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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN DIEGO**

13 RENEE BUNKLEY, an individual, on behalf
14 of the State of California, as a private attorney
15 general,

16 **PLAINTIFF,**

17 **v.**

18 DMSD FOODS, INC., a California
19 Corporation; BESHAY FOODS, INC., a
20 California Corporation; BESHAY
21 ENTERPRISES, a California Corporation;
22 and DOES 1 to 50, inclusive,

23 **DEFENDANTS.**

CASE NO. 37-2020-00017973-CU-OE-CTL

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

1. Penalties Pursuant to Labor Code § 2698, *et seq.* for violations of Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 226.7, 256, and 558 as well as IWC Wage Order No. 5-2001

1. Plaintiff RENEE BUNKLEY, on behalf of the people of the State of California and as an “aggrieved employee” acting as a private attorney general under the Labor Code Private Attorneys General Act of 2004, § 2698, *et seq.* (“PAGA”) complains of DMSD FOODS, INC., BESHAY FOODS, INC., AND BESHAY ENTERPRISES and/or any businesses or entities doing business as DMSD FOODS, INC., BESHAY FOODS, INC., AND BESHAY ENTERPRISES and the Doe Defendants (“Defendants” or “DMSD”) and each of them, as follows:

I.

INTRODUCTION

2. This is a representative action brought pursuant to Labor Code § 2698, *et seq.*, on behalf of the State of California and several groups of aggrieved employees defined as follows:

- (1) all individuals who were employed by DMSD Foods, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“DMSD Foods Rest Period Aggrieved Employee”);
- (2) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“Beshay Foods Rest Period Aggrieved Employee”);
- (3) all individuals who were employed by Beshay Enterprises, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“Beshay Enterprises Rest Period Aggrieved Employee”);
- (4) all individuals who were employed by DMSD Foods, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more overnight/graveyard shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“DMSD Foods Graveyard Rest Period Aggrieved Employee”);

1 (5) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged
2 or related entities in California as a non-exempt hourly employee, or other similar
3 position, who worked one or more overnight/graveyard shifts of more than four (4)
4 hours in length or major fraction thereof from February 2, 2019 and continuing into
the present. (“Beshay Foods Graveyard Rest Period Aggrieved Employee”);

5 (6) all individuals who were employed by Beshay Enterprises, or its predecessor, merged
6 or related entities in California as a non-exempt hourly employee, or other similar
7 position, who worked one or more overnight/graveyard shifts of more than four (4)
8 hours in length or major fraction thereof from February 2, 2019 and continuing into
the present. (“Beshay Enterprises Graveyard Rest Period Aggrieved Employee”);

9 Collectively, aggrieved employee groups one (1), (2), (3), (4), (5), and (6) may be referred
10 to as the “Rest Period Aggrieved Employees.”

11 (7) all individuals who were employed by DMSD Foods, Inc. or its predecessor, merged
12 or related entities as a non-exempt hourly employee, or other similar position, for one
13 or more pay periods in California and whose employment concluded at any time
14 between February 2, 2019 and continuing into the present; (“DMSD Foods Late
Payment Aggrieved Employee”);

15 (8) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged
16 or related entities as a non-exempt hourly employee, or other similar position, for one
17 or more pay periods in California and whose employment concluded at any time
18 between February 2, 2019 and continuing into the present; (“Beshay Foods Late
Payment Aggrieved Employee”);

19 (9) all individuals who were employed by Beshay Enterprises or its predecessor, merged
20 or related entities as a non-exempt hourly employee, or other similar position, for one
21 or more pay periods in California and whose employment concluded at any time
22 between February 2, 2019 and continuing into the present; (“Beshay Enterprises Late
Payment Aggrieved Employee”);

23 Collectively, aggrieved employee groups seven (7), eight (8), and nine (9) may be referred
24 to as the “Late Payment Aggrieved Employees.”

25 3. The groups referenced in paragraph 2 may also all collectively be referred to
26 herein as aggrieved employees, other aggrieved employees, and/or all aggrieved employees where
27 appropriate.
28

4. Plaintiff, on behalf of the State of California as a private attorney general brings claims for alleged Labor Code violations committed against herself and all aggrieved employees presently or formerly employed by Defendants during the liability period pursuant to Labor Code § 2698, *et seq.* seeking penalties for Defendants violations of California Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 226.7, 256, and 558 as well as IWC Wage Order No. 5-2001. Based upon the allegations herein, Plaintiff and all aggrieved employees are aggrieved employees within the meaning of Labor Code § 2698, *et seq.*

II.

FACTUAL BACKGROUND

5. Plaintiff and all aggrieved employees worked for Defendants at one or more of its locations in California during the statutory period at issue.

6. Labor Code § 558.1 provides that “[a]ny employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.” Based upon Labor Code § 558.1, the California Court of Appeal held in a published decision in *Atempa v. Pedrazzani*, 27 Cal.App.5th 809, 820 (2018) that although the alter ego doctrine did not apply, PAGA penalties could be awarded against “any ‘other person’ who causes a violation of the overtime pay or minimum wage laws.” Plaintiff alleges, based upon information and belief, on behalf of the State of California that the Doe Defendants include persons acting on behalf of an employer within the meaning of Labor Code § 558.1 as it relates to all of the alleged allegations in this action.

7. At all times relevant hereto, Defendants have operated as a single entity and/or enterprise that either directly and/or jointly employed all aggrieved employees. Plaintiff contends that she worked for each of Defendants through their capacity as joint employers, single enterprises, and alter egos for each other. Plaintiff and the other aggrieved employees Labor Code Section 2810.5 notices identified their employer as Beshay Enterprises, DMSD Foods, Inc., and/or Beshay Foods, Inc. As evidenced by Plaintiff's Labor Code § 2810.5 Notice that identified

1 her employer as “Beshay Enterprises” as the legal name of the entity that is the employer,
2 Defendant also identified Beshay Foods, Inc., Restaurant Leadership Group, LLC, DMSD Foods,
3 Inc. DMSD Restaurants, Inc. and Beshay Enterprises as a single entity known as Beshay Foods,
4 Inc. covered by a single workers’ compensation policy. **Exh. A** at Exh. 1 at p. 2 (“Beshay Foods,
5 Inc.: (Beshay Foods, Inc., Restaurant Leadership Group, LLC, DMSD Foods, Inc. DMSD
6 Restaurants, Inc., and Beshay Enterprises).....Policy Number:...”).

7 8. At all times relevant hereto, Defendants also shared common ownership (Dawood
8 Beshay)—who serves as the Chief Executive Officer, Secretary, and Chief Financial Officer of
9 each—and shared a common corporate headquarters: 41760 Ivy St Ste#201, Murrieta, CA 92562.

10 9. Moreover, at all times throughout their employment, Plaintiff and all aggrieved
11 employees were regularly and consistently subject to the common policies utilized by Defendants.
12 This includes the employee handbooks that were issued to Plaintiff and all aggrieved employees.
13 Moreover, at all times herein, Plaintiff and all aggrieved employees were subject to the same
14 common control and compensation policies of Defendants.

