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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

MICHAEL SILVA, individually, on behalf of the
State of California, and as a representative of
other aggrieved employees,

Plaintiff,

v.

MANOR CARE OF PALM DESERT CA, LLC,
a Delaware limited liability company; and DOES
1-20, inclusive,

Defendants.

Case No. 30-2020-01143646-CU-OE-CXC

**REPRESENTATIVE-ACTION COMPLAINT
FOR CIVIL PENALTIES**

1. Civil Penalties, Cal. Lab. Code § 2698 *et seq.*

Assigned for All Purposes
Judge William Claster

CX-104

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2. In this action, Plaintiff contends that Defendants committed various Labor Code violations. Plaintiff seeks to collect the civil penalties owing on account of those violations occurring since January 16, 2018—one year before the date that Plaintiff provided notice to the California Labor and Workforce Development Agency (“LWDA”) of those violations.

3. ***Subject-Matter Jurisdiction.*** This is a civil action in which the amount in controversy, exclusive of interest, exceeds \$25,000.00. The cause of action asserted in this action arises under the laws of the State of California and is subject to adjudication in the courts of the State of California. The Court therefore has original jurisdiction under article VI, section 10, of the California Constitution, and under California Code of Civil Procedure section 410.10.

5. **Venue.** Venue is proper in this Court pursuant to Code of Civil Procedure section 395, which provides that, “[i]f none of the defendants reside in the state . . . , the action may be tried in the superior court in any county that the plaintiff may designate in his or her complaint.” Cal. Civ. Proc. Code § 395(a). Plaintiff is informed and believes, and based thereon alleges, that Manor Care does not reside in California.

¹ Michael Silva is referred to herein as “Plaintiff”; Manor Care of Palm Desert, LLC, is referred to herein as “Manor Care”; and Manor Care and Does 1 through 20 are collectively referred to herein as “Defendants.”

1 **PARTIES**

2 6. Manor Care owns and operates a post-hospital skilled nursing care facility located in
3 Palm Desert, California.

4 7. Plaintiff is, and at all times relevant to this action was, a citizen of California who worked
5 for Defendants during the statutory period applicable to his PAGA cause of action. Plaintiff worked for
6 Defendants at their location in Palm Desert, California, from approximately July 2017 through
7 approximately March 2019. During his employment, Defendants employed him as a certified nursing
8 assistant and paid him on an hourly basis.

9 8. Plaintiff is informed and believes, and based thereon alleges, that Manor Care is a foreign
10 corporation organized under the laws of the State of Delaware, with its principal place of business in
11 Toledo, Ohio.

12 9. Plaintiff is unaware of the true names and capacities of the Defendants sued herein under
13 the fictitious names “Doe 1” through “Doe 20.” Plaintiff is informed and believes, and based thereon
14 alleges, that each Defendant acted as the agent, servant, employee, joint venturer, or alter ego of the
15 other Defendants, with the legal authority to act on the others’ behalves, and that the acts and omissions
16 of each Defendant were in accordance with, and represent, the official practice and policy of all
17 Defendants. Plaintiff is further informed and believes, and based thereon alleges, that each Defendant
18 acted within the scope of such agency, or ratified each and every act or omission alleged herein. In
19 addition, Plaintiff is informed and believes, and based thereon alleges, that each Defendant aided and
20 abetted each and every act or omission alleged herein. Likewise, Plaintiff is informed and believes, and
21 based thereon alleges, that each Defendant is, in some manner, intentionally, negligently, or otherwise
22 responsible for each and every act or omission alleged herein. Plaintiff will seek leave of this Court to
23 amend this Complaint once the names and capacities of Doe 1 through Doe 20 become known.

24 **GENERAL ALLEGATIONS**

25 10. **Unpaid Overtime Compensation.** Labor Code sections 510 and 1198, and section 3 of
26 the Industrial Welfare Commission’s (“IWC”) wage order no. 5, require employers to pay an employee
27 working more than eight hours in a day or forty hours in a workweek at a rate of one-and-a-half times
28 the employee’s regular rate of pay for all such hours. Cal. Lab. Code §§ 510(a), 1198; 8 Cal. Code

1 Regs. § 11050 subsec. 3. Sections 510 and 1198 of the Labor Code, and section 3 of wage order no. 5,
2 further provide that employers are required to pay an employee working more than twelve hours in a day
3 compensation at a rate of two times his or her regular rate for all such hours. Cal. Lab. Code §§ 510(a),
4 1198; 8 Cal. Code Regs. § 11050 subsec. 3. Generally speaking, an employee's regular rate of pay
5 includes all remuneration for employment paid to, or on behalf of, the employee; accordingly, if, for
6 example, an employer pays an employee two or more different hourly rates, the employee's regular rate,
7 and his or her overtime rate, are weighted averages of those different hourly rates.

