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Kern County Superior Court
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KIA SPURNEY, and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN
(UNLIMITED JURISDICTION)

KIA SPURNEY, on behalf of herself, the State of California, and as an "aggrieved employee" on behalf of other "aggrieved employees" under the Labor Code Private Attorneys General Act of 2004,

Plaintiff(s),

vs.

ELITE SPORTS BAR GROUP LLC, a California limited liability company; and DOES 1 through 50, inclusive,

Defendant(s).

Case No.: BCV-20-101293

CLASS ACTION

COMPLAINT FOR:

1. Failure to Provide Meal and Rest Periods (Lab. Code §§ 226.7, 512, and 1198);
2. Failure to Indemnify (Lab. Code §§ 1198 & 2802)
3. Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198);
4. Wage Statement Penalties (Lab. Code § 226);
5. Waiting Time Penalties (Lab. Code §§ 201, 202, 203);
6. Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*); and
7. Civil Penalties (Lab. Code §§ 2968, *et seq.*).

JURY TRIAL DEMANDED

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Plaintiff KIA SPURNEY (hereafter "Plaintiff"), on behalf of herself and all others similarly situated, complains and alleges as follows:

INTRODUCTION

1. Plaintiff brings this class and representative action based on alleged violations of the California Labor Code, Industrial Welfare Commission Order No. 5-2001 (hereafter "the Wage Order") and the Business and Professions Code against defendants ELITE SPORTS BAR GROUP LLC, a California limited liability company; and DOES 1 through 50, inclusive (collectively "Defendants").

2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to her and other similarly situated current and former employees in California for unpaid wages and other related relief. These claims are based on Defendants' alleged failures to (1) provide all rest and meal periods; (2) indemnify for necessary work-related expenditures; (3) pay all wages for all hours worked; (4) provide accurate written wage statements; (5) timely pay all wages upon termination, and (6) fairly compete. Additionally, Plaintiff seeks civil penalties under the California Private Attorneys General Act, Labor Code §§ 2698, *et seq.* ("PAGA") based on these allegations. Accordingly, Plaintiff now seeks to recover civil penalties, unpaid wages, and related relief through this class action.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction because the aggregate claims of Plaintiff and Class Members, inclusive of all relief, place more than $25,000 in controversy.

4. There is no basis for federal question subject matter jurisdiction in this case. Specifically, Plaintiff asserts claims on behalf of herself and Class Members that solely arise under California law, rather than federal law.

5. There is also no basis for federal diversity jurisdiction in this case.

6. Venue is proper in Kern County pursuant to California Code of Civil Procedure § 395(a) and § 395.5 in that liability arose in Kern County because at least some of the transactions that are the subject matter of this Complaint occurred therein and/or because each defendant is found, maintains offices, transacts business, and/or has an agent therein.

PARTIES

7. Plaintiff KIA SPURNEY is a natural person and resident of the State of California. At all relevant times, Plaintiff was an "employee" within the meaning of Title 8 California Code

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of Regulations Section 11160 and an “aggrieved employee” within the meaning of the California Labor Code Section 2699(c).

8. Defendant ELITE SPORTS BAR GROUP, LLC is a California limited liability company headquartered in Contra Costa County, California, and doing business in the State of California based on Plaintiff’s information and belief.

9. Plaintiff is ignorant of the true names, capacities, relationships, and extents of participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but is informed and believes and thereon alleges that said defendants are legally responsible for the wrongful conduct alleged herein and therefore sues these defendants by such fictitious names. Plaintiff will amend the complaint to allege the true names and capacities of the DOE defendants when ascertained.

10. Plaintiff is informed and believes and thereon alleges that, at all relevant times herein, all Defendants were the agents, employees and/or servants, masters or employers of the remaining Defendants, and in doing the things hereinafter alleged, were acting within the course and scope of such agency or employment, and with the approval and ratification of each of the other Defendants.

11. At all relevant times, in perpetrating the acts and omissions alleged herein, Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack of a practice which resulted in Defendants not paying Plaintiff and other members of the below-described class in accordance with applicable California labor laws as alleged herein.

12. Plaintiff is informed and believes and thereon alleges that each and every one of the acts and omissions alleged herein were performed by, and/or attributable to, all Defendants, each acting as agents and/or employees, and/or under the direction and control of each of the other Defendants, and that said acts and failures to act were within the course and scope of said agency, employment and/or direction and control.

CLASS ACTION ALLEGATIONS

13. This action has been brought and may be maintained as a class action pursuant to California Code of Civil Procedure § 382 because there is a well-defined community of interest among the persons who comprise the readily ascertainable class defined below and because Plaintiff is unaware of any difficulties likely to be encountered in managing this case as a class action.

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14. **Class Definition:** The class is defined as follows: All persons Defendants employed in California as hourly employees, including but not limited to servers, performers, and other hourly employees in comparable positions (individually, "Class Members"), at any time during the period beginning four years prior to the filling of this action and ending on the date that final judgment is entered in this action.

15. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff reserves the right to amend or modify the class definition with greater specificity, by further division into subclasses and/or by limitation to particular issues.

16. **Numerosity:** The Class Members are so numerous that the individual joinder of each individual Class Member is impractical. While Plaintiff does not currently know the exact number of Class Members, Plaintiff is informed and believes that the actual number exceeds the minimum required for numerosity under California law.