15 10. Based upon the foregoing, at all times relevant hereto, all Defendants engaged,
16 suffered and permitted Plaintiff and all aggrieved employees to perform services from which they
17 benefitted. Moreover, the aforementioned entities had the right to exercise control over the wages,
18 hours and/or working conditions over Plaintiff and all aggrieved employees at all relevant times
19 herein, so as to be considered the joint employers of all of the aggrieved employees. By reason of
20 their status as joint employers, they are each liable for civil penalties for violation of the
21 California Labor Code as to Complainant and other aggrieved employees as set forth herein.

22 11. Upon information and belief, Plaintiff and the other aggrieved employees are
23 covered by California Industrial Welfare Commission Occupational Wage Order No. 5-2001 and
24 were classified as non-exempt for the purposes of rest periods.

25 12. Labor Code § 226.7 provides “an employer shall not require an employee to work
26 during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable
27 regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Under IWC Wage
28 Order Nos. 7-2001 and 9-2001, an employer must authorize and permit all employees to take ten

1 (10) minute duty free rest periods for every major fraction of four hours worked. *See Augustus v.*
2 *ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269 (concluding that “during rest periods
3 employers must relieve employees of all duties and relinquish control over how employees spend
4 their time.”). In *Augustus*, the court expressly rejected the employer’s assertion that it could
5 provide an on-duty rest period to employees and further explained “that employers [must]
6 relinquish any control over how employees spend their break time, and relieve their employees of
7 all duties.” *Id.* at 273.

8 13. At all times relevant hereto, Plaintiff and the Rest Period Aggrieved Employees
9 regularly worked shifts in excess of four (4) hours in length.

10 14. Pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 5-2001, Defendants
11 failed to provide Plaintiff and all Rest Period Aggrieved Employees with duty-free rest periods of
12 not less than ten (10) minutes for every major fraction of four (4) hours worked in violation of
13 Labor Code § 226.7 and IWC Wage Order No. 5-2001. Instead, Defendants regularly and
14 consistently required Plaintiff and the other Rest Period Aggrieved Employees to remain on the
15 premises during their rest periods as part of their common policies and practices. Specifically,
16 Defendants rest period policy advised Plaintiff and the other Rest Period Aggrieved Employees
17 that “Employees must stay on the premises during these paid breaks” and that “[f]ailure to strictly
18 adhere to the Rest Break Policy will result in discipline, up to and including termination.” **Exh. A**
19 at Exh. 2.

20 15. At all times relevant hereto, by requiring Plaintiff and the other Rest Period
21 Aggrieved Employees to remain on the premises during rest periods, Defendants continued to
22 exercise control over and restrained their employees from leaving the workplace, engaging in
23 certain specified activities without restriction, and interfered with the right of their employees to
24 take rest periods. For instance, Defendants’ policy and practice had a chilling effect on the ability
25 of employees to make personal phone calls while eating or smoking away from an area that
26 Defendants could not easily monitor and/or their limited their ability to complain about workplace
27 conditions during their breaks. Such conduct violated Labor Code § 226.7 and IWC Wage Order
28 No. 5-2001. In addition, Defendants actively interfered with Plaintiff and the other aggrieved

1 employees' ability to take lawful rest periods by locking the doors to the store during graveyard
2 shifts. Due to Defendants' policy and practice of locking Plaintiff and the other aggrieved
3 employees in the store during the graveyard/overnight shifts, Defendants both failed to authorize
4 and permit lawful rest periods and actively obstructed them from taking lawful rest periods.

5 16. Moreover, as a result of its understaffing practices and policies at all times relevant
6 hereto, including the fact that Plaintiff and many of the Rest Period Aggrieved Employees were
7 the only employees assigned to a particular work location who could perform a required and/or
8 needed job function at a given time, it was not possible for Plaintiff and the other Rest Period
9 Aggrieved Employees to take lawful rest periods. Notably, although Defendants' rest period
10 policies and practices are not compliant, they also pressured and coerced employees to forgo rest
11 periods and made it difficult for employees to take lawful duty-free rest periods both due to their
12 understaffing policies and practices and otherwise.

13 17. With respect to Rest Periods, Labor Code § 226.7 provides "an employer shall not
14 require an employee to work during a meal or rest or recovery period mandated pursuant to an
15 applicable statute, or applicable regulation, standard, or order of the Industrial Welfare
16 Commission ("IWC"). Under IWC Wage Order No. 5-2001, an employer must authorize and
17 permit all employees to take ten (10) minute duty free rest periods for every major fraction of four
18 hours worked.

19 18. Moreover, during the time period applicable to this action, Plaintiff and the Rest
20 Period Aggrieved Employees were not compensated with one (1) hours' worth of pay at their
21 regular rate of compensation when they were not provided with a compliant rest period as
22 required by Labor Code § 226.7.

23 19. In addition, Labor Code § 558 imposes a penalty upon employers "who violates, or
24 causes to be violated...any provision regulating hours and days of work in any order of the
25 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
26 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
27 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For
28 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay

1 period for which the employee was underpaid in addition to an amount sufficient to recover
2 underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected
3 employee.” For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil
4 penalties pursuant to PAGA and *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid
5 wages.

6 20. Labor Code § 226 obligates employers, semi-monthly or at the time of each
7 payment to furnish an itemized wage statement in writing showing:

- 8 (1) gross wages earned;
- 9 (2) total hours worked by the employee;
- 10 (3) the number of piece-rate units earned and any applicable piece rate if the
11 employee is paid on a piece rate;
- 12 (4) all deductions, provided that all deductions made on written orders of the employee
13 may be aggregated and shown as one item;
- 14 (5) net wages earned;
- 15 (6) the inclusive dates of the period for which the employee is paid;
- 16 (7) the name of the employee and only the last four digits of his or her social security
17 number or an employee identification number other than a social security number;
- 18 (8) the name and address of the legal entity that is the employer...;
- 19 (9) all applicable hourly rates in effect during the pay period and the corresponding
20 number of hours worked at each hourly rate by the employee...

21 21. Similarly, Labor Code § 226(e) provides:

22 (e) (1) An employee suffering injury as a result of a knowing and intentional failure by an
23 employer to comply with subdivision (a) is entitled to recover the greater of all actual
24 damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and
25 one hundred dollars (\$100) per employee for each violation in a subsequent pay period,
26 not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an
27 award of costs and reasonable attorney’s fees.

28 (2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the
employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the
employer fails to provide accurate and complete information as required by any one or
more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly
and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the
pay period or any of the other information required to be provided on the itemized
wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision
(a).