8 11. Defendants willfully failed to pay all overtime wages owed to Plaintiff and other non-
9 exempt employees. During the relevant time period, Plaintiff and other non-exempt employees were not
10 paid overtime premiums at the correct rate for all of the hours they worked in excess of eight hours a
11 day, twelve hours a day, and/or forty hours a week because Defendants' regular-rate methodology did
12 not properly compute the regular rate of pay. For instance, Plaintiff earned two different hourly rates of
13 pay for his straight-time work, but his overtime rate was not computed as a correct weighted average of
14 those straight-time hourly rates.

15 12. In addition, Plaintiff and other non-exempt employees were subjected to Defendants'
16 company-wide practice of failing to provide adequate meal-period coverage to allow employees to take
17 compliant meal breaks. Instead, Defendants engaged in a practice of impeding and preventing
18 employees from taking meal breaks by under-staffing their facility such that there was no one available
19 to cover the job assignments for employees who needed to take meal breaks. Defendants knew or
20 should have known that, as a result of these company-wide practices, Plaintiff and other non-exempt
21 employees were tending to duties during their meal periods, thereby performing work for which they
22 were not paid. Defendants also knew, or should have known, that they did not compensate Plaintiff and
23 other non-exempt employees for this and other off-the-clock work.

24 13. Because Plaintiff and other non-exempt employees regularly worked shifts of eight hours
25 a day or more, or forty hours a week or more, some of this off-the-clock work performed during unpaid
26 meal periods qualified for overtime premium pay. Therefore, Plaintiff and other non-exempt employees
27 were not paid overtime wages for all of the overtime hours they actually worked. Defendants' failure to
28 pay Plaintiff and other non-exempt employees the balance of overtime compensation, as required by

California law, violates the provisions of Labor Code sections 510 and 1198, and section 3 of wage order no. 5.

14. Unpaid Minimum Wages. Labor Code sections 1182.12, 1194, 1197, and 1198, and section 4 of wage order no. 5, require employers to pay a minimum wage to employees, and the payment of a lesser wage than the minimum is unlawful. Cal. Lab. Code §§ 1182.12(a)–(b), 1194(a), 1197, 1198; 8 Cal. Code Regs. § 11050 subsec. 4.

15. As set forth above, due to Defendants’ company-wide failure to provide meal periods and adequate meal-break coverage, Plaintiff and other non-exempt employees were forced to forego meal periods and/or have their meal periods interrupted by work, and were not relieved of all duties for unpaid meal periods, in order to complete their job duties. As stated, Defendants required Plaintiff and other non-exempt employees to work during their thirty-minute unpaid meal periods due to Defendants’ systemic and company-wide understaffing and failure to provide enough coverage for meal periods to be taken by its employees. Defendants did not pay minimum wages for meal periods. As explained above, Plaintiff and other non-exempt employees’ work through their meal periods qualified for overtime premium payments; to the extent that these off-the-clock hours did not qualify for overtime, Defendants did not pay at least the minimum wages for those hours worked off-the-clock, in violation of Labor Code sections 1182.12, 1194, 1197, and 1198, as well as section 4 of wage order no. 5.

16. Improper Meal and Rest Periods. Labor Code sections 226.7, 512(a), and 1198, and sections 11 and 12 of wage order no. 5, require employers to provide meal and rest breaks and to pay an employee one additional hour of pay at the employee’s regular rate for each workday that a meal or rest period is not provided. Cal. Lab. Code §§ 226.7(c), 512(a), 1198; 8 Cal. Code Regs. subsecs. 11–12. Under these sections, an employer may not require, cause, or permit an employee to work for a period of more than five hours per day without providing the employee with an uninterrupted meal period of not less than thirty minutes, except that, if the total work period per day of the employee is not more than six hours, the meal period may be waived by mutual consent of both the employer and the employee. Cal. Lab. Code §§ 226.7(c), 512(a), 1198; 8 Cal. Code Regs. subsec. 11. In addition, first meal periods must start after no more than five hours. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1041–42 (2012). Labor Code sections 226.7 and 512(a), and section 11 of wage order no. 5, also require employers to

1 provide a second meal break of not less than thirty minutes if an employee works over ten hours per day,
2 or to pay an employee one additional hour of pay at the employee's regular rate, except that, if the total
3 hours worked is no more than twelve hours, the second meal period may be waived by mutual consent
4 of the employer and the employee only if the first meal period was not waived. Cal. Lab. Code
5 §§ 226.7(c), 512(a); 8 Cal. Code Regs. subsec. 11.

6 17. Labor Code section 226.7 provides that no employer shall require an employee to work
7 during any rest period mandated by an IWC wage order. Section 12 of wage order no. 5 provides that
8 "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as
9 practicable shall be in the middle of each work period," and that the "rest period time shall be based on
10 the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major
11 fraction thereof," unless the "total daily work time is less than three and one-half (3 ½) hours." 8 Cal.
12 Code Regs. § 11050 subsec. 12.