17. **Commonality and Predominance:** Common questions of law and fact exist as to all Class Members and predominate over any questions which affect only individual Class Members. These questions include, but are not limited to:

A. Whether Defendants failed to pay all wages earned to Class Members for all hours worked;

B. Whether Defendants failed to provide the Class Members with all rest periods as required by section 12 of the Wage Order;

C. Whether Defendants failed to provide the Class Members with all meal periods as required by section 11 of the Wage Order;

D. Whether Defendants failed to indemnify for all business expenses;

E. Whether Defendants knowingly and intentionally failed to provide the Class Members with accurate wage statements;

F. Whether Defendants violated California Labor Code §§ 201-203 by failing to provide all wages earned and due at the time of termination;

G. Whether Defendants engaged in unfair competition within the meaning of Business and Professions Code §§ 17200, *et seq.*, with respect to the Class Members;

H. Whether the Class Members are entitled to restitution of money or property that Defendants may have acquired from them through alleged Labor Code violations;

I. Whether the Class Members are entitled to prejudgment interest; and

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J. Whether the Class Members are entitled to attorneys' fees.

18. **Typicality:** Plaintiff's claims are typical of the other Class Members' claims. Plaintiff is informed and believes and thereon alleges that Defendants have a policy, practice or a lack of a policy which resulted in Defendants failing to comply with the California Labor Code, the Wage Order, and the Business and Professions Code as alleged herein.

19. **Adequacy of Class Representative:** Plaintiff is an adequate class representative in that she has no interests that are adverse to, or otherwise in conflict with, the interests of absent Class Members. Plaintiff is dedicated to vigorously prosecuting this action on behalf of Class Members. Plaintiff will fairly and adequately represent and protect the interests of Class Members.

20. **Adequacy of Class Counsel:** Plaintiff's counsel are adequate class counsel in that they have no known conflicts of interest with Plaintiff or absent Class Members, are experienced in wage and hour class action litigation and are dedicated to vigorously prosecuting this action on behalf of Plaintiff and absent Class Members.

21. **Superiority:** A class action is vastly superior to other available means for fair and efficient adjudication of Class Members' claims and would be beneficial to the parties and the Court. Class action treatment will allow a number of similarly situated persons to simultaneously and efficiently prosecute their common claims in a single forum without the unnecessary duplication of effort and expense that numerous individual actions would entail. In addition, the monetary amounts due to many individual Class Members are likely to be relatively small and would thus make it difficult, if not impossible, for individual Class Members to both seek and obtain relief. Moreover, a class action will serve an important public interest by permitting Class Members to effectively pursue the recovery of monies owed to them. Further, a class action will prevent the potential for inconsistent or contradictory judgments inherent in individual litigation.

STATEMENT OF FACTS

22. Defendants first employed Plaintiff in approximately June of 2016 to work as a non-exempt hourly server at their restaurant located in Bakersfield, California. Plaintiff continuously worked for Defendants from the time of her hire until on or about October 1, 2018 when her first term of employment ended. Defendants again employed Plaintiff beginning in April of 2019 as a non-exempt hourly server at their Bakersfield, California restaurant. Plaintiff continuously worked for Defendants in this capacity from the time of her rehire until

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approximately August 1, 2019, when her second term of employment ended.

23. At all relevant times, Defendants compensated Plaintiff and the Class Members at an hourly rate and issued their wages on a bi-weekly basis. At all relevant times, Defendants classified Plaintiff and the Class Members as non-exempt employees entitled to the protections of both the Labor Code and Wage Order.

24. At all relevant times, Defendants failed to provide Plaintiff and the Class Members adequate rest periods and premium wages for missed rest periods in violation of California law. Defendants failed to permit Plaintiff and the Class Members to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof during most of their workdays. On the occasions Defendants permitted Plaintiff and the Class Members to take ten-minute rest breaks, Defendants frequently interrupted these breaks and required Plaintiff and the Class members to return to work before they had taken ten minutes of break time. On information and belief, Defendants did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement ("DLSE").

25. At relevant times, Defendants failed to provide Plaintiff and the Class Members with an off-duty 30-minute meal period before the end of the fifth hour worked. Instead, Defendants regularly required Plaintiff and the Class Members to work through their meal periods

26. At relevant times, Defendants also required Plaintiff and the Class to perform work while clocked out. Defendants required Plaintiff and the Class to study and memorize their menus while off-the-clock. On the occasions when Defendants updated their menus, Defendants required Plaintiff and the Class to demonstrate their menu knowledge by passing tests on Defendant's online testing platform, "Peaks Point," while clocked out for work. Defendants did not pay Plaintiff and the Class Members for this work time.

27. Defendants required Plaintiff and the Class to incur certain business expenses in the course of performing their duties. These business expense included the purchase of several uniforms, including, but not limited to, lingerie sets for Defendants' "Lingerie Days." Such lingerie sets included garter belts, brassieres, stockings, and underwear of specific colors pertaining to the events in question. For instance, Defendants required Plaintiff and the Class to purchase green lingerie sets for Defendants' St. Patrick's Day Lingerie Days. Defendants further required Plaintiff and the Class to purchase Ugg boots or snow boots as part of their work

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uniforms. Defendants also required Plaintiff and the Class to maintain specific hairstyles and manicures as part of their work uniforms. When Plaintiff requested reimbursement for these expenses, Defendants' managers instructed her to "keep your receipts" and "write it off in your taxes."

28. Defendants further required Plaintiff and the Class to use their personal mobile telephones to communicate with Defendants and failed to reimburse them for this expense.

29. Defendants also consistently failed to pay all wages for all hours worked by Plaintiff and the Class. Defendants regularly edited Plaintiff's and the Class Members' time records to reflect work days of shorter duration than those actually worked. As a result, Defendants have failed to properly itemize the gross and net wages earned, total hours worked, hourly rate of pay, and corresponding number of hours worked at each hourly rate of Plaintiff and the Class.

30. At all relevant times, upon resignation or termination, Defendants failed to pay final wages in a timely manner. Defendants willfully failed and refused to pay timely compensation and wages for, among other things, unpaid regular and overtime wages for all hours worked off-the-clock, that Defendants subsequently edited out of Plaintiff's and the Class Members' time records.

