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Clerk of the Superior Court
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11 ESTEBAN HERNANDEZ, and all others similarly situated

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF MERCED**
14 **(UNLIMITED JURISDICTION)**

15 ESTEBAN HERNANDEZ, on behalf of
16 himself, the State of California, and as an
17 “aggrieved employee” on behalf of other
18 “aggrieved employees” under the Labor Code
19 Private Attorneys General Act of 2004,

20 *Plaintiff(s),*

21 vs.

22 PELUSO MEXICAN CHEESE, a California
23 corporation; and DOES 1 through 50, inclusive,

24 *Defendant(s).*

Case No.: 20CV-01553

CLASS ACTION

COMPLAINT FOR:

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

JURY TRIAL DEMANDED



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1 Plaintiff ESTEBAN HERNANDEZ (hereafter “Plaintiff”), on behalf of himself and all
2 others similarly situated, complains and alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff brings this class and representative action based on alleged violations of
5 the California Labor Code, Industrial Welfare Commission Order No. 8-2001 (hereafter “the
6 Wage Order”) and the Business and Professions Code against defendant PELUSO MEXICAN
7 CHEESE, a California corporation doing business as The Best Tasting Cheese; and DOES 1
8 through 50, inclusive (collectively “Defendants”).

9 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
10 him, the State of California, and other similarly situated current and former employees in
11 California for unpaid wages and other related relief. These claims are based on Defendants’
12 alleged failures to (1) pay all wages for all hours worked, (2) provide all rest and meal periods,
13 (3) provide fresh and pure drinking water at reasonable and convenient times and places; (4)
14 provide accurate written wage statements, (5) timely pay all wages upon termination, and (6)
15 fairly compete. Accordingly, Plaintiff now seeks to recover unpaid wages and related relief
16 through this class and representative action.

17 **JURISDICTION AND VENUE**

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

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

23 5. Venue is proper in Merced County pursuant to California Code of Civil Procedure
24 § 395(a) and § 395.5 in that liability arose in Merced County because at least some of the
25 transactions that are the subject matter of this Complaint occurred therein and/or because each
26 defendant is found, maintains offices, transacts business, and/or has an agent therein.

27 **PARTIES**

28 6. Plaintiff ESTEBAN HERNANDEZ is a natural person and resident of the State of
California.

7. Defendant PELUSO MEXICAN CHEESE is a California corporation and is doing
business in the State of California.



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

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

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

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

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

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

15 C. Whether Defendants failed to pay all wages earned to Class Members for
16 all hours worked;

17 D. Whether Defendants failed to provide the Class Members with fresh and
18 pure drinking water at reasonable and convenient times and places;

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

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

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

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

 18. **Adequacy of Class Representative:** Plaintiff is an adequate class representative
in that he 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.

19. **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.

20. **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

21. Defendants first employed Plaintiff as a non-exempt hourly cheese maker at its factory and storefront, Hacienda Cheese, on or about August 1, 2019 and continuously employed him in this capacity until on or about December 16, 2019, when his employment ended. At all relevant times, Plaintiff was an "employee" within the meaning of Title 8 of the California Code of Regulations Section 11040 and an "aggrieved employee" within the meaning of Labor Code Section 2699(c).

22. At all relevant times, Defendants compensated Plaintiff and other Class Members at an hourly rate and paid their wages on a semimonthly basis.

23. At all relevant times, Defendants failed to provide Plaintiff and the Class with adequate rest periods, and compensation 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 fraction thereof during most of their workdays. Although 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



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1 work. Additionally, Defendants required Plaintiff and the Class Members to remain on the
2 factory premises during their rest periods. Defendants did not seek an exemption from the rest
3 period protections of Industrial Welfare Commission Order No. 8-2001 (the “Wage Order”) from
4 the California Division of Labor standards Enforcement.

5 24. At relevant times, Defendants failed to provide Plaintiff and the Class Members
6 with an off-duty, 30-minute meal period before the end of the fifth hour worked. Plaintiff’s
7 supervisor, Jose (last name unknown), regularly required Plaintiff and the Class to finish their
8 assigned tasks – such as mixing cheese, shoveling cheese, and moving cheese into freezers –
9 before clocking out for their meal periods. As a result, Defendants frequently provided late meal
periods to Plaintiff and the Class.

10 25. Defendants also required Plaintiff and the Class Members to perform work while
11 clocked out. Defendants required Plaintiff and the Class to pass through a sanitization station and
12 don their uniforms – including hair nets, beard nets, and boots – prior to clocking in. Due to
13 inadequate space in Defendants’ changing rooms, Plaintiff and the Class Members regularly had
14 to wait in line in order to don their uniforms. Further, upon donning their uniforms, Defendants
15 required Plaintiff and the Class Members to punch in to work on a single machine. Due to the
16 general disrepair of Defendants’ timekeeping machine, Plaintiff and the Class Members would
17 frequently need to punch in several times in order to receive a legible reading. All told, these
18 procedures would take anywhere from five to fifteen minutes off-the-clock to complete.
19 Defendants required Plaintiff and the Class to perform the same procedures at the end of their
shifts.