13 18. As mentioned above, Defendants' company-wide failure to schedule meal periods and
14 failure to provide adequate meal-break coverage prevented Plaintiff and other non-exempt employees
15 from taking compliant meal breaks. As a result of these practices and/or policies, Plaintiff and other
16 non-exempt employees were frequently required to continue to perform their duties without being able
17 to take timely, compliant meal breaks. In any event, Defendants had a policy and practice of not
18 providing any meal periods to employees who worked shifts that were longer than five hours, but shorter
19 than six hours, in length, and non-exempt employees did not sign valid meal-break waivers for those
20 days that they were entitled to meal periods and were not relieved of all duties.

21 19. As with meal periods, Defendants' scheduling policies and practices, or lack thereof,
22 prevented Plaintiff and other non-exempt employees from being relieved of all duty in order to take
23 compliant rest breaks. Defendants similarly failed to schedule rest periods for Plaintiff and other non-
24 exempt employees on a company-wide basis. Defendants' management would request that employees
25 refrain from taking rest breaks in order to complete their assigned duties. As a result, Plaintiff and other
26 non-exempt employees would sometimes work shifts in excess of three-and-a-half and six hours without
27 receiving all uninterrupted ten-minute rest periods to which they were entitled. Indeed, Defendants had
28 a policy and practice of not providing any rest periods to employees who worked shifts that were longer

1 than three-and-a-half hours, but shorter than four hours, in length.

2 **20. Improper Wage Statements and Recordkeeping.** Labor Code section 226 requires
3 employers to provide employees with accurate itemized wage statements. Cal. Lab. Code § 226(a).

4 21. During the relevant time period, Defendants knowingly and intentionally provided
5 Plaintiff and other non-exempt employees with uniform, incomplete, and inaccurate wage statements.
6 Specifically, Defendants violated subsections (a)(1), (a)(2), (a)(5), and (a)(9) of section 226. Because
7 Defendants did not provide Plaintiff and other non-exempt employees with proper minimum-wage and
8 overtime compensation, and did not provide proper meal and rest breaks, Defendants did not list the
9 correct number of hours worked and correct amount of gross wages earned by Plaintiff and other non-
10 exempt employees in compliance with sections 226(a)(1) and (a)(2). For the same reason, Defendants
11 failed to list the correct amount of net wages earned by Plaintiff and other non-exempt employees, in
12 violation of section 226(a)(5), as well as correct hourly rates, in violation of section 226(a)(9).
13 Additionally, Defendants failed to list the name of the legal entity that employed Plaintiff and other non-
14 exempt employees on the wage statements, as required by Labor Code section 226(a)(8).

15 22. In addition, Labor Code section 1174(d) provides that “[e]very person employing labor in
16 this state shall . . . [k]eep, at a central location in the state or at the plants or establishments at which
17 employees are employed, payroll records showing the hours worked daily by and the wages paid to, and
18 the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at
19 the respective plants or establishments.” *Id.* § 1174(d). During the relevant time period, and in violation
20 of Labor Code section 1174(d), Defendants willfully failed to maintain accurate payroll records for
21 Plaintiff and other non-exempt employees showing the hours worked and the wages paid, all as a result
22 of underlying violations set forth above.

23 23. Labor Code section 1198 provides that the maximum hours of work and the standard
24 conditions of labor shall be those fixed by the Labor Commissioner and as set forth in the applicable
25 IWC wage orders. *Id.* § 1198. Section 1198 further provides that “[t]he employment of any employee
26 for longer hours than those fixed by the order or under conditions of labor prohibited by the order is
27 unlawful.” *Id.* Pursuant to section 7 of wage order no. 5, employers are required to keep accurate time
28 records showing when the employee begins and ends each work period and meal period. 8 Cal. Code

1 Regs. § 11050 subsec. 7. During the relevant time period, Defendants failed, on a company-wide basis,
2 to keep records of meal-period start and stop times for Plaintiff and other non-exempt employees, in
3 violation of wage order no. 5.

4 24. ***Untimely Payment of Wages.*** Labor Code section 204 requires that all wages earned by
5 any person in any employment between the first and fifteenth days, inclusive, of any calendar month,
6 other than those wages due upon termination of employment, are due and payable between the sixteenth
7 and twenty-sixth day of the month during which the labor was performed, and that all wages earned by
8 any person in any employment between the sixteenth and the last day, inclusive, of any calendar month,
9 other than those wages due upon termination of employment, are due and payable between the first and
10 tenth day of the following month. Cal. Lab. Code § 204(a). Labor Code section 204 also requires that
11 all wages earned for labor in excess of the normal work period shall be paid no later than the payday for
12 the next regular payroll period. *Id.* § 204(b).

13 25. Alternatively, section 204 provides that its requirements are deemed satisfied by the
14 payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than
15 seven calendar days following the close of the payroll period. *Id.* § 204(d).

16 26. As set forth above, during the relevant time period, Defendants failed to pay Plaintiff and
17 other non-exempt employees all wages due them, including, but not limited to, overtime wages,
18 minimum wages, and meal- and rest-period premium wages, within any time period specified by Labor
19 Code section 204.