(ii) Which deductions the employer made from gross wages to determine the net
wages paid to the employee during the pay period. Nothing in this subdivision
alters the ability of the employer to aggregate deductions consistent with the
requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor
contractor, as defined in subdivision (b) of Section 1682, the name and address of
the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

22. Labor Code § 226(a)(1), (2), (5), and (9) require employers semimonthly or at the time or each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing the gross wages earned, the total hours worked by the employee, all deductions, the net wages earned, as well as all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

23. Labor Code Section 226(e), as amended on January 1, 2013 through Senate Bill 1255 (2012), provides that an “injury” occurs when an employer violates Section 226(a) and “the employee cannot promptly and easily determine from the wage statement alone one or more of the items of information provided in the statute.” Lab. Code § 226(e)(2)(B). The Labor Code defines “promptly and easily determine” to mean “a reasonable person would be able to readily ascertain the information without reference to other documents or information.” Lab. Code § 226(e)(2)(C) (emphasis added); *Willner*, 35 F. Supp. 3d 1116, 1129 (N.D. Cal. 2014) [holding that an employer violated Lab. Code § 226(a)(6) and (8) even though the employer’s “address appears on the checks attached to the statements and on the front of the envelopes containing the statements.”] (emphasis added). Moreover, the bill analyses for SB 1255 (2012) confirm that all of the required information must appear on the wage statement itself and must not require the employee to reference or review other documents. (“For purposes of the bill, ‘promptly and easily determine’ is defined as a reasonable person who would be able to readily ascertain the information **without reference to other documents or information.**”)(emphasis added) (“Defines ‘promptly and easily’ to mean a reasonable person would be able to readily ascertain the information **without reference to other documents or information.**”) (emphasis added).

24. Due to Defendants’ failure to pay Plaintiff and all aggrieved employees all rest period premiums, the wage statements issued by Defendants do not indicate the correct amount of gross wages earned, the total hours worked, the net wages earned, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Thus, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendants have

1 violated Labor Code §226(a)(1), (2), (5), and (9) with respect to Plaintiff and all aggrieved
2 employees.

3 25. In addition to violating Labor Code § 226(a), Defendants also knowingly and
4 intentionally failed to pay Plaintiff and all aggrieved employees rest periods premiums including
5 at the proper rates. Moreover, Plaintiff and all aggrieved employees also suffered legal “injury”
6 for purposes of Labor Code section 226(e) insofar as they were unable to readily and easily
7 determine from the wage statements themselves the information required to be set forth by
8 Section 226(a), the information provided by Defendants was confusing and inaccurate. In
9 addition, Plaintiff and the aggrieved employees were unable to determine at all the total hours
10 worked by the employee, the gross wages earned, the net wages earned, and all applicable hourly
11 rates in effect during the pay period and the corresponding number of hours worked at each
12 hourly rate by the employee for the reasons discussed above.

13 26. Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of
14 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250)
15 per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee
16 for each violation in a subsequent citation, for which the employer fails to provide the employee a
17 wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” To the
18 extent that Labor Code § 226.3 applies, Plaintiff also seeks such penalties on behalf of herself and
19 the other aggrieved employees.

20 27. Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in
21 any employment are due and payable twice during each calendar month, on days designated in
22 advance by the employer as the regular paydays.”

23 28. Labor Code § 210 provides that “in addition to, an entirely independent and apart
24 from, any other penalty provided in this article, every person who fails to pay the wages of each
25 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
26 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
27 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
28 each failure to pay each employee, plus 25% of the amount unlawfully withheld.” *See Amaral v.*

1 *Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of Labor Code
2 section 210 penalties under PAGA due to the employer's failure to timely pay wages at the proper
3 rate in accordance with a local wage ordinance).

4 29. As discussed in detail above, Defendants failed to pay Plaintiff and all aggrieved
5 employees rest period premiums owed, Defendants failed to timely pay the aggrieved employees
6 for labor performed between the 1st and 15th days between the 16th calendar day of the month
7 during which the labor was performed on a regular and consistent basis. Moreover, as a result of
8 the conduct described in detail above, Defendants also failed to pay Plaintiff and the other
9 aggrieved employees all wages owed for labor performed between the 16th and last day between
10 the 1st and 10th day of the following month on a regular and consistent basis.

11 30. Pursuant to Labor Code §§ 201-202, an employer must provide an employee
12 wages at the time of discharge or within up to seventy-two (72) hours of their resignation. Labor
13 Code § 203 provides "if an employer willfully fails to pay . . . any wages of an employee who is
14 discharged or who quits, the wages of the employee shall continue as a penalty. . ." for up to 30
15 days. Lab. Code § 203; *Mamika v. Barca*, 68 Cal.App.4th 487, 492 (1998).

16 31. As described in detail above, Defendants failed to pay Plaintiff and other
17 aggrieved employees whose employment concluded all wages owed, including but not limited to
18 rest period premiums within the time constraints proscribed in Labor Code §§ 201-202 at the time
19 of their termination/separation. Thus, as result of Defendants' faulty policies described above,
20 Plaintiff and all aggrieved employees left their employment with Defendants without being
21 compensated for each and every hour worked and/or at the appropriate rate in violation of Labor
22 Code §§ 201, 202, and 203.

23 32. In addition, Labor Code § 256 provides that the Labor Commissioner "shall
24 impose a civil penalty in an amount not exceeding 30 days pay as waiting time under the terms of
25 Section 203. The California Supreme Court and California Court of Appeal have both specifically
26 recognized the ability of an aggrieved employee to recover civil penalties under Labor Code §
27 256 for a defendant's willful violation of Labor Code § 201 and 202 under PAGA. In *Iskanian v.*
28 *CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014), the California Supreme Court

1 acknowledged that PAGA penalties for the untimely payment of wages included the 30 days of
2 pay as waiting time pursuant to Labor Code § 256. *See also Esparza v. KS Industries, L.P.* 13
3 Cal.App.5th 1228, 1242 (2017) (explaining that the Labor Code § 256 penalties under PAGA
4 only exist if the employer’s failure to timely pay wages upon separation was willful is a “civil
5 penalty” “recovered or imposed by the Labor Commissioner.”).

6 33. Plaintiff fully and completely exhausted her administrative remedies under PAGA
7 prior to proceeding with this action. Plaintiff filed her PAGA Notice online with the Labor
8 Workforce Development Agency (“LWDA”) and sent a letter by certified mail to Defendants
9 setting forth the facts and theories of the violations alleged against Defendants, as prescribed by
10 Labor Code § 2698 *et seq.* **Exh. A.** As required by PAGA, Plaintiff submitted the \$75.00 filing
11 fee with the LWDA by regular mail. Pursuant to Labor Code § 2699.3(a)(2)(A), no notice was
12 received and/or will have been received by Plaintiff from the LWDA evidencing its intention to
13 investigate within sixty-five (65) calendar days of the postmark date of the PAGA notice. Plaintiff
14 is therefore, entitled to commence and proceed with a civil action pursuant to Labor Code § 2699.

15 III.

16 JURISDICTION AND VENUE

17 34. This Court has subject matter jurisdiction over any and all causes of action
18 asserted herein pursuant to Article VI, § 10 of the California Constitution and California Code of
19 Civil Procedure § 410.10 by virtue of the fact that this is a civil action in which the matter in
20 controversy, exclusive of interest, exceeds \$25,000, and because each cause of action asserted
21 arises under the laws of the State of California or is subject to adjudication in the courts of the
22 State of California.

23 35. This Court has personal jurisdiction over Defendants because Defendants have
24 caused injuries in the County of San Diego through their acts, and by their violation of the
25 California Labor Code and California state common law.

26 36. Venue as to each Defendants is proper in this judicial district, pursuant to Code of
27 Civil Procedure § 395. Defendants operates within California and does business within San Diego
28

County, California. The unlawful acts alleged herein have a direct effect on Plaintiff and all “employees” within the State of California and San Diego County.