20 26. Defendants further failed to provide Plaintiff and the Class with fresh and pure
21 drinking water, despite the fact that Defendants’ cheese factory could reach temperatures in
22 excess of 100 degrees Fahrenheit.

23 27. Defendants also failed to timely pay Plaintiff and the Class their earned wages.
24 Defendants paid Plaintiff and the Class Members on a semi-monthly basis. However, Defendants
consistently issued Plaintiff’s and the Class Members’ paychecks one to two days late.

25 28. Moreover, Defendants failed to timely pay all wages to Plaintiff and the Class
26 upon resignation or termination of employment. Plaintiff quit his position with Defendants on
27 December 16, 2019. However, Defendants failed to provide Plaintiff with his final paycheck until
28 December 20, 2019.



29. For the reasons stated herein, Plaintiff alleges the following violations of the California Labor Code and the Wage Order on behalf of himself and the Class Members:

- a) Defendants failed to provide Plaintiff and the Class Members with all rest breaks and meal periods;
- b) Defendants failed to pay Plaintiff and the Class Members one hour's pay for each workday in which they failed to provide Plaintiff and the Class Members with one or more rest breaks required by law;
- c) Defendants failed to pay Plaintiff and the Class Members one hour's pay for each workday in which they failed to provide them with one or more meal periods required by law;
- d) Defendants failed to pay Plaintiff and the Class Members for all hours worked at the correct rates of pay, including, but not limited to, minimum, regular, and overtime wages;
- e) Defendants failed to provide Plaintiff and the Class with fresh and pure drinking water at reasonable and convenient times and places;
- f) Defendants failed to provide Plaintiff and the Class Members with accurate wage statements; and
- g) Defendants failed to timely pay Plaintiff and the Class Members during employment and at the time of termination the wages they earned.

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)

- 30. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.
- 31. At all relevant times during the applicable limitations period, Plaintiff and the Class Members have been non-exempt employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 226.7, 512, 1198, and the Wage Order.
- 32. 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.

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

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 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.

34. 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 of ten (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.”

35. 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 employee and the employee.

(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 work day that the meal period is not provided.

(C) 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."

36. In relevant part, California Labor Code § 226.7 states:

(b) An employer shall not require an employee to work during a meal or rest 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 period or rest 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 work day that the meal or rest period is not provided.

37. 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.

38. 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.



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39. Defendants intentionally failed to provide Plaintiff and the Class Members with all required 30-minute duty free meal periods and 10-minute rest periods in accordance with the Wage Order. Plaintiff is informed and believes and thereon alleges that, at all relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants not providing the Class with all off-duty meal periods and rest breaks required by California law.

40. As a result of Defendants' unlawful conduct, Plaintiff and the 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.

41. By reason of the above, pursuant to California Labor Code section 226.7, 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 PAY EMPLOYEES ALL WAGES FOR ALL HOURS WORKED AT
CORRECT RATES OF PAY
(Lab. Code §§ 510, 1194, 1197, and 1198)
(By Plaintiff and the Class against all Defendants)

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

43. 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.

44. Section 3 of the applicable 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 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 (7th) 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.

45. 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 overtime work.

46. 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.

47. During the Class Period, Plaintiff and the Class Members have worked in excess of eight (8) hours in a workday, twelve (12) hours in a workday, (40) hours in a workweek, and in excess of eight (8) hours on the seventh day of a workweek.



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1 48. Throughout the Class Period, Defendants have failed and refused to pay Plaintiff
2 and the Class Members overtime compensation for their overtime hours worked as required by
3 California law.

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

7 50. California Labor Code § 1194 invalidates any agreement between an employer
8 and an employee to work for less than the minimum or overtime wage required under the
9 applicable Wage Order.

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

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

16 53. With respect to overtime wages, the regular rate of pay under California law must
17 include “all remuneration for employment paid to, on behalf of, the employee.” O.L. 2002.06.14
18 (quoting 29 U.S.C. § 207(e)). This requirement includes, but is not limited, to, non-discretionary
19 bonuses. *See, e.g., Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893,
20 904–05. Commissions and bonuses must be included in the regular rate whether they are the sole
21 source of the employee’s compensation or are in addition to a guaranteed salary or hourly rate.
22 29 C.F.R. §§778.117, 778.208. *See Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

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

26 55. At all relevant times, Defendants compensated Plaintiff and the Class Members
27 with an hourly rate of pay on a semimonthly basis.

28 56. At all relevant times, Defendants failed to pay Plaintiff and the Class Members
for all hours worked at the correct rates of pay, including, but not limited to, regular and overtime
wages for all regular and overtime hours they worked while clocked out.