20 27. Furthermore, Labor Code sections 201, 202, and 203 provide that, if an employer
21 discharges an employee, the wages earned and unpaid at the time of discharge are due and payable
22 immediately, and that, if an employee voluntarily leaves his or her employment, his or her wages shall
23 become due and payable not later than seventy-two hours thereafter, unless the employee has given
24 seventy-two hours previous notice of his or her intention to quit, in which case the employee is entitled
25 to his or her wages at the time of quitting. *Id.* §§ 201(a), 202(a), 203(a). Such wages include accrued
26 vacation pay, as set forth in Labor Code section 227.3. *Id.* § 227.3.

27 28. Based on the violations described above, Defendants willfully failed to pay Plaintiff and
28 other non-exempt employees who are no longer employed by Defendants all their earned wages,

1 including, but not limited to, overtime wages, minimum wages, and meal- and rest-period premium
2 wages, either at the time of discharge or within seventy-two hours of their leaving Defendants' employ,
3 in violation of California Labor Code sections 201, 202, and 203.

4 ***FIRST CAUSE OF ACTION***

5 *Civil Penalties*

6 *Cal. Lab. Code § 2698 et seq.*

7 29. Plaintiff re-pleads, re-alleges, and incorporates by reference each and every allegation set
8 forth in this Complaint.

9 30. Based on the above-described violations, Plaintiff seeks penalties under PAGA. PAGA
10 provides:

11 (a) Notwithstanding any other provision of law, any provision of th[e Labor
12 C]ode that provides for a civil penalty to be assessed and collected by the [LWDA] or
13 any of its departments, divisions, commissions, boards, agencies, or employees, for a
14 violation of th[e Labor C]ode, may, as an alternative, be recovered through a civil action
15 brought by an aggrieved employee on behalf of himself or herself and other current or
16 former employees pursuant to the procedures specified in [s]ection 2699.3.

17

18 (f) For all provisions of th[e Labor C]ode except those for which a civil penalty is
19 specifically provided, there is established a civil penalty for a violation of these
20 provisions, as follows: (2) If, at the time of the alleged violation, the person
21 employs one or more employees, the civil penalty is one hundred dollars (\$100) for each
22 aggrieved employee per pay period for the initial violation and two hundred dollars
23 (\$200) for each aggrieved employee per pay period for each subsequent violation. . . .

24 (g)(1) . . . [A]n aggrieved employee may recover the civil penalty described in
25 subdivision (f) in a civil action pursuant to the procedures specified in [s]ection 2699.3
26 filed on behalf of himself or herself and other current or former employees against whom
27 one or more of the alleged violations was committed. Any employee who prevails in any
28 action shall be entitled to an award of reasonable attorney's fees and costs, including any

1 filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or
2 subparagraph (B) of paragraph (1) of subdivision (c) of [s]ection 2699.3. Nothing in this
3 part shall operate to limit an employee's right to pursue or recover other remedies
4 available under state or federal law, either separately or concurrently with an action taken
5 under this part.

6 *Id.* § 2699. Section 558 of the Labor Code sets forth the civil-penalty amounts for the overtime,
7 minimum-wage, meal-period, and rest-period violations alleged in this action; sections 226.3 and 1174.5
8 set forth the civil-penalty amounts for the wage-statement and recordkeeping violations alleged in this
9 action; and section 210 sets forth the civil-penalty amounts for the untimely-payment-of-wages violation
10 alleged in this action under section 204. *Id.* §§ 204(a), 226.3, 558(a), 1174.5. With respect to the
11 alleged violations of sections 201 through 203, the Labor Code does not set forth specific civil-penalty
12 amounts; the amounts established by section 2699(f) therefore apply to Defendants' failure to timely
13 provide all outstanding pay at the termination of employment.

14 31. As alleged below, Plaintiff has complied with the procedures specified by Labor Code
15 section 2699.3. Section 2699.3 provides:

16 (a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of
17 [s]ection 2699 alleging a violation of any provision listed in [s]ection 2699.5 shall
18 commence only after the following requirements have been met:

19 (1)(A) The aggrieved employee or representative shall give written notice by
20 online filing with the [LWDA] and by certified mail to the employer of the specific
21 provisions of th[e Labor C]ode alleged to have been violated, including the facts and
22 theories to support the alleged violation.

23 (B) A notice filed with the [LWDA] pursuant to subparagraph (A) and any
24 employer response to that notice shall be accompanied by a filing fee of seventy-five
25 dollars (\$75). . . .

26

27 (2)(A) The [LWDA] shall notify the employer and the aggrieved employee or
28 representative by certified mail that it does not intend to investigate the alleged violation

1 within 60 calendar days of the postmark date of the notice received pursuant to paragraph
2 (1). Upon receipt of that notice or if no notice is provided within 65 calendar days of the
3 postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may
4 commence a civil action pursuant to [s]ection 2699.