FIRST CAUSE OF ACTION

FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS

(Lab. Code §§ 226.7, 512, and 1198)

(By Plaintiff and the Class against all Defendants)

31. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

32. At all relevant times during the applicable limitations period, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 226.7, 512, 1198, and the Wage Order.

33. In relevant part, California Labor Code § 1198 states:

> The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.

34. In relevant part, California Labor Code § 512 states:

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> An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and the employee.
>
> An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 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.

35. In relevant part, Section 12 of the Wage Order states:

> **Rest Periods**
>
> (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
>
> (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

36. In relevant part, Section 11 of the Wage Order states:

> **Meal Periods**
>
> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time work. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the

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> employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not covered.

37. "[I]n the context of an eight-hour shift, '[a]s a general matter,' one rest break should fall on either side of the meal break. *(Ibid.)" Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1032, 273 P.3d 513, 531.

38. In addition, California Labor Code § 226.7 states

> (b) 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, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
>
> (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

39. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the Class Members were entitled to uninterrupted meal periods of at least 30 minutes for each day they worked five or more hours. Pursuant to California Labor Code § 512, they were also entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

40. Pursuant to the Wage Order, Plaintiff and the Class Members were entitled to be provided with net rest breaks of at least ten minutes for each four hour period of work, or major fraction thereof.

41. Defendants failed to provide Plaintiff with all required 30-minute meal periods and 10-minute rest periods in accordance with the Wage Order. Plaintiff is informed and believes and thereon alleges that, at relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants failure to provide the Class Members with all off-duty meal periods and rest breaks required by California law.

42. Defendants failed to pay Plaintiff the additional wages required by California Labor Code § 226.7 for all rest breaks not provided to her. Plaintiff is informed and believes and thereon alleges that, at relevant times within the applicable limitations period, Defendants have

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maintained a policy, practice, or a lack of a policy which resulted in Defendants failure to provide the Class Members with additional wages for all rest breaks not provided to them as required by California Labor Code § 226.7.

43. As a result of Defendants' unlawful conduct, Plaintiff and the Class Members have suffered damages in amounts, subject to proof, to the extent they were not paid additional wages owed for all meal periods and rest breaks not provided to them.

44. By reason of the above, Plaintiff and the Class Members are entitled to premium wages for workdays in which one or more off-duty meal periods were not provided to them, and for workdays in which one or more rest breaks were not provided to them.

SECOND CAUSE OF ACTION

FAILURE TO INDEMNIFY

(Lab. Code §§ 1198 & 2802)

(By Plaintiff and the Class against all Defendants)

45. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

46. At all relevant times, Plaintiff and the Class have been employees of Defendants and entitled to the benefits and protections of California Labor Code section 2802 and the Wage Order.

47. In pertinent part, California Labor Code section 2802(a) states, "An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties."

48. Section 9(B) of the Wage Order states,

> When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

49. Labor Code section 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

50. At relevant times during the applicable limitations period, Defendants required Plaintiff and the Class Members to use personal mobile telephones to communicate with

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Defendants as a necessary condition of employment. Defendants failed to indemnify Plaintiff and the Class Members for these expenses both during and after their employment ended. Defendants further required Plaintiff and the Class Members incur expenses relating to their uniforms, such as the purchase various articles of clothing and the preparation of their hair and nails in particular fashions. Defendants failed to indemnify Plaintiff and the Class Members for their uniform-related expenses, instead instructing them to "write it off in [their] taxes."

51. Plaintiff is informed and believes and thereon alleges that, at all relevant times, Defendants maintained a policy, practice, or a lack of a policy which resulted in Defendants' failure to indemnify Plaintiff and the Class for the reasonable expenses they incurred during the course of performing their duties.

52. By reason of the above, Plaintiff and the Class Members are entitled to reimbursement for all necessary expenditures and losses and interest due and owing to them within four (4) years of the date of the filing of the Complaint until the date of entry of judgment pursuant to California Labor Code section 2802(b).

53. Accordingly, with respect to this cause of action, on behalf of herself and the Class members, Plaintiff prays for the above stated relief, costs, and all reasonable attorneys' fees pursuant to Labor Code § 2802(c) and as otherwise permitted by law.

THIRD CAUSE OF ACTION

FAILURE TO PAY EMPLOYEES ALL WAGES FOR ALL HOURS WORKED

(Lab. Code §§ 510, 1194, 1197, and 1198)

(By Plaintiff and the Class against all Defendants)

54. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

55. At all relevant times, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of the California Labor Code §§ 510, 1194, 1197, and 1198, and the Wage Order.

56. Section 2 of the Wage Order defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

57. Section 3 of the Wage Order states:

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to

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> employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:
>
> (a) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7^{th}) consecutive day of work in a workweek; and
>
> (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.
>
> (c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

58. Section 4 of the Wage Order requires an employer to pay non-exempt employees at least the minimum wage set forth therein for all hours worked, which is consistent of all hours that an employer has actual or constructive knowledge that the employees are working.

59. Labor Code section 510 states:

> Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of

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overtime work.

60. California Labor Code § 1194 invalidates any agreement between an employer and an employee to work for less than the minimum wage required under the Wage Order.

61. California Labor Code § 1197 makes it unlawful for an employer to pay an employee less than the minimum wage required under the Wage Order for all hours worked during a payroll period.

62. California Labor Code § 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

63. Defendants are required to pay overtime compensation to all employees, unless they are made exempt from the overtime pay requirements by the Legislature or the IWC. Plaintiff and Class Members have not qualified for any exemption at any time relevant to this action. Therefore, Plaintiff and Class Members have at all times relevant to this action been entitled to be paid overtime compensation for all overtime hours worked.