IV.

PARTIES

A. PLAINTIFF

37. Plaintiff RENEE BUNKLEY is a resident of California and at all times pertinent hereto worked for Defendants and was harmed by activities in San Diego County.

38. Plaintiff and all aggrieved employees are, and at all times pertinent hereto, have been classified as employees by Defendants. Defendants hires employees to work in California.

39. Upon information and belief, Plaintiff and all aggrieved employees are covered by California Industrial Welfare Commission Occupational Wage Order No. 5-2001.

40. Plaintiff represents the state of California in prosecuting claims against Defendants on behalf of several groups of employees defined as:

- (1) all individuals who were employed by DMSD Foods, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“DMSD Foods Rest Period Aggrieved Employee”);
- (2) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“Beshay Foods Rest Period Aggrieved Employee”);
- (3) all individuals who were employed by Beshay Enterprises, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“Beshay Enterprises Rest Period Aggrieved Employee”);
- (4) all individuals who were employed by DMSD Foods, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more overnight/graveyard shifts of more than four (4)

hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“DMSD Foods Graveyard Rest Period Aggrieved Employee”);

(5) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more overnight/graveyard shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“Beshay Foods Graveyard Rest Period Aggrieved Employee”);

(6) all individuals who were employed by Beshay Enterprises, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more overnight/graveyard shifts of more than four (4) hours in length or major fraction thereof from February 2, 2019 and continuing into the present. (“Beshay Enterprises Graveyard Rest Period Aggrieved Employee”);

Collectively, aggrieved employee groups one (1), (2), (3), (4), (5), and (6) may be referred to as the “Rest Period Aggrieved Employees.”

(7) all individuals who were employed by DMSD Foods, Inc. or its predecessor, merged or related entities as a non-exempt hourly employee, or other similar position, for one or more pay periods in California and whose employment concluded at any time between February 2, 2019 and continuing into the present; (“DMSD Foods Late Payment Aggrieved Employee”);

(8) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged or related entities as a non-exempt hourly employee, or other similar position, for one or more pay periods in California and whose employment concluded at any time between February 2, 2019 and continuing into the present; (“Beshay Foods Late Payment Aggrieved Employee”);

(9) all individuals who were employed by Beshay Enterprises or its predecessor, merged or related entities as a non-exempt hourly employee, or other similar position, for one or more pay periods in California and whose employment concluded at any time between February 2, 2019 and continuing into the present; (“Beshay Enterprises Late Payment Aggrieved Employee”);

Collectively, aggrieved employee groups seven (7), eight (8), and nine (9) may be referred to as the “Late Payment Aggrieved Employees.”

B. DEFENDANTS

1 41. Defendant DMSD FOODS, INC. is believed to be a California Corporation
2 operating within the State of California including within San Diego County. Defendant's
3 principal place of business is believed to be 41760 Ivy St., Suite #201, Murrieta, CA 92562.
4 Defendant has done and does business throughout the State of California including San Diego
5 County.

6 42. Defendant BESHAY FOODS, INC. is believed to be a California Corporation
7 operating within the State of California including within San Diego County. Defendant's
8 principal place of business is believed to be 41760 Ivy St., Suite #201, Murrieta, CA 92562.
9 Defendant has done and does business throughout the State of California including San Diego
10 County.

11 43. Defendant BESHAY ENTERPRISES is believed to be a California Corporation
12 operating within the State of California including within San Diego County. Defendant's
13 principal place of business is believed to be 41760 Ivy St., Suite #201, Murrieta, CA 92562.
14 Defendant has done and does business throughout the State of California including San Diego
15 County.

16 44. The true names and capacities, whether individual, corporate, associate, or
17 otherwise, of Defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to
18 Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure
19 § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants
20 designated herein as a DOE is legally responsible in some manner for the unlawful acts referred
21 to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and
22 capacities of the Defendants designated hereinafter as DOES when such identities become
23 known.

24 45. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
25 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
26 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
27 legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the
28 employer and/or joint employer of Plaintiff and the other aggrieved employees.

V.

FIRST CAUSE OF ACTION

**PLAINTIFF AND ALL AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS
FOR PENALTIES PURSUANT TO LABOR CODE § 2698, ET SEQ. FOR VIOLATIONS
OF LABOR CODE §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 226.7, 256, and 558 AS
WELL AS IWC WAGE ORDER No. 5-2001**

46. Plaintiff, on behalf of the State of California, realleges and incorporates by reference all previous paragraphs.

47. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code § 2698, *et seq.* because of Defendants' violations of Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 226.7, 256, and 558 as well as IWC Wage Order No. 5-2001.

48. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiff and all other aggrieved employees are entitled to penalties in an amount to be shown at the time of trial subject to the following formula:

\$100 for the initial violation per employee per pay period; and

\$200 for each subsequent violation per employee per pay period.

These penalties will be allocated 75% to the Labor Workforce Development Agency and 25% to the affected employees. These penalties may be stacked separately for each of Defendants violations of the California Labor Code. *See e.g. Kaanaana v. Barrett Business Services, Inc.*, 29 Cal.App.5th 778, 808 (2018) (acknowledging that the employees could get separate PAGA penalties for interrupted meal periods because interrupted meal periods violated Labor Code sections 1194 and 512 and remanding to the trial court to determine the amount of PAGA penalties to award). *Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) ("hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the 'injury' and 'knowing and intentional' requirements of section 226(e)(1) and acknowledging that a Plaintiff could recover separately under PAGA for violations of Labor Code §§ 226(a) and 226(e)); *Magadia vs. Wal-Mart*, No. 17-CV-00062-LHK, 2019 U.S. Dist. LEXIS 91792 (N.D. Cal. May 31, 2019) (awarding three sets of PAGA penalties including several during the same pay period); *Hernandez v. Towne Park, Ltd.*, No. CV 12-02972 MMM (JCGx) 2012 U.S.Dist. LEXIS 86975, at *59, fn. 77 (C.D.Cal. June 22, 2012) (holding that

1 although the plaintiff did not seek stacked PAGA penalties, that “PAGA penalties can be
2 ‘stacked,’ i.e., multiple PAGA penalties can be assessed for the same pay period for different
3 Labor Code violations.”); accord *Schiller v. David’s Bridal, Inc.*, No. 1:10-cv-00616 AWI SKO)
4 2010 U.S. Dist. LEXIS 81128, at *17 (E.D. Cal. July 14, 2010); *Pulera v. F & B, Inc.*, No. 2:08-
5 cv-00275-MCE-DAD, 2008 U.S. Dist. LEXIS 72659, 2008 WL 3863489, at * 2-3 (E.D. Cal.
6 Aug. 19, 2008); *Smith v. Brinker Intern, Inc.*, No. C 10-0213 VRW, 2010 U.S. Dist. LEXIS
7 54110, 2010 WL 1838726, at * 2-6 (N.D. Cal. May 5, 2010).