5 *Id.* § 2699.3. Other than the alleged violation of Labor Code section 226(a)(8)—concerning the failure
6 to list on wage statements the name of the legal entity that employed Plaintiff and other non-exempt
7 employees—the Labor Code provisions that are implicated by this action (sections 201, 202, 203, 204,
8 226(a)(1), 226(a)(2), 226(a)(5), 226(a)(9), 226.7, 227.3, 510, 512, 1174, 1194, 1197, and 1198) are all
9 listed in section 2699.5 of PAGA, triggering the procedure set forth in section 2699.3.

10 32. On approximately January 16, 2020, Plaintiff provided written notice by online filing
11 with the LWDA, and by certified mail to Manor Care, of the specific violations of the Labor Code
12 detailed above. The written notice to the LWDA was accompanied by the \$75.00 filing fee. A copy of
13 the written notice is attached hereto as **Exhibit 1**.

14 33. As of the signing of this Complaint, Plaintiff has not received any notice from the LWDA
15 about whether it intends to investigate the allegations set forth in Plaintiff’s written notice. Since more
16 than sixty-five days have passed since Plaintiff provided notice, he “may commence a civil action
17 pursuant to [s]ection 2699” to collect civil penalties under PAGA as to those violations listed in section
18 2699.5. *Id.* § 2699.3(a)(2)(A). In other words, with respect to the violations listed in section 2699.5,
19 Plaintiff is entitled to commence and proceed with a civil action pursuant to Labor Code section 2699,
20 and he may collect civil penalties for himself and other aggrieved employees for the above-alleged
21 Labor Code violations, along with attorney’s fees and costs.

22 34. In addition, Plaintiff has complied with PAGA’s procedural requirements as to
23 Defendants’ violation of section 226(a)(8). These requirements are also set forth in section 2699.3.
24 Specifically:

25 (c) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of
26 [s]ection 2699 alleging a violation of any provision other than those listed in [s]ection
27 2699.5 or Division 5 (commencing with [s]ection 6300) shall commence only after the
28 following requirements have been met:

1 (1)(A) The aggrieved employee or representative shall give written notice by
2 online filing with the [LWDA] and by certified mail to the employer of the specific
3 provisions of th[e Labor C]ode alleged to have been violated, including the facts and
4 theories to support the alleged violation.

5

6 (2)(A) The employer may cure the alleged violation within 33 calendar days of
7 the postmark date of the notice sent by the aggrieved employee or representative. The
8 employer shall give written notice within that period of time by certified mail to the
9 aggrieved employee or representative and by online filing with the [LWDA] if the
10 alleged violation is cured, including a description of actions taken, and no civil action
11 pursuant to [s]ection 2699 may commence. If the alleged violation is not cured within
12 the 33-day period, the employee may commence a civil action pursuant to [s]ection
13 2699. . . .

14 *Id.* § 2699.3(c).

15 35. Again, on approximately January 16, 2020, Plaintiff provided written notice by online
16 filing with the LWDA, and by certified mail to Manor Care, of the specific violations of the Labor Code
17 detailed above. (*See* Ex. 1.) To date, Plaintiff has not received any notice from Defendants that the
18 violation of section 226(a)(8) has been cured. Plaintiff therefore is entitled to commence and proceed
19 with a civil action pursuant to Labor Code section 2699, and he may collect civil penalties for himself
20 and other aggrieved employees for the above-alleged violation of Labor Code section 226(a)(8), along
21 with attorney's fees and costs.

22 /////

1 ***PRAYER FOR RELIEF***

2 Plaintiff prays for the following relief:

3 1. With respect to the first cause of action, that the Court enter judgment in favor of
4 Plaintiff, on behalf of himself, the State of California, and all aggrieved employees, and against
5 Defendants, for civil penalties, attorney's fees, and costs in accordance with section 2699 of the Labor
6 Code, all in amounts according to proof at the time of trial.

7 2. That the Court award such other and further relief deemed just and proper.
8

9 Dated: April 17, 2020

10 ZELENSKI LAW, PC
11 GREENSTONE LAW APC

12 Abigail A. Zelenski
13 David Zelenski
14 Mark S. Greenstone
15 *Attorneys for Plaintiff*

16 ***DEMAND FOR JURY TRIAL***

17 Plaintiff requests a trial by jury as to all causes of action.

18 Dated: April 17, 2020

19 ZELENSKI LAW, PC
20 GREENSTONE LAW APC

21 Abigail A. Zelenski
22 David Zelenski
23 Mark S. Greenstone
24 *Attorneys for Plaintiff*
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EXHIBIT 1

GREENSTONE LAW APC

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mgreenstone@greenstonelaw.com

January 16, 2020

VIA ONLINE FILING

California Labor and Workforce Development Agency
ATTN: PAGA Administrator

VIA CERTIFIED MAIL

CT Corporation System
Registered Agent for Manor Care of Palm Desert CA, LLC
818 West Seventh Street, Suite 930
Los Angeles, California 90017