64. Employers must compensate non-exempt employees for "off-the-clock" work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

65. With respect to overtime wages, the regular rate of pay under California law must include "all remuneration for employment paid to, on behalf of, the employee." O.L. 2002.06.14 (quoting 29 U.S.C. § 207(e)). This requirement includes, but is not limited, to, non-discretionary bonuses. *See, e.g., Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904–05. Commissions and bonuses must be included in the regular rate whether they are the sole source of the employee's compensation or are in addition to a guaranteed salary or hourly rate. 29 C.F.R. §§778.117, 778.208. *See Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

66. Plaintiff is informed and believes that, at all relevant times, Defendants have applied centrally devised policies and practices to her and the Class Members with respect to working conditions and compensation arrangements.

67. Defendants compensated Plaintiff and the Class Members with an hourly rate of pay on a bi-weekly basis.

68. Plaintiff is informed and believes and thereon alleges that, at all relevant times, Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants'

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failure to compensate the Class Members for all hours worked as required by California law, including, but not limited to, all regular and overtime wages for hours they worked that Defendants subsequently removed from their time records, and all regular and overtime wages for the work they performed by memorizing Defendants' menu options and performing assessments on Defendants' "Peaks Point" application while off-the-clock.

69. As a result of Defendants' unlawful conduct, Plaintiff and the other Class Members have suffered damages in an amount, subject to proof, to the extent they were not paid the full amount of wages earned during each pay period during the applicable limitations period.

70. Pursuant to Labor Code section 1194, Plaintiff, on behalf of herself and Class Members, seeks to recover unpaid wages, liquidated damages in amounts equal to the amounts of unpaid wages, interest thereon, and awards of reasonable costs and attorneys' fees, all in amounts subject to proof.

FOURTH CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE, WRITTEN WAGE STATEMENTS

(Lab. Code § 226)

(By Plaintiff and the Class Members against all Defendants)

71. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

72. At all relevant times during the applicable limitations period, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of California Labor Code § 226.

73. Pursuant to California Labor Code § 226(a), Plaintiff and the Class Members were entitled to receive, semimonthly or at the time of each payment of wages, an accurate itemized statement showing among other things: a) gross wages earned; b) total hours worked; c) net wages earned; d) all deductions; e) the inclusive dates of the period for which the employee is paid; e) the name of the employee and only the last four digits of his or her social security number or an employee identification number; f) the name and address of the legal entity that is the employer; g) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

74. Pursuant to California Labor Code § 226(e), 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

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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.

75. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer injury if the employer fails to provide a wage statement. Also, an employee is deemed to suffer injury if the employer fails to provide accurate and complete information as required by California Labor Code § 226(a) and the employee cannot "promptly and easily determine" from the wage statement alone one or more of the following:

A. 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 California Labor Code § 226(a);

B. Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period;

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

D. 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.

76. "Promptly and easily determine," as stated in California Labor Code § 226(e), means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

77. As alleged herein, Defendants failed to provide Plaintiff and the Class Members all wages owed, including but not limited to, all regular and overtime wages for work they performed that Defendants subsequently edited out of their time records, and all regular and overtime wages for work Plaintiff and the Class Members performed while clocked out. As a result, Defendants have failed to properly and accurately itemize each employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked by employees and other requirements of California Labor Code § 226. As a result, Defendants have violated California Labor Code § 226.

78. Defendants' failure to provide Plaintiff and the Class Members with accurate

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wage statements was knowing and intentional. Defendants had the ability to provide Plaintiff and the Class Members with accurate wage statements but intentionally provided wage statements that Defendants knew were not accurate.

79. As a result of being provided with inaccurate wage statements by Defendants, Plaintiff and the Class Members have suffered injury. Their legal rights to receive accurate wage statements were violated and they were misled about the amount of wages they had actually earned and were owed. In addition, the absence of accurate information on their wage statements prevented immediate challenges to Defendants' unlawful pay practices, has required discovery and mathematical computations to determine the amounts of wages owed, has caused difficulty and expense in attempting to reconstruct time and pay records and/or has led to the submission of inaccurate information about wages to state and federal government agencies. Further, Plaintiff and the Class Members were not able to ascertain from the wage statements whether Defendants complied with their obligations under California Labor Code § 226(a).

80. Pursuant to California Labor Code § 226(e), Plaintiff and the Class are entitled to recover the greater of actual damages, or penalties of fifty dollars ($50.00) for the initial pay period in which a violation of California Labor Code § 226(a) occurred and one hundred dollars ($100.00) for each violation of California Labor Code § 226(a) in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000.00) per Class Member, and are also entitled to an award of costs and reasonable attorneys' fees.

FIFTH CAUSE OF ACTION

WAITING TIME PENALTIES

(Lab. Code §§ 201-203)

(By Plaintiffs and the Class against all Defendants)

81. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

82. At all relevant times during the applicable limitations period, Plaintiff and the Class have been non-exempt employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 201 to 203 and the Wage Order.

83. California Labor Code § 201 provides that all earned and unpaid wages of an employee who is discharged are due and payable immediately at the time of discharge.

84. California Labor Code § 202 provides that all earned and unpaid wages of an employee who quits after providing at least 72-hours notice before quitting are due and payable

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at the time of quitting and that all earned and unpaid wages of an employee who quits without providing at least 72-hours notice before quitting are due and payable within 72 hours.

85. By failing to pay all earned minimum, regular, and overtime wages to Plaintiff and the Class Members as described above, Defendants failed to timely pay Plaintiff and the Class Members all earned and unpaid wages in violation of California Labor Code §§ 201 or 202.

86. Plaintiff is informed and believes that Defendants' failures to timely pay all final wages to her and the Class Members have been willful in that Defendants have the ability to pay final wages in accordance with California Labor Code §§ 201 and 202 but have intentionally adopted policies or practice that are incompatible with those requirements.

87. California Labor Code § 203 provides that the wages of an employee continue on a daily basis as a penalty for up to 30 days where an employer willfully fails to timely pay earned and unpaid wages to the employee in accordance with California Labor Code §§ 201 or 202.

88. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff and the Class all of their earned and unpaid wages have been willful in that, at all relevant times, Defendants have deliberately maintained policies and practices that violate the requirements of the Labor Code and the Wage Order even though, at all relevant times, they have had the ability to comply with those legal requirements.

89. Pursuant to California Labor Code § 203, Plaintiff seeks waiting time penalties on behalf of herself and the Class Members, in amounts subject to proof not to exceed 30 days of waiting time penalties for each Class Member.

<u>SIXTH CAUSE OF ACTION</u>

UNFAIR COMPETITION

(Bus. & Prof. Code §§ 17200, *et seq.*)

(By Plaintiff and the Class against all Defendants)

90. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

91. At all relevant times during the applicable limitations period, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of the Business and Professions Code §§ 17200, *et seq*.

92. The unlawful conduct of Defendants alleged herein amount to and constitutes unfair competition within the meaning of California Business & Professions Code §§ 17200, *et seq*. Due to their unfair and unlawful business practices alleged herein, Defendants have unfairly

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gained a competitive advantage over other comparable companies doing business in California that comply with their legal obligations to, among other things, provide their employees with all off-duty meal and rest periods, pay them all earned wages for all regular and overtime hours worked, and indemnify them for all necessary business expenditures.

93. As a result of Defendants' unfair competition as alleged herein, Plaintiff and the Class Members have suffered injuries in fact and lost money or property. Defendants deprived Plaintiff and the Class Members of regular wages, overtime wages, premium wages for all workdays one or more meal periods were not provided, and premium wages for all workdays rest periods were not provided. Plaintiff and the Class Members were further harmed by Defendants' failure to reimburse Plaintiff and the Class Members for all their business expenses.

94. Pursuant to California Business & Professions Code § 17203, Plaintiff and the Class Members are entitled to restitution of all monies rightfully belonging to them that Defendants did not pay them or otherwise retained by means of their unlawful and unfair business practices.

95. Plaintiff and the Class Members are entitled to reasonable attorneys' fees in connection with their unfair competition claims pursuant to California Code of Civil Procedure § 1021.5, the substantial benefit doctrine and/or the common fund doctrine.

96. Accordingly, with respect to this cause of action, on behalf of herself and the Class, Plaintiff prays for the herein stated relief, an award of all reasonable costs and attorneys' fees, including interest thereon, as permitted by law, all in amounts subject to proof.

SEVENTH CAUSE OF ACTION

CIVIL PENALTIES

(By Plaintiff and the Class against all Defendants)

97. Plaintiff incorporates all paragraphs of the Complaint as if fully alleged herein.

98. Labor Code § 204 states

> (a) All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, 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. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. …
>
> (b) (1) Notwithstanding any other provision of this section, all wages

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> earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.
>
> (2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.
>
> (c) However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall apply to the covered employees.
>
> (d) The requirements of this section shall be 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.

99. Defendants paid wages to employees on bi-weekly intervals. Defendants failed to pay Plaintiff on such intervals for all wages earned and all hours worked. On information and belief, Plaintiff alleges that Defendants also failed to pay the aggrieved employees on such intervals for all wages earned and all hours worked.

100. During the applicable time period, Defendants violated California Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1174.5, 1194, 1197, 1198, and 2802.

101. California Labor Code §§2699(a) and (g) authorize an aggrieved employee, on behalf of themselves and other current or former employees, to bring a civil action to recover civil penalties pursuant to the procedures specified in California Labor Code § 2699.3.

102. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Class are entitled to recover civil penalties for each of the Defendants' violations of California Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802 during the applicable limitations period in the following amounts:

A. For violations of California Labor Code § 204, one hundred dollars ($100.00) for each aggrieved employee for each initial violation and two hundred dollars ($200.00) for each aggrieved employee for each subsequent, willful or intentional violation (penalty amounts established by California Labor Code § 210).

B. For violations of California Labor Code § 226(a), two hundred fifty dollars ($250.00) for each aggrieved employee for each initial violation and one thousand dollars

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($1,000.00) for each aggrieved employee for each subsequent violation (penalty amounts established by California Labor Code § 226.3)

C. For violations of California Labor Code §§ 510 and 512, fifty dollars ($50.00) for each aggrieved employee for each initial violation and one hundred dollars ($100.00) for each aggrieved employee for each subsequent violation per pay period (penalty amounts established by California Labor Code § 558).

D. For violations of California Labor Code § 1174, five hundred dollars ($500.00) for each aggrieved employee for each violation (penalty amounts established by California Labor Code § 1174.5).

E. For violations of California Labor Code § 1197, one hundred dollars ($100.00) for each aggrieved employee for each initial violation and two hundred fifty dollars ($250.00) for each aggrieved employee for each subsequent violation per pay period (regardless of whether the initial violations were intentionally committed) (penalty amounts established by California Labor Code § 1197.1).

F. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194, 1198, and 2802, one hundred dollars ($100.00) for each aggrieved employee per pay period for each initial violation and two hundred dollars ($200.00) for each aggrieved employee per pay period for each subsequent violation (penalty amounts established by California Labor Code § 2699(f)(2)).

G. For violations of California Labor Code § 221, one hundred dollars ($100.00) for each aggrieved employee for each initial violation of California Labor Code § 221 (if found to be neither willful nor intentional) and two hundred dollars ($200.00) for each aggrieved employee (if found to be either willful or intentional) and for each subsequent violation of California Labor Code § 221 (regardless of whether they are found to be willful or intentional) (penalties set by California Labor Code § 225.5).

103. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated March 27, 2020, Plaintiff filed written notice online with the Labor and Workforce Development Agency ("LWDA") and gave written notice by certified mail to Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. Plaintiff accompanied her LWDA notice with a fee in the amount of $75.00. A true and correct copy of Plaintiff's letter

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to the LWDA dated March 27, 2020 is attached hereto as **Exhibit A**. The LWDA has failed to take action in response within 65 calendar days of the date of Plaintiff's notice, but Plaintiff anticipates the LWDA will provide written notice to Plaintiff informing her that it does not intend to investigate these allegations.