8 49. In addition, to the extent permitted by law, Plaintiff failed to provide Plaintiff and
9 all aggrieved employees with accurate itemized wage statements in compliance with Labor Code
10 § 226(a). Plaintiff seeks separate PAGA penalties for Defendants’ violations of Labor Code §§
11 226(a) and 226(e). *Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017). For
12 violations of Labor Code § 226(a), Plaintiff seeks the default penalty provided by Labor Code §
13 226.3. Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section
14 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per
15 employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for
16 each violation in a subsequent citation, for which the employer fails to provide the employee a
17 wage deduction statement or fails to keep the required in subdivision (a) of Section 226.”
18 Accordingly, through PAGA and to the extent permitted by law Plaintiff and the aggrieved
19 employees are entitled to recover penalties for violations of Labor Code § 226.3 and seeks default
20 PAGA penalties for each of Defendants’ numerous violations of Labor Code § 226(e).¹

21 50. Labor Code § 210 provides that “in addition to, an entirely independent and apart
22 from, any other penalty provided in this article, every person who fails to pay the wages of each
23 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For

24 ¹ Plaintiff does not seek statutory penalties under Labor Code § 226(e); rather, Plaintiff only seeks civil penalties
25 under PAGA for Defendant’s knowing and intentional violation of Labor Code § 226(e) similar to the ability of
26 recovering Labor Code § 256 civil penalties under PAGA for a willful violation of Labor Code §§ 201-202 and only
27 to the extent such penalties are recoverable by the State under PAGA. *Iskanian v. CLS Transportation Los Angeles,*
28 *LLC*, 59 Cal.4th 348, 381 (2014); *Esparza v. KS Industries, L.P.* 13 Cal.App.5th 1228, 1242 (2017) (explaining that
the Labor Code § 256 penalties only exist if the employer’s failure to timely pay wages upon separation was willful
and that it is a “civil penalty” “recovered or imposed by the Labor Commissioner.”); *Magadia v. Wal-Mart Assocs.*,
384 F. Supp. 3d 1058, 1082 (N.D.Cal. 2019) (explaining that since 1948 the Legislature and courts have found
references in the Labor Code to “knowing and intentional” as synonymous to “willful.”).

1 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
2 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
3 each failure to pay each employee, plus 25% of the amount unlawfully withheld.” Pursuant to
4 Labor Code § 210, “[t]welve and one-half percent of the penalty recovered shall be paid into a
5 fund within the Labor and Workforce Development Agency dedicated to educating employers
6 about state labor laws, and the remainder shall be paid into the State Treasury to the credit of the
7 General Fund.” As a result of the faulty compensation policies and practices described in detail
8 above, the State of California is entitled to recover penalties under Labor Code § 210 through
9 PAGA.

10 51. In addition, Labor Code § 256 provides that the Labor Commissioner “shall
11 impose a civil penalty in an amount not exceeding 30 days pay as waiting time under the terms of
12 Section 203. The California Supreme Court and California Court of Appeal have both specifically
13 recognized the ability of an aggrieved employee to recover civil penalties under Labor Code §
14 256 for a defendant’s willful violation of Labor Code § 201 and 202 under PAGA. In *Iskanian v.*
15 *CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014), the California Supreme Court
16 acknowledged that PAGA penalties for the untimely payment of wages included the 30 days of
17 pay as waiting time pursuant to Labor Code § 256. *See also Esparza v. KS Industries, L.P.* 13
18 Cal.App.5th 1228, 1242 (2017) (explaining that the Labor Code § 256 penalties under PAGA
19 only exist if the employer’s failure to timely pay wages upon separation was willful is a “civil
20 penalty” “recovered or imposed by the Labor Commissioner.”).

21 52. Further, Labor Code § 558 imposes a penalty upon employers “who violates, or
22 causes to be violated...any provision regulating hours and days of work in any order of the
23 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
24 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
25 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For
26 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
27 period for which the employee was underpaid...” Based upon the above factual allegations
28

1 related to rest period violations, Plaintiff and the aggrieved employees are entitled to recover civil
2 penalties under Labor Code § 558. *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019).

3 **RELIEF REQUESTED**

4 **WHEREFORE**, Plaintiff prays for the following relief:

- 5 1. For penalties under Labor Code § 2698, *et seq.* for Plaintiff and all aggrieved
6 employees because of Defendants' violation of Labor Code §§ 201, 202, 203, 204, 210, 226(a),
7 226(e), 226.3, 226.7, 256, and 558 as well as IWC Wage Order No. 5-2001.
- 8 2. An award providing for payment of costs of suit;
- 9 3. An award of attorneys' fees; and
- 10 4. Such other and further relief as this Court may deem proper and just.

11 Dated: May 26, 2020

WINSTON LAW GROUP, P.C.

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13
14 By: David Winston
15 DAVID S. WINSTON
16 Attorney for Plaintiff and the Aggrieved Employees
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Exhibit A

WINSTON LAW GROUP, P.C.

1180 S BEVERLY DR., SUITE 320 • LOS ANGELES, CA 90035 • (424) 288-4568

February 10, 2020

Via Online Filing with the LWDA & by Certified Mail to Defendants

DMSD Foods, Inc.
41760 Ivy St Ste#201
Murrieta, CA 92562

Beshay Enterprises
41760 Ivy St Ste#201
Murrieta, CA 92562

Beshay Foods, Inc.
41760 Ivy St Ste#201
Murrieta, CA 92562

Re: *Renee Bunkley vs. DMSD Foods, Inc., Beshay Foods, Inc., and Beshay Enterprises - California Labor Code § 2699 Penalties*

Gentlepersons:

This firm and Ackermann & Tilajef, P.C. represent Renee Bunkley ("Plaintiff" or "Ms. Bunkley ") and a proposed group of current and former employees working for DMSD Foods, Inc., Beshay Foods, Inc., and Beshay Enterprises and/or any businesses or entities doing business as DMSD Foods, Inc., Beshay Foods, Inc., and Beshay Enterprises ("Defendants" or "DMSD") in California for violations of California Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 226.7, 558 as well as IWC Wage Order No. 5-2001. Ms. Bunkley wishes to bring a representative action on behalf of the State of California based upon alleged improper acts committed against her and several groups of aggrieved employees defined as:

- (1) all individuals who were employed by DMSD Foods, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. ("DMSD Foods Rest Period Aggrieved Employee");
- (2) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. ("Beshay Foods Rest Period Aggrieved Employee");
- (3) all individuals who were employed by Beshay Enterprises, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction

thereof from one year prior to the date of this letter and continuing into the present. (“Beshay Enterprises Rest Period Aggrieved Employee”);

- (4) all individuals who were employed by DMSD Foods, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more overnight/graveyard shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. (“DMSD Foods Graveyard Rest Period Aggrieved Employee”);
- (5) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more overnight/graveyard shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. (“Beshay Foods Graveyard Rest Period Aggrieved Employee”);
- (6) all individuals who were employed by Beshay Enterprises, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more overnight/graveyard shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. (“Beshay Enterprises Graveyard Rest Period Aggrieved Employee”);

Collectively, aggrieved employee groups one (1), (2), (3), (4), (5), and (6) may be referred to as the “Rest Period Aggrieved Employees.”