VIA CERTIFIED MAIL

Manor Care of Palm Desert CA, LLC
333 North Summit Street
Toledo, Ohio 43604

Re: Notice of Claims Under Private Attorney General Act

To the California Labor and Workforce Development Agency and to Manor Care of Palm Desert CA, LLC:

This office represents Michael Silva (“Claimant”), on information and belief, a former employee of Manor Care of Palm Desert CA, LLC. (“Respondent”). Claimant contends that Respondent violated various provisions of the California Labor Code, and he seeks to prosecute a civil action under the Private Attorneys General Act (“PAGA”), Labor Code section 2698 *et seq.*, to collect civil penalties based on those violations. The purpose of this letter is to comply with PAGA’s procedural requirements for bringing such an action.

Claimant seeks relief on behalf of himself, the State of California, and other persons who were employed by Respondent in California as non-exempt employees and were not paid minimum wages and/or overtime wages, not provided with proper meal and rest periods, not provided with accurate wage statements, and not paid all wages when due, including upon termination, among other violations as outlined herein (“Aggrieved Employees”). This letter is sent in compliance with the notice requirements of California Labor Code section 2699.3.

Factual Background

Claimant was hired by Respondent as a certified nursing assistant in approximately July

2017. His employment ended in approximately March 2019. Due to severe understaffing by Respondent, Claimant and other Aggrieved Employees did not receive meal and/or rest periods. In addition, Claimant and other Aggrieved Employees were not paid proper overtime wages when they worked more than eight hours in a day or forty hours in a week. In addition, Respondent unlawfully failed to pay all wages due, as this compensation was not paid to Aggrieved Employees upon the termination of employment. Finally, Respondent failed to provide accurate wage statements in compliance with California law, as the wage statements issued to Claimant and other Aggrieved Employees failed to include overtime wages, meal- and rest-period premiums, and the correct employer name.

Violation of California Labor Code §§ 510 and 1198

California Labor Code sections 510 and 1198, and section 3 of the Industrial Welfare Commission's ("IWC") Wage Order 5, require employers to pay an employee working more than eight hours in a day or forty hours in a workweek at a rate of one-and-a-half times the employee's regular rate of pay for all such hours. Sections 510 and 1198 of the Labor Code, and section of Wage Order 5, further provide that employers are required to pay an employee working more than twelve hours in a day compensation at a rate of two times his or her regular rate for all such hours. Generally speaking, an employee's regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee; accordingly, if, for example, an employer pays an employee two or more different hourly rates, the employee's regular rate—and his or her overtime rate—are a weighted average of those different hourly rates.

Respondent willfully failed to pay all overtime wages owed to Claimant and other Aggrieved Employees. During the relevant time period, Claimant and other Aggrieved Employees were not paid overtime premiums at the correct rate for all of the hours they worked in excess of eight hours a day, twelve hours a day, and/or forty hours a week because Respondent's regular-rate methodology did not properly compute the regular rate of pay. For instance, Claimant earned two different hourly rates of pay for his straight-time work, but his overtime rate was not computed as a correct weighted average of those straight-time hourly rates.

In addition, Claimant and other Aggrieved Employees were subjected to Respondent's company-wide practice of failing to provide adequate meal-break coverage to allow employees to take compliant meal periods. Instead, Respondent engaged in a practice of impeding and preventing employees from taking meal periods by under-staffing its facilities such that there is no one available to cover the job assignments for employees who need to take meal breaks. Respondent knew or should have known that, as a result of these company-wide practices, Claimant and other Aggrieved Employees were tending to duties during their meal periods, and thereby performing work for which they were not paid. Respondent also knew, or should have known, that they did not compensate Claimant and other Aggrieved Employees for this and other off-the-clock work.

Because Claimant and other Aggrieved Employees regularly worked shifts of eight hours a day or more, or forty hours a week or more, some of this off-the-clock work performed during

unpaid meal periods qualified for overtime premium pay. Therefore, Claimant and other Aggrieved Employees were not paid overtime wages for all of the overtime hours they actually worked. Respondent's failure to pay Claimant and other Aggrieved Employees the balance of overtime compensation, as required by California law, violates the provisions of Labor Code sections 510 and 1198, and section 3 of Wage Order 5.

Claimant and other Aggrieved Employees are therefore entitled to recover civil penalties (including those set forth by Labor Code section 558) pursuant to Labor Code section 2699.

Violation of California Labor Code §§ 1182.12, 1194, 1197, and 1198

California Labor Code sections 1182.12, 1194, 1197, and 1198, and section 4 of Wage Order 5, require employers to pay a minimum wage to employees. The payment of a lesser wage than the minimum is unlawful.