104. Pursuant to California Labor Code § 2699(g), Plaintiff and the aggrieved employees are entitled to an award of civil penalties and reasonable attorneys' fees and costs in connection with their claims for civil penalties.

<u>PRAYER FOR RELIEF</u>

105. WHEREFORE, Plaintiff, on behalf of herself and the Class Members, prays for relief and judgment against Defendants as follows:

A. An order that the action be certified as a class action;

B. An order that Plaintiff be appointed class representative;

C. An order that counsel for Plaintiff be appointed class counsel;

D. Unpaid wages;

E. Premium wages;

F. Actual damages;

G. Statutory penalties;

H. Civil Penalties;

I. Declaratory relief;

J. Actual damages;

K. Liquidated damages;

L. Restitution;

M. Pre-judgment interest and post-judgment interest;

N. Costs of suit;

O. Interest;

P. Reasonable attorneys' fees; and

Q. Such other relief as the Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and all others similarly situated, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: June 3, 2020

By______________________________

DAVID SPIVAK
CARL KAPLAN
Attorneys for Plaintiff, KIA SPURNEY and all others similarly situated

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EXHIBIT A

SPIVAK LAW

***SENT BY ELECTRONIC SUBMISSION, AND CERTIFIED U.S. MAIL ***

March 27, 2020

Attn: PAGA Administrator
Labor and Workforce Development Agency
http://dir.tflaforms.net
Via Electronic Submission

RE: *Kia Spurney / Twin Peaks*

To whom it may concern:

This notice concerns the following employers:

1. Elite Sports Bar Group LLC, a California limited liability company; and
2. Twin Restaurant Holdings, LP, a Delaware limited partnership

Collectively, the aforementioned employers are herein referred to as "Twin Peaks."

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Kia Spurney (hereafter "Spurney") provides notice on behalf of herself and of all individuals currently and formerly employed in California as hourly employees, including but not limited to servers, performers, and other hourly employees in comparable positions (hereafter referred to collectively as "Aggrieved Employees") by Twin Peaks, of violations of California Labor Code §§ 201, 202, 203, 204, 221226, 226.7, 510, 512, 1174, 1174.5, 1194, 1197, 1198, and 2802.

At all relevant times, Twin Peaks has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Spurney and the Aggrieved Employees are "employees" within the meaning of Industrial Welfare Commission Order No. 5-2001 (hereafter "the Wage Order"

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or "Wage Order 5"), paragraph 2.F, and "Aggrieved Employees" within the meaning of California Labor Code § 2699(c).

Statement of Facts

Twin Peaks began to employ Spurney in approximately June of 2016 as a non-exempt hourly server at its restaurant located in Bakersfield, California. Spurney continuously worked for Twin Peaks from the time of her hire until on or about October 1, 2018, when she left to care for her newborn child. Twin Peaks again employed Spurney beginning April of 2019 as a non-exempt hourly server at its Bakersfield, California restaurant. Spurney continuously worked for Twin Peaks in this capacity from the time of her rehire until approximately August 1, 2019, when her employment ended.

At all relevant times, Twin Peaks employed Spurney and the other Aggrieved Employees and issued their paychecks on a bi-weekly basis. At all relevant times, Twin Peaks classified Spurney and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and Wage Order.

At all relevant times, Twin Peaks failed to provide Spurney and the Aggrieved Employees adequate rest periods and premium wages for missed rest periods in violation of California law. Twin Peaks failed to permit Spurney and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof during most of their workdays. On the occasions Twin Peaks permitted Spurney and the Aggrieved Employees to take ten-minute rest breaks, Twin Peaks frequently interrupted these breaks and required Spurney and the Aggrieved Employees to return to work before they had ten minutes of break time. Twin Peaks did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement.

At relevant times, Twin Peaks failed to provide Spurney and the Aggrieved Employees with an off-duty, 30-minute meal period before the end of the fifth hour worked. Instead, Twin Peaks regularly required Spurney and the Aggrieved Employees to work through their meal periods.

Twin Peaks also required Spurney and the Aggrieved Employees to perform work while clocked out. Twin Peaks required Spurney and the Aggrieved Employees to study and memorize its menus while off-the-clock. On the occasions when Twin Peaks updated its menus, Twin Peaks required Spurney and the Aggrieved Employees to demonstrate their menu knowledge by passing tests on Twin Peaks's online testing platform, "Peaks Point," while clocked out for work. Twin Peaks did not pay Spurney and the Aggrieved Employees for this work time.

Twin Peaks required Spurney and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. These business expenses included the purchase of several uniforms, including, but not limited to, lingerie sets for Twin Peaks' "Lingerie Days." Such lingerie sets included garter belts, brassieres, stockings, and underwear of specific colors pertaining to the events in question – for instance, Twin peaks required Spurney and the Aggrieved Employees to purchase green lingerie sets for Twin Peaks's St. Patrick's Day Lingerie Days. Twin Peaks further required Spurney and the Aggrieved Employees to purchase Ugg boots or snow boots as part of their work uniforms. Twin Peaks also required Spurney and the Aggrieved Employees to maintain specific hair styles and manicures as part of their work uniforms. When Spurney requested reimbursement for these expenses, Twin Peaks managers instructed her to "keep your receipts" and "write it off in your taxes."

Twin Peaks further required Spurney and the Aggrieved Employees to use their personal mobile telephones to communicate with Twin Peaks and failed to reimburse them for this expense.

Twin Peaks also consistently failed to pay all wages for all hours worked by Spurney and the Aggrieved Employees. Twin Peaks regularly edited Spurney's and the Aggrieved Employees' time records to reflect work days of shorter duration than those actually worked.