- (7) all individuals who were employed by DMSD Foods, Inc. or its predecessor, merged or related entities as a non-exempt hourly employee, or other similar position, for one or more pay periods in California and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into the present; (“DMSD Foods Late Payment Aggrieved Employee”);
- (8) all individuals who were employed by Beshay Foods, Inc. or its predecessor, merged or related entities as a non-exempt hourly employee, or other similar position, for one or more pay periods in California and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into the present; (“Beshay Foods Late Payment Aggrieved Employee”);
- (9) all individuals who were employed by Beshay Enterprises or its predecessor, merged or related entities as a non-exempt hourly employee, or other similar position, for one or

more pay periods in California and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into the present; (“Beshay Enterprises Late Payment Aggrieved Employee”);

Collectively, aggrieved employee groups seven (7), eight (8), and nine (9) may be referred to as the “Late Payment Aggrieved Employees.”

These groups may all collectively be referred to herein as aggrieved employees and/or all aggrieved employees where appropriate. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698 *et seq.* We herein set forth some of the facts and theories of California Labor Code violations which we allege Defendants engaged in with respect to our client and all aggrieved employees.¹

DEFENDANTS AT ALL RELEVANT TIMES HERETO WERE EMPLOYERS, OTHER PERSONS ACTING ON BEHALF OF EMPLOYERS, JOINT EMPLOYERS AND/OR OPERATED AS A SINGLE ENTERPRISE

California courts have recognized that the definition of “employer” for purposes of enforcement of the California Labor Code goes beyond the concept of traditional employment to reach irregular working arrangements for the purpose of preventing evasion and subterfuge of California’s labor laws. *Martinez v. Combs* (2010) 49 Cal.4th 35, 65. As such, anyone who directly or indirectly, or through an agent or any other person, engages, suffers, or permits any person to work or exercises control over the wages, hours, or working conditions of any person, may be liable for violations of the California Labor Code as to that person.

In addition, California law also permits and recognizes the piercing of a corporate veil between sister companies under the single enterprise rule. *Hasso v. Hapke* (2014) 227 Cal. App. 4th 107, 155; *Greenspan v. LADT, LLC* (2010) 191 Cal. App. 4th 486, 512. The single enterprise rule applies where “there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it.” *Hasso*, 227 Cal. App. 4th at 155; *Greenspan*, 191 Cal. App. 4th at 512.

To determine whether the single enterprise rule applies, the court must evaluate whether “(1) there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased,’ and (2) ‘an adherence to the fiction of the separate existence of

¹ See *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. Jul. 8, 2011) 796 F. Supp. 2d 1246, 1261; *Moua v. Int'l Bus. Machines Corp.* (N.D. Cal. Jan. 31, 2012) No. 5:10-CV-01070 EJD, 2012 WL 370570, at *5; *York v. Starbucks Corp.*, (C.D. Cal. Nov. 1, 2012) No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *4.

the corporation would ... sanction a fraud or promote injustice.” *Sonora Diamond Corp v. Sup. Ct.*, 83 Cal. App. 4th 523, 538-539 (2000).

When determining whether a unity of interest and ownership exists, courts may consider factors including disregard of corporate formalities, lack of segregation of corporate records, use of the same office or business location, the use of the corporate entity to procure labor for another entity, contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, and sharing employees between the entities. *Zoran Corp. v. Chen*, 185 Cal.App.4th 799, 811–812 (2010); *Sonora Diamond Corp*, 83 Cal. App. 4th at 538-539; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285.

At all times relevant hereto, Defendants have operated as a single entity and/or enterprise that either directly and/or jointly employed all aggrieved employees. Plaintiff contends that she worked for each of Defendants through their capacity as joint employers, single enterprises, and alter egos for each other. Plaintiff and the other aggrieved employees Labor Code Section 2810.5 notices identified their employer as Beshay Enterprises, DMSD Foods, Inc., and/or Beshay Foods, Inc. As evidenced by Plaintiff’s Labor Code § 2810.5 Notice that identified her employer as “Beshay Enterprises” as the legal name of the entity that is the employer, Defendant also identified Beshay Foods, Inc., Restaurant Leadership Group, LLC, DMSD Foods, Inc. DMSD Restaurants, Inc. and Beshay Enterprises as a single entity known as Beshay Foods, Inc. covered by a single workers’ compensation policy. **Exh. 1.** at p. 2 (“**Beshay Foods, Inc.: (Beshay Foods, Inc., Restaurant Leadership Group, LLC, DMSD Foods, Inc. DMSD Restaurants, Inc., and Beshay Enterprises)**”).Policy Number:ZAWC15501000.”).

Defendants also share common ownership (Dawood Beshay)—who serves as the Chief Executive Officer, Secretary, and Chief Financial Officer of each—and share a common corporate headquarters: 41760 Ivy St Ste#201, Murrieta, CA 92562.

Moreover, at all times throughout their employment, Plaintiff and all aggrieved employees were regularly and consistently subject to the common policies utilized by Defendants. This includes the employee handbooks that were issued to Plaintiff and all aggrieved employees. Moreover, at all times herein, Plaintiff and all aggrieved employees were subject to the same common control and compensation policies of Defendants.

Accordingly, all Defendants engaged, suffered and permitted Plaintiff and all aggrieved employees to perform services from which they benefitted. Moreover, the aforementioned entities had the right to exercise control over the wages, hours and/or working conditions over Plaintiff and all aggrieved employees at all relevant times herein, so as to be considered the joint employers of all

of the aggrieved employees. By reason of their status as joint employers, they are each liable for civil penalties for violation of the California Labor Code as to Complainant and other aggrieved employees as set forth herein.

DEFENDANTS VIOLATED AND CONTINUES TO VIOLATE LABOR CODE § 226.7 AND IWC WAGE ORDER No. 5-2001

Labor Code § 226.7 provides “an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Under IWC Wage Order Nos. 7-2001 and 9-2001, an employer must authorize and permit all employees to take ten (10) minute duty free rest periods for every major fraction of four hours worked. *See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269 (concluding that “during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time.”). In *Augustus*, the court expressly rejected the employer’s assertion that it could provide an on-duty rest period to employees and further explained “that employers [must] relinquish any control over how employees spend their break time, and relieve their employees of all duties.” *Id.* at 273.

In *Augustus*, the court expressly rejected the employer’s assertion that it could provide an on-duty rest period to employees and further explained “that employers [must] relinquish any control over how employees spend their break time, and relieve their employees of all duties.” *Id.* at 273; *accord Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal.App.4th 220, 236 (2013) (“There does not appear to be an on-duty rest break exception as there is for meal breaks.”); *Wright vs. Renzenberger, Inc.*, Case No. 2:13-cv-06642-FMO-AGR, Dkt. 118 (C.D. Cal. Mar. 8, 2018) (holding that requiring employees to stay in near proximity of the vans violated California’s rest period laws).