As set forth above, due to Respondent's company-wide failure to provide meal periods and adequate meal-break coverage, Claimant and other Aggrieved Employees were forced to forego meal periods and/or have their meal periods interrupted by work, and were not relieved of all duties for unpaid meal periods, in order to complete their job duties. As stated, Respondent required Claimant and other Aggrieved Employees to work during their thirty-minute unpaid meal periods due to Respondent's systemic and company-wide understaffing and failure to provide enough coverage for meal periods to be taken by its employees. Respondent did not pay minimum wages for meal periods. As explained above, Claimant and other Aggrieved Employees' work through their meal periods qualified for overtime premium payments; to the extent that these off-the-clock hours did not qualify for overtime, Respondent did not pay at least the minimum wages for those hours worked off-the-clock, in violation of California Labor Code sections 1182.12, 1194, 1197, and 1198.

Claimant and other Aggrieved Employees are therefore entitled to recover civil penalties (including those set forth by Labor Code section 1197.1) pursuant to Labor Code section 2699.

Violation of California Labor Code §§ 226.7, 512(a), and 1198

California Labor Code sections 226.7, 512(a), and 1198, and sections 11 and 12 of Wage Order 5, require employers to provide meal and rest breaks and to pay an employee one additional hour of pay at the employee's regular rate for each workday that a meal or rest period is not provided. Under these sections, an employer may not require, cause, or permit an employee to work for a period of more than five hours per day without providing the employee with an uninterrupted meal period of not less than thirty minutes, except that, if the total work period per day of the employee is not more than six hours, the meal period may be waived by mutual consent of both the employer and the employee. In addition, first meal periods must start after no more than five hours. *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1041–42 (2012). Labor Code sections 226.7 and 512(a), and section 11 of Wage Order 5, also require employers to provide a second meal break of not less than thirty minutes if an employee works over ten hours per day, or to pay an employee one additional hour of pay at the employee's

regular rate, except that, if the total hours worked is no more than twelve hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

California Labor Code section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an IWC Wage Order. Section 12 of Wage Order 5 provides that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period," and that the "rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof," unless the "total daily work time is less than three and one-half (3 ½) hours."

As mentioned above, Respondent's company-wide failure to schedule meal periods and failure to provide adequate meal-break coverage prevented Claimant and other Aggrieved Employees from taking compliant meal periods. As a result of these practices and/or policies, Claimant and other Aggrieved Employees were frequently required to continue to perform their duties without being able to take timely, compliant meal breaks. In any event, Respondent had a policy and practice of not providing any meal periods to employees who worked shifts that were longer than five hours, but shorter than six hours, in length, and Aggrieved Employees did not sign valid meal-break waivers for those days that they were entitled to meal periods and were not relieved of all duties.

As with meal periods, Respondent's scheduling policies and practices, or lack thereof, prevented Claimant and other Aggrieved Employees from being relieved of all duty in order to take compliant rest periods. Respondent similarly failed to schedule rest periods for Claimant and other Aggrieved Employees on a company-wide basis. Respondent's management would request that employees refrain from taking rest breaks in order to provide completion of their assigned duties. As a result, Claimant and other Aggrieved Employees would sometimes work shifts in excess of three-and-a-half and six hours without receiving all uninterrupted ten-minute rest periods to which they were entitled. Indeed, Respondent had a policy and practice of not providing any rest periods to employees who worked shifts that were longer than three-and-a-half hours, but shorter than four hours, in length.

Based on the foregoing, Claimant and other Aggrieved Employees are entitled to recover civil penalties (including those set forth by Labor Code section 558) pursuant to Labor Code sections 2699.

Violation of California Labor Code §§ 226(a), 1174(d), and 1198

California Labor Code section 226(a) requires employers to provide employees with accurate itemized wage statements. Section 226(e) provides that, if an employer fails to comply with providing an employee properly itemized wages statements as set forth in 226(a), then the employee is entitled to recover the greater of all actual damages or \$50 for the initial pay period in which a violation occurs and \$100 per employee for each violation in any subsequent pay period, not to exceed \$4,000. Further, Labor Code section 226.3 provides that any employer

who violates section 226(a) shall be subject to a civil penalty in the amount of \$250 per employee per violation in an initial citation and \$1,000 per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage statement or fails to keep the required records pursuant to section 226(a).

During the relevant time period, Respondent knowingly and intentionally provided Claimant and other Aggrieved Employees with uniform, incomplete, and inaccurate wage statements. Specifically, Respondent violated sections 226(a)(1), (a)(2), (a)(5), and (a)(9). Because Respondent did not provide Claimant and Aggrieved Employees with proper minimum-wage and overtime compensation, and did not provide proper meal and rest breaks, Respondent did not list the correct number of hours worked and correct amount of gross wages earned by Claimant and other Aggrieved Employees in compliance with sections 226(a)(1) and (a)(2). For the same reason, Respondent failed to list the correct amount of net wages earned by Claimant and other Aggrieved Employees, in violation of section 226(a)(5), as well as correct hourly rates, in violation of section 226(a)(9). Additionally, Respondent failed to list the name of the legal entity that employed Claimant and other Aggrieved Employees on the wage statements, as required by Labor Code section 226(a)(8).