For the reasons herein, Spurney alleges the following violations of the California Labor Code and the Wage Order on behalf of herself and the Aggrieved Employees:

a) Twin Peaks failed to provide Spurney and the other Aggrieved Employees with all timely, off-duty rest breaks and meal periods;

b) Twin Peaks failed to compensate Spurney and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more meal periods required by law;

c) Twin Peaks failed to compensate Spurney and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more rest breaks required by law;

d) Twin Peaks failed to pay Spurney and the other Aggrieved Employees for all hours worked at the correct rates of pay including, but not limited to, minimum and overtime pay due to off-the-clock work;

e) Twin Peaks failed to indemnify Spurney and the other Aggrieved Employees for all necessary business expenditures incurred during the discharge of their duties;

f) Twin Peaks failed to provide Spurney and the Aggrieved Employees with accurate wage statements;

g) Twin Peaks failed to timely pay Spurney and the Aggrieved Employees all earned and unpaid wages during employment;

h) Twin Peaks unlawfully deducted the wages Spurney and the Aggrieved Employees earned, including, but not limited to, regular and overtime wages;

i) Twin Peaks failed to timely pay Spurney and the Aggrieved Employees who are former employees all earned and unpaid wages at the time of separation from employment; and

j) Twin Peaks willfully failed to maintain accurate employment records regarding Spurney and the Aggrieved Employees.

Accordingly, Spurney now seeks civil penalties on behalf of herself and the other Aggrieved Employees based on Twin Peaks's alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to "all persons employed in the public housekeeping industry[.]" Wage Order § 1. The phrase "public housekeeping industry" includes restaurants. *Id.* § 2 (P)(1).

At all relevant times during the applicable limitations period, Twin Peaks employed Spurney and the other Aggrieved Employees as servers and employees in comparable positions. Accordingly, Spurney and the other Aggrieved Employees are entitled to the protections provided under the Wage Order.

Failure To Provide Rest Breaks And Meal Periods (Lab. Code §§ 226.7, 512, and 1198)

In relevant part, California Labor Code § 1198 states:

> The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.

In relevant part, California Labor Code § 512 states:

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.
>
> An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 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.

In relevant part, Section 11 of Wage Order 5 states:

> Meal Periods:
>
> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30-minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the- job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

…

(D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

In relevant part, Section 12 of Wage Order 5 states:

Rest Periods:

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

In relevant part, California Labor Code § 558.1 states:

(a) Any 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, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.

(b) For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of § 3294 of the Civil Code.

Section 17 of the Wage Order states:

> If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the division.

Twin Peaks has intentionally and improperly failed to provide all duty-free rest breaks and/or meal periods free from any work or duties to Spurney and the other Aggrieved Employees as required by law. Twin Peaks did not pay premium wages to Spurney and Aggrieved Employees on days it failed to provide them with one or more timely meal and rest periods as required by law. In failing to do so, Twin Peaks violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Spurney seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows:

1. $100 for each aggrieved employee for each initial violation of California Labor Code § 226.7, and $200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));

2. $50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and $100 for each Aggrieved

Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 558); and

3. $100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and $200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

<u>Failure to Indemnify for Expenses</u>
(Lab Code § 2802)

In pertinent part, California Labor Code § 2802(a) states, "An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties."

At relevant times during the applicable limitations period, Twin Peaks required Spurney and the Aggrieved Employees to use personal mobile telephones to communicate Twin Peaks as a necessary condition of employment. Twin Peaks failed to indemnify Spurney and the Aggrieved Employees for these expenses both during and after their employment ended. Twin Peaks further required Spurney and the Aggrieved Employees incur expenses relating to their uniforms, such as the purchase various articles of clothing and the preparation of their hair and nails in particular fashions. Twin Peaks failed to indemnify Spurney and the Aggrieved Employees for their uniform-related expenses, instead instructing them to "write it off in [their] taxes."

Accordingly, Spurney seeks civil penalties on behalf of herself and the Aggrieved Employees as follows: $100 for each Aggrieved Employee per pay period in which initial violations of California Labor Code § 2802 occurred, and $200 for each Aggrieved Employee per pay period in which subsequent violations of § 2802 occurred (penalties set by California Labor Code § 2699(f)(2)).

///

<u>Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay</u>
(Lab Code §§ 510, 1194, 1197, and 1198)

Under California Labor Code § 1197, "The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful."

In relevant part, section 2(K) of the Wage Order states,

> "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]

In relevant part, California Labor Code § 1194 states,

> (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the […] legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of […] overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

In relevant part, Section 3 of the Wage Order states,

> (A) Daily Overtime - General Provisions
>
> (1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8)

> hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:
>
> (a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7^{th}) consecutive day of work in a workweek.
>
> (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

> Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

With respect to overtime wages, the regular rate of pay under California law must include "all remuneration for employment paid to, on behalf of, the employee." O.L. 2002.06.14 (quoting 29 U.S.C. § 207(e)). This requirement includes, but is not limited, to, non-discretionary bonuses. See, e.g., *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904–05.

Commissions and bonuses must be included in the regular rate whether they are the sole source of the employee's compensation or are in addition to a guaranteed salary or hourly rate. 29 C.F.R. §§778.117, 778.208. See *Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Employers must compensate non-exempt employees for "off-the-clock" work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

At all relevant times during the applicable limitations period, Twin Peaks knowingly failed to pay Spurney and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, all regular and overtime wages for hours they worked that Twin Peaks subsequently removed from their time records, and all regular and overtime wages for the work they performed by memorizing Twin Peaks' menu options and performing assessments on Twin Peaks's "Peaks Point" application while off-the-clock.

Accordingly, Spurney seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows:

1. $50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and $100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by Labor Code § 558);

2. $100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and $200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));

3. $100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and $200 for each Aggrieved Employee for each

subsequent violation, per pay period (penalties set by California labor Code § 2699(f)(2)); and

4. $100 for each Aggrieved Employee for each initial violation of California Labor Code § 1197, and $250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalties set by California Labor Code § 1197.1).

