs with mandatory meal and rest breaks;
13

14 WHEREFORE, Plaintiffs pray for judgment as set forth below.

15 **FOURTH CAUSE OF ACTION**
16 (Failure to Pay Wages Upon Termination
Labor Code §§ 201, 202, 203)

17 34. Plaintiffs re-allege and incorporate those allegations of paragraphs 1-33, as if fully
18 stated herein;

19 35. Defendants are subject to Labor Code Sections 201 and 202, which provide that upon
20 discharge or layoff from employment, an employee is subject to immediate payment of wages due,
21 and if an employee resigns, the employers must pay that employee all wages due within a reasonable
22 period of time, not to exceed 72 hours under Labor Code section 203;

24 36. Defendants failed to make payment to Plaintiffs under these Labor Code sections;

25 37. By not paying Plaintiffs pursuant to Labor Code sections 201-203, Defendants
26 violated Plaintiffs' rights under the Labor Code;
27
28

38. As a direct and proximate cause of Defendants violation of the Labor Codes 201-203, Plaintiffs have incurred compensatory and economic damages in the form of lost wages, in an amount to be proven at trial;

39. Defendants were aware of the existence of the requirement of payment of wages due upon separation of employment pursuant to the California Labor Code, and willfully, knowingly, and intentionally failed to pay Plaintiffs wages due upon separation of employment;

40. Plaintiffs have been required to retain an attorney for the purposes of redress of the Labor Code violations set forth herein and is entitled to an award of attorney fees and pre-judgement interest pursuant to California Labor Code section 1194(a), and other applicable Labor Code sections.

WHEREFORE, Plaintiffs pray for judgment as set forth below.

FIFTH CAUSE OF ACTION

(For Restitution of Unpaid Overtime Wages
In Violation of California's Unfair Trade Practices Act
Business and Profession Code Sections 17200, et seq.)

41. Plaintiffs re-allege and incorporate those allegations of paragraphs 1-40, as if fully stated herein;

42. At all times relevant herein, Plaintiffs' employment with Defendants was governed by the California Labor Code and applicable Wage Orders promulgated by the California Industrial Welfare Commission and the FLSA, which require all employees to be paid overtime for work performed in excess of forty hours per week/or eight hours per day unless specifically exempted by the law, and provided meal and rest breaks, minimum wages. Pursuant to the California Labor Code and Applicable Wage Orders;

43. During the four years prior to filing tis complaint, Defendants were subject to the California Unfair Trade Practices Act (California Business and Professions Code Section §17000 *et*

1 *seq.*). Defendants violated the Unfair Trade Practices Act, by inter alia, failure to pay Plaintiffs
 2 overtime wages and to provide meal and rest breaks;

3 44. During the four years prior to filing this complaint, Defendants wrongfully obtained
 4 monies from Plaintiffs in the form of overtime wages, meal and rest break hours that inured to
 5 Plaintiffs. By doing so, Defendants violated the California Unfair Trade Practices Act, Business and
 6 Professions Code §17200, *et seq.* by committing acts prohibited by the California Labor Code and
 7 applicable California Wage Orders, in order to give Defendants a competitive advantage over
 8 businesses with whom Defendants are in competition with, and who were in compliance with
 9 California's wage and hour laws;
 10

11 45. As a direct and proximate cause of Defendants statutory violations, the rights of the
 12 Plaintiffs under the law were violated, causing them to incur general damages in the form of unpaid
 13 and lost wages to which they were legally entitled;
 14

15 46. Defendants were aware of the existence and requirements of the state and federal
 16 wage and hour laws, and willfully, knowingly, intentionally, and fraudulently, violated those wage
 17 and hour laws, and the violation was willful, intentional, malicious, fraudulent, and done without
 18 regard for the health or welfare of Plaintiffs and therefore Plaintiffs seek an award of punitive
 19 damages to be determined at time of trial. Defendants failed to pay Plaintiffs overtime pay and
 20 provide meal and rest breaks. Plaintiffs herein seek restitution of such compensation pursuant to the
 21 Business and Professions Code §17203;
 22

23 WHEREFORE, Plaintiffs pray for judgment as set forth below.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiffs pray for judgment against the Defendants and demand as follows:

26 1. Award Plaintiffs economic and compensatory damages for unpaid overtime
 27 premiums, loss of meal, and rest breaks; and other pecuniary losses in amounts to be proven at trial;
 28

1 2. Award Plaintiffs pre-judgment interest of 10% on the amounts due under the
2 California Labor Code;

3 3. Award Plaintiffs liquidated damages according to the FLSA;

4 4. Award Plaintiffs restitution of unpaid overtime compensation and meal and rest break
5 premiums, inter alia, pursuant to California Business and Professions Code §17203 in amounts to be
6 proven at trial;

7
8 5. Award Plaintiffs compensation pursuant to Labor Code Section 201 - 203, for the
9 failure of Defendants to make payment of wages due on separation of employment;

10 6. Enter an order certifying this action as an FLSA collective class action based on the
11 class of hourly nonexempt “managers,” cashiers, and cooks, who worked for Defendants within the
12 past three years at Defendants’ food facilities, who are entitled to overtime compensation pursuant to
13 29 U.S.C. § 207;

14
15 7. Enter a permanent injunctive order against Defendants ensuring compliance with the
16 California Labor Code and Wage Orders and the FLSA;

17 8. Enter an order decreeing Thomas W. Sudberry personally liable for all damages
18 incurred by Plaintiffs;

19 9. For reasonable attorney’s fees pursuant to California Labor Code §1194(a) and the
20 FLSA;

21 10. Award Plaintiffs their costs of suit herein;

22 11. Grant such other and further relief as this Court may deem appropriate.
23

24 **PLAINTIFFS DEMAND A JURY TRIAL ON ALL CAUSES**

25 Dated: November 10, 2020

26 /S/
27 Robert David Baker, Esq.
28