The California Supreme Court’s ruling in *Augustus* follows the clear directive in *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975 (1995) that “[w]hen an employer directs, commands or restrains an employees from leaving the work place...and thus prevents the employee from using the time effectively for his or her own purposes, that employees remains subject to the employer’s control. *Augustus*, 2 Cal.5th at 275 (citing *Bono*, 32 Cal. App. 4th at 975). “Restricting employees to the employer’s premises, or worksite, means that the employee is subject to the employer’s control so as to constitute hours worked.” DLSE Manual 45.1.5.1 (2016) at p. 45-3; *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000). Specifically, in *Morillion*, the California Supreme Court rejected the employer’s argument that employees “were not under its control during the required bus ride because they could read on the bus, or perform other personal activities.” *Id.* at 586. The court explained that “[p]ermitting plaintiffs to engage in limited activities such as reading or sleeping on the bus does not allow them to use “the time effectively for their own purposes...during

the bus ride plaintiffs could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car.” *Id.*

Following *Augustus*, the California Labor Commissioner published a memorandum on rest periods wherein it unequivocally stated both that employers cannot require employees to remain on the premises during rest periods and that an employer cannot require an employee to engage in radio communications during a rest period:

5. Q.Can my employer require that I stay on the work premises during my rest period?

A.No, your employer cannot impose any restraints not inherent in the rest period requirement itself. In *Augustus v. ABM Security Services, Inc.* (2016) 5 Cal.5th 257, 269, the California Supreme Court held that the rest period requirement "obligates employers to permit-and authorizes employees to take-off-duty rest periods. That is, during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time." (citation omitted) As a practical matter, however, if an employee is provided a ten minute rest period, the employee can only travel five minutes from a work post before heading back to return in time.

The *Brinker* Court explained in the context of rest breaks that employer liability attaches from adopting an unlawful policy:

An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—***it has violated the wage order and is liable.***

(*Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033.) [emphasis added].

Pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 5-2001, Defendants failed to provide Plaintiff and all Rest Period Aggrieved Employees with duty-free rest periods of not less than ten (10) minutes for every major fraction of four (4) hours worked. Instead, Defendants regularly and consistently required Plaintiff and the other Rest Period Aggrieved Employees to remain on the premises during their rest periods as part of their common policies and practices. Specifically, Defendants rest period policy advised Plaintiff and the other Rest Period Aggrieved Employees that “Employees must stay on the premises during these paid breaks” and that “[f]ailure to strictly adhere to the Rest Break Policy will result in discipline, up to and including termination.” **Exh. 2.**

As discussed above, “[r]estricting employees to the employer’s premises, or worksite, means that the employee is subject to the employer’s control so as to constitute hours worked.” DLSE

Manual 45.1.5.1 (2016) at p. 45-3; *Morillion*, 22 Cal.4th 575 (2000) (holding that employees who could were required to remain on a bus and could eat and make phone calls were still subject to the employer's control). By requiring Plaintiff and the other Rest Period Aggrieved Employees to remain on the premises during rest periods, Defendants continued to exercise control over and restrained their employees from leaving the workplace, engaging in certain specified activities without restriction, and interfered with the right of their employees to take rest periods. For instance, Defendants' policy and practice had a chilling effect on the ability of employees to make personal phone calls while eating or smoking away from an area that Defendants could not easily monitor and/or their limited their ability to complain about workplace conditions during their breaks. Such conduct violated Labor Code § 226.7 and IWC Wage Order No. 7-2001. In addition, Defendants actively interfered with Plaintiff and the other aggrieved employees' ability to take lawful rest periods by locking the doors to the store during graveyard shifts. Due to Defendants' policy and practice of locking Plaintiff and the other aggrieved employees in the store during the graveyard/overnight shifts, Defendants both failed to authorize and permit lawful rest periods and actively obstructed them from taking lawful rest periods.

Moreover, as a result of its understaffing practices and policies, including the fact that Plaintiff and many of the Rest Period Aggrieved Employees were the only employees assigned to a particular work location who could perform a required and/or needed job function at a given time, it was not possible for Plaintiff and the other Rest Period Aggrieved Employees to take rest periods. Notably, although Defendants' rest period policies and practices are not compliant, they also pressured and coerced employees to forgo rest periods and made it difficult for employees to take lawful duty-free rest periods both due to their understaffing policies and practices and otherwise.

Further, Labor Code § 558 imposes a penalty upon employers "who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee." For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

DEFENDANTS VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 226(a), 226(e), and 226.3

As to Plaintiff and all aggrieved employees, Defendants also failed to provide accurate itemized wage statements in accordance with Labor Code § 226(a)(1, 2, 5, and 9). Labor Code § 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- (5) net wages earned;
- (6) the inclusive dates of the period for which the employee is paid;
- (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number;
- (8) the name and address of the legal entity that is the employer...;
- (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee...

Similarly, Labor Code § 226(e) provides:

- (e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.
- (2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.
- (B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:
 - (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).
 - (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of

item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

Due to Defendants' failure to pay Plaintiff and all aggrieved employees all rest period premiums, the wage statements issued by Defendants do not indicate the correct amount of gross wages earned, the total hours worked, the net wages earned, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Thus, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendants have violated Labor Code §226(a)(1), (2), (5), and (9) with respect to Plaintiff and all aggrieved employees.

Plaintiff and the aggrieved employees will prevail on their claim for PAGA penalties under Labor Code § 226(a). *See Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) ("hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the 'injury' and 'knowing and intentional' requirements of section 226(e)(1)."); *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 679 (2018) (finding that the "requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a).").

In addition to violating Labor Code § 226(a), Defendants also knowingly and intentionally failed to pay Plaintiff and all aggrieved employees rest periods premiums including at the proper rates. Moreover, Plaintiff and all aggrieved employees also suffered legal "injury" for purposes of Labor Code section 226(e) insofar as they were unable to readily and easily determine from the wage statements themselves the information required to be set forth by Section 226(a), the information provided by Defendants was confusing and inaccurate. In addition, Plaintiff and the aggrieved employees were unable to determine at all the total hours worked by the employee, the gross wages earned, the net wages earned, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee for the reasons discussed above.

Labor Code § 226.3 provides that "[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226." As explained in detail above, Defendant failed to provide Plaintiff and the other aggrieved employees with accurate itemized wage

statements. Accordingly, Plaintiff and the other aggrieved employees may also recover Labor Code § 226.3 penalties for Defendant's violations of Labor Code § 226(a).

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 204 AND 210

Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.” Violations of Labor Code § 204 are non-curable under PAGA pursuant to Labor Code § 2699.5.

As discussed in detail above, Defendants failed to pay Plaintiff and all aggrieved employees minimum wages, for the non-productive time associated with rest periods, overtime wages, rest period premiums owed, Defendants failed to timely pay the aggrieved employees for labor performed between the 1st and 15th days between the 16th calendar day of the month during which the labor was performed on a regular and consistent basis. Moreover, as a result of the conduct described in detail above, Defendants also failed to pay Plaintiff and the other aggrieved employees all wages owed for labor performed between the 16th and last day between the 1st and 10th day of the following month on a regular and consistent basis. In addition, Defendants failed to pay Plaintiff and the other late payment/itemized wage statement aggrieved employees who it pays on a bi-weekly basis within seven (7) days of the close of the payroll period as required by Labor Code § 204(d). *See Parson v. Golden State FC, LLC*, No. 16-cv-00405-JST, 2016 U.S. Dist. LEXIS 58299, 2016 WL 1734010, at *3-5 (N.D. Cal. May 2, 2016) (finding after *Ling* that a failure to pay rest period premiums can support claims under Labor Code §§ 203 and 204).