In addition, California Labor Code section 1174(d) provide that “[e]very person employing labor in this state shall . . . [k]eep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments.” Labor Code section 1174.5 provides that employers are subject to a \$500 civil penalty if they fail to maintain accurate and complete records as required by section 1174(d). During the relevant time period, and in violation of Labor Code section 1174(d), Respondent willfully failed to maintain accurate payroll records for Claimant and other Aggrieved Employees showing the hours worked and the wages paid, all as a result of underlying violations set forth in this letter.

California Labor Code section 1198 provides that the maximum hours of work and the standard conditions of labor shall be those fixed by the Labor Commissioner and as set forth in the applicable IWC Wage Orders. Section 1198 further provides that “[t]he employment of any employees for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.” Pursuant to section 7 of IWC Wage Order 5, employers are required to keep accurate time records showing when the employee begins and ends each work period and meal period. As described above, during the relevant time period, Respondent failed, on a company-wide basis, to keep records of meal-period start and stop times for Claimant and other Aggrieved Employees, in violation of Wage Order 5.

Because Respondent failed to provide the accurate number of total hours worked on wage statements, Claimant and other Aggrieved Employees have been prevented from verifying, solely from information on the wage statements themselves, that they were paid correctly and in full. Instead, Claimant and Aggrieved Employees have had to look to sources outside of the wage statements themselves and to reconstruct time records in order to determine whether in fact they were paid correctly and the extent of underpayment, thereby causing them injury.

Claimant and other Aggrieved Employees are therefore entitled to recover civil penalties (including those set forth by Labor Code sections 226.3 and 1174.5) pursuant to Labor Code section 2699.

Violation of California Labor Code § 204

California Labor Code section 204 requires that all wages earned by any person in any employment between the first and fifteenth days, inclusive, of any calendar month, other than those wages due upon termination of employment, are due and payable between the sixteenth and twenty-sixth day of the month during which the labor was performed, and that all wages earned by any person in any employment between the sixteenth and the last day, inclusive, of any calendar month, other than those wages due upon termination of employment, are due and payable between the first and tenth day of the following month. California Labor Code section 204 also requires that all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

Alternatively, section 204 provides that its requirements are deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

As set forth above, during the relevant time period, Respondent failed to pay Claimant and other Aggrieved Employees all wages due them, including, but not limited to, overtime wages, minimum wages, and meal- and rest-period premium wages, within any time period specified by California Labor Code section 204.

Claimant and Aggrieved Employees are therefore entitled to recover penalties (including those set forth by Labor Code section 210) pursuant to Labor Code section 2699.

Violation of California Labor Code §§ 201, 202, 203, and 227.3

California Labor Code sections 201, 202, and 203 provide that, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that, if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two hours thereafter, unless the employee has given seventy-two hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Such wages include accrued vacation pay, as set forth in Labor Code section 227.3.

Based on the violations described above, Respondent willfully failed to pay Claimant and other Aggrieved Employees who are no longer employed by Respondent all their earned wages, including, but not limited to, overtime wages, minimum wages, and meal- and rest-period premium wages, either at the time of discharge or within seventy-two hours of their leaving Respondent's employ, in violation of California Labor Code sections 201, 202, and 203.

Claimant and other Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor Code section 2699.

Attorney's Fees, Costs, Interest, and Penalties

Labor Code sections 218.5, 218.6, 226(e), 1194, 1194.2, 2802, and 2698 *et seq.* give employees the right to recover in a civil action the unpaid balance of the full amount of minimum wages, regular wages, overtime compensation, damages, liquidated damages, and penalties, including interest thereon, reasonable attorney's fees, and costs of suit. Pursuant to Labor code section 2698 *et seq.*, Aggrieved Employees are entitled to collect 25% of the penalty assessment and 100% of the underpaid wages. Accordingly, Respondent is liable for these items in addition to the unpaid wages. Claimant has already incurred actual damages, costs, and attorney's fees, and will continue to incur costs because of Respondent's unlawful actions.

The facts and claims contained herein are based on the information available at the time of this writing. Therefore, if, through discovery and/or expert review, Claimant becomes aware of additional claims, she reserves the right to revise these facts and/or add any new claims by amending this claim letter, or by adding applicable causes of action and additional representatives in the complaint for damages.

Based on the foregoing, Claimant wishes to bring a representative action under PAGA on behalf of herself and the State of California, as well as on behalf of all other Aggrieved Employees. Claimant requests that the Labor and Workforce Development Agency ("LWDA") investigate the above allegations and provide notice of its findings pursuant to PAGA's provisions. Alternatively, Mr. Silva requests that the LWDA inform her if it does not intend to investigate these violations so that she may proceed with her lawsuit including the violations discussed in this letter.

Concurrently with the online filing of this letter, Claimant will remit the \$75 filing fee to the LWDA. Please direct all future notices under PAGA to our office. Thank you.

Very truly yours,

/s/ Mark S. Greenstone

Mark S. Greenstone, Esq.