<u>Unlawful Collection of Wages</u>
(Lab. Code § 221)

In relevant part, California Labor Code § 221 states, "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

Twin Peaks illegally and arbitrarily deducted several minutes from Spurney's and the Aggrieved Employees' time records and reported on their wage statements less hours than their actual hours worked. As a result, Twin Peaks collected and received part of Spurney's and the Aggrieved Employees' wages in violation of California Labor Code § 221.

Accordingly, Spurney seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows: $100 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be neither willful nor intentional), and $200 for each employee for each initial violation of California Labor Code 221 (if found to be either willful or intentional) and for each subsequent violation of California Labor Code § 221 (regardless of whether they are found to be either willful or intentional) (penalties set by California Labor Code § 225.5).

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<u>Failure to Provide Accurate Written Wage Statements</u>
(Lab. Code § 226)

California Labor Code § 226 requires employers to furnish employees with accurate itemized written wage statements showing:

1) Gross wages earned

2) Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission;

3) The number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;

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;

8) The name and address of the legal entity that is the employer; and

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.

At relevant times during the applicable limitations period, Twin Peaks violated California Labor Code § 226 because it did not properly and accurately itemize each employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the employee and other requirements of California Labor Code § 226. Twin Peaks failed to state in the wage statements it issued to Spurney and the other Aggrieved Employees all their hours worked and wages earned, including, but not limited to, regular and overtime wages for work they performed that Twin Peaks subsequently edited out of their time records, and regular and overtime wages for work they performed while clocked out.

Accordingly, Spurney now seeks civil penalties for the Labor Code violations that Twin Peaks has committed against herself and the other Aggrieved Employees as follows: $250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and $1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

Failure to Timely Pay Wages During Employment
(Lab. Code § 204)

California Labor Code § 204 states that all wages (other than those mentioned in Labor Code sections 201-202) 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. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

As alleged herein, Twin Peaks consistently failed to timely pay all wages to Spurney and the Aggrieved Employees. Twin Peaks failed to provide Spurney and the other Aggrieved Employees all wages owed, including, but not limited to, (1) all premium wages for missed, interrupted, or late meal and rest periods; (2) all regular and overtime wages for time they worked that Twin Peaks subsequently edited out of their time records; and (3) all regular and overtime wages for work they performed off-the-clock. As a result, Twin Peaks failed to pay Spurney and the other Aggrieved Employees all wages within the time periods set by California Labor Code § 204. As a result, Twin Peaks has violated California Labor Code § 204. Because of Twin Peaks's failure to fully pay Spurney and the other Aggrieved Employees within the time periods set by California Labor Code § 204, Twin Peaks failed to timely pay all wages due during employment.

Accordingly, Spurney seeks civil penalties on behalf of herself and Aggrieved Employees as follows:

(1) $100 for each Aggrieved Employee for each initial violation of California Labor Code § 204; and

(2) $200 for each Aggrieved Employee for each subsequent violation of California Labor Code § 204 (penalties set by Labor Code § 210).

Failure to Timely Pay Wages After Separation of Employment
(Lab. Code §§ 201, 202 and 203)

Under California Labor Code § 201, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under California Labor Code § 202, if an employee, not having a written contract for a definite period, quits his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) 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. Notwithstanding any other provision of law, an employee who quits without providing a seventy-two (72) hour notice shall be entitled to receive payment by mail if he or she so requests at a designated mailing address. *Id.* The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within seventy-two (72) hours of the notice of quitting. *Id.*

Under California Labor Code § 203, if an employer willfully fails to timely pay in accordance with California Labor Code §§ 201 and 202, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

As alleged herein, Twin Peaks failed to provide Spurney and the other Aggrieved Employees all wages owed at the time of resignation or termination including, but not limited to, regular and overtime wages for all hours they worked that Twin Peaks subsequently edited out of their time records, and regular and overtime wages they earned for work they performed off-the-clock. As a result, Twin Peaks failed to pay Spurney and other Aggrieved Employees all wages within the time periods set by California Labor Code §§ 201, 202 and 203. As a result, Twin Peaks has violated California Labor Code §§ 201, 202 and 203.

Accordingly, Spurney seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows: $100 for each Aggrieved Employee per pay period in which initial violations of California Labor Code §§ 201, 202 and 203 occurred, and $200 for each Aggrieved Employee per pay period in which subsequent violations occurred (penalties set by California Labor Code § 2699(f)(2)).

<u>Failure to Maintain Accurate Employment Records</u>
(Lab. Code §§ 1174, 1174.5, 1198)

Labor Code § 1174, which also pertains to recordkeeping, states:

> Every person employing labor in this state shall:
> ...
>
> (c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

> (d) Keep, 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. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Section 7 of Wage Order states,

> (A) Every employer shall keep accurate information with respect to each employee including the following:
>
> > (1) Full name, home address, occupation and social security number.
> >
> > (2) Birth date, if under 18 years, and designation as a minor.
> >
> > (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
> >
> > (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
> >
> > (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Twin Peaks has willfully failed to maintain the records required by § 1174 and the Wage Order, including but not limited to, 1) all premium wages for missed, interrupted, or late meal and rest periods; (2) all regular and overtime wages for time they worked that Twin Peaks subsequently edited out of their time records; and (3) all regular and overtime wages for work they performed off-the-clock. Accordingly, Spurney seeks civil penalties from Twin Peaks on behalf of herself and the other Aggrieved Employee as follows:

1. $500 for each aggrieved employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and

2. $100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and $200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

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Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g) (1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure section 1021.5 to resolve this matter before litigation.

Sincerely,

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cc: Kia Spurney
Walter Haines, Esq.

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