Labor Code § 210 provides that “in addition to, an entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld.” As a result of the faulty compensation policies and practices described in detail above, Plaintiff and the other aggrieved employees are entitled to recover penalties under Labor Code § 210 through PAGA. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of Labor Code section 210 penalties under PAGA due to the employer's failure to timely pay wages at the proper rate in accordance with a local wage ordinance).

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 201-203

Under Labor Code §§ 201-202, an employer must provide an employee wages at the time or discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, 68 Cal.App.4th 487, 492 (1998).

As described in detail above, Defendants failed to pay Plaintiff and other aggrieved employees whose employment concluded all wages owed, including but not limited to rest period premiums within the time constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation. Thus, as result of Defendants’ faulty policies described above, Plaintiff and all aggrieved employees left their employment with Defendants without being compensated for each and every hour worked at the appropriate rate in violation of Labor Code §§ 201, 202, and 203.

CONCLUSION

Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of the alleged Labor Code violations.

Very truly yours,

WINSTON LAW GROUP, P.C.

By: 
DAVID S. WINSTON

Certified Mail # 7019 0700 0001 5627 4676
7019 0700 0001 5627 4683
7019 0700 0001 5627 4690

Exhibit 1

WORKERS' COMPENSATION**NOTICE TO EMPLOYEE***California Labor Code section 2810.5***EMPLOYEE**

Employee Name: Renee Bunkley
Start Date: 04/13/2019

EMPLOYER

Legal Name of Hiring Employer: Beshay Enterprises

Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? Yes ☐ No ☒

Other Names Hiring Employer is "doing business as" (if applicable):

Physical Address of Hiring Employer's Main Office:

41856 Ivy Street, Suite 201, Murrieta CA 92562

Hiring Employer's Mailing Address (if different than above):

Same as above

Hiring Employer's Telephone Number: (951) 677-3976

If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work:

Name: --n/a--

Physical Address of Main Office: _____

Mailing Address: _____

Telephone Number: _____

WAGE INFORMATION

Rate(s) of Pay: \$12.00 Overtime Rate(s) of Pay: _____

Rate by (check box): ☒ Hour ☐ Shift ☐ Day ☐ Week ☐ Salary ☐ Piece rate ☐ Commission

☐ Other (provide specifics): _____

Does a written agreement exist providing the rate(s) of pay? (check box) ☐ Yes ☒ No

If yes, are all rate(s) of pay and bases thereof contained in that written agreement? ☐ Yes ☐ No

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

(If the employee has signed the acknowledgment of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)

Regular Payday: 7th and 22nd of every month

Beshay Foods, Inc.: (Beshay Foods, Inc., Restaurant Leadership Group, LLC, DMSD Foods, Inc. DMSD Restaurants, Inc., and Beshay Enterprises)

Insurance Carrier Name: ARCH Insurance Company

Address: One Sansome St. Ste 1400, San Francisco CA 94104

Telephone: (415) 490-9700

Policy Number: [REDACTED]

FEAST Foods, LLC/FEAST California Café, LLC:

Insurance Carrier Name: Security National Insurance Company

Address: 800 Superior Ave E., 21st, Cleveland , OH 44114

Telephone: (877) 528-7878

Policy Number FEAST Foods, LLC: [REDACTED]

Policy Number FEAST California Café, LLC: SWC1168247

PAID SICK LEAVE

Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee:

- a. May accrue paid sick leave and may request and use up to 3 days or 24 hours of accrued paid sick leave per year;
- b. May not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and
- c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for
 1. requesting or using accrued sick days;
 2. attempting to exercise the right to use accrued paid sick days;
 3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code;
 4. Cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor Code. The following applies to the employee identified on this notice: *(Check one box)*

- ☒ 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave.
- ☐ 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246.
- ☐ 3. Employer provides no less than 24 hours (or 3 days) of paid sick leave at the beginning of each 12-month period.
- ☐ 4. The employee is exempt from paid sick leave protection by Labor Code §245.5. (State exemption and specific subsection for exemption):-----

ACKNOWLEDGEMENT OF RECEIPT(Optional)

-----Laura Solie-----
(PRINT NAME of Employer representative)

Laura Solie
(SIGNATURE of Employer Representative)

04/16/2019

(Date)

(PRINT NAME of Employee)

Renee Bunkley

(SIGNATURE of Employee)

04/16/2019

(Date)

The employee's signature on this notice merely constitutes acknowledgement of receipt.

Labor Code section 2810.5(b) requires that the employer notify you in writing of any changes to the information set forth in this Notice within seven calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226; (b) Notice of all changes is provided in another writing required by law within seven days of the changes.

Exhibit 2

DMSD Foods, Inc.
a
Jack in the Box Franchisee

EMPLOYEE HANDBOOK

Effective January 1, 2018

***This Handbook supersedes all previous employee handbooks,
and all previous handbooks are hereby revoked.***

Failure to have good attendance may result in disciplinary action up to and including termination.

Employee may not leave a work shift early or close a location early without the prior approval of Management.

Any employee who fails to report for work for three (3) days without giving prior notice to the Company, may be considered to have voluntarily quit at the end of the employee's shift on the third day.

MEAL PERIOD POLICY

- Non-exempt employees working over 5 hours in any workday qualify for a 30 minute, unpaid, off duty meal period. If the employee works more than 10 hours in a day, they will receive a second 30 minute, unpaid, off duty meal period. Employees have the option of executing a Meal Period Waiver which allows them to work up to 6 hours without being required to take a 30 minute, unpaid, off-duty meal period. It also allows an employee who works more than 10 hours in a day to waive their second meal period.
- Employees should coordinate their meal breaks with the manager to ensure proper coverage.
- If for some reason you are unable to take a meal period before the 5th hour of your shift, you are required to immediately notify your manager for further direction.
- You are prohibited from performing any type of work on behalf of the Company at any point during your meal break and you may leave the building to take your meal period.
- You are responsible for clocking out and in for your meal period. You must clock out for a minimum of 30 minutes.
- Failure to strictly adhere to the Meal Period Policy will result in discipline, up to and including termination

REST BREAK POLICY

- Hourly employees will receive a 10-minute paid rest break for each 4 hours worked or major fraction thereof.
- Employees may not report to work later and/or leave early during their scheduled workday instead of taking their breaks. Also, they may not add a rest break onto a meal period.
- Employees should coordinate their rest breaks with the manager to ensure proper coverage.
- Employees must stay on the premises during these paid breaks.
- Failure to strictly adhere to the Rest Break Policy will result in discipline, up to and including termination.

LACTATION BREAK

The Company will provide a reasonable amount of unpaid break time to accommodate female Employees' needs to express breast milk for the employee's infant child. If possible, the Lactation Break time should be taken concurrent with the rest breaks or meal periods already provided. If the employee needs longer than a scheduled rest break to express milk, the remainder of the break will be unpaid. The Company will also make reasonable effort to provide the employee with the use of a room or other location in close proximity to the employee's work area for the employee to express milk in private. Employees should notify their manager if they are requesting time to express breast milk under this policy.