57. Plaintiff is informed and believes and thereon alleges that, at all relevant times,



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1 Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants’
2 failure to compensate the Class Members for all hours worked as required by California law.

3 58. As a result of Defendants’ unlawful conduct, Plaintiff and the other Class
4 Members have suffered damages in an amount, subject to proof, to the extent they were not paid
5 the full amount of wages earned during each pay period during the applicable limitations period,
6 including minimum and overtime wages.

7 59. Pursuant to Labor Code section 1194, Plaintiff, on behalf of himself and Class
8 Members, seeks to recover unpaid wages, liquidated damages in amounts equal to the amounts
9 of unpaid wages, interest thereon, and awards of reasonable costs and attorneys’ fees, including
10 interest thereon, as permitted by law, all in amounts subject to proof.

11 **THIRD CAUSE OF ACTION**

12 **FAILURE TO PROVIDE ACCURATE, WRITTEN WAGE STATEMENTS**

13 **(Lab. Code § 226)**

14 **(By Plaintiff and the Class Members against all Defendants)**

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

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

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

27 63. Pursuant to California Labor Code § 226(e), an employee suffering injury as a
28 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



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1 is entitled to an award of costs and reasonable attorney's fees.

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

7 A. The amount of the gross wages or net wages paid to the employee during
8 the pay period or any of the other information required to be provided on the itemized wage
9 statement pursuant to California Labor Code § 226(a);

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

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

16 D. The name of the employee and only the last four digits of his or her social
17 security number or an employee identification number other than a social security number.

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

21 66. As alleged herein, Defendants failed to provide Plaintiff and the Class Members
22 all wages owed, including but not limited to regular and overtime wages for work performed off-
23 the-clock. As a result, Defendants have failed to properly and accurately itemize each employee's
24 gross wages earned, net wages earned, the total hours worked, the corresponding number of hours
25 worked by employees and other requirements of California Labor Code § 226. As a result,
26 Defendants have violated California Labor Code § 226.

27 67. Defendants' failure to provide Plaintiff and the Class Members with accurate
28 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.

68. As a result of being provided with inaccurate wage statements by Defendants,



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

10 **FOURTH CAUSE OF ACTION**

11 **WAITING TIME PENALTIES**

12 **(Lab. Code §§ 201-203)**

13 **(By Plaintiffs and the Class against all Defendants)**

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

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

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

20 72. California Labor Code § 202 provides that all earned and unpaid wages of an
21 employee who quits after providing at least 72-hours notice before quitting are due and payable
22 at the time of quitting and that all earned and unpaid wages of an employee who quits without
23 providing at least 72-hours notice before quitting are due and payable within 72 hours.

24 73. By failing to pay all earned minimum, regular, overtime, and premium wages to
25 Plaintiffs and the Class Members as described above, Defendants failed to timely pay Plaintiff
26 and the Class Members all earned and unpaid wages in violation of California Labor Code §§
27 201 or 202.

28 74. Plaintiff is informed and believes that Defendants’ failures to timely pay all final
wages to him 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.



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practices.

83. 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.

SIXTH CAUSE OF ACTION

CIVIL PENALTIES

(By Plaintiff and the Class against all Defendants)

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

85. 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 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



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the close of the payroll period.

86. Defendants paid wages to employees on regular 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.

87. During the applicable time period, Defendants violated California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1174.5, 1194, 1197, 1198, and 2441.

88. 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.

89. 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, 226, 226.7, 510, 512, 1174, 1174.5, 1194, 1197, 1198, and 2441 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 (\$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 § 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).



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1 E. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,
2 1198, and 2441, one hundred dollars (\$100.00) for each aggrieved employee per pay period for
3 each initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay
4 period for each subsequent violation (penalty amounts established by California Labor Code §
5 2699(f)(2)).

6 90. Plaintiff has complied with the procedures for bringing suit specified in California
7 Labor Code § 2699.3. By letter dated March 3, 2020, Plaintiff filed written notice online with the
8 Labor and Workforce Development Agency (“LWDA”) and gave written notice by certified mail
9 to Defendants of the specific provisions of the California Labor Code alleged to have been
10 violated, including the facts and theories to support the alleged violations. Plaintiff accompanied
11 his LWDA notice with a fee in the amount of \$75.00. A true and correct copy of Plaintiff’s letter
12 to the LWDA dated March 3, 2020 is attached hereto as **Exhibit A**. The LWDA has failed to
13 take action in response within 65 calendar days of the date of Plaintiff’s notice, but Plaintiff
14 anticipates the LWDA will provide written notice to Plaintiff informing him that it does not
15 intend to investigate these allegations.

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

19 **PRAYER FOR RELIEF**

20 92. WHEREFORE, Plaintiff, on behalf of himself and the Class Members, prays for
21 relief and judgment against Defendants as follows:

- 22 A. An order that the action be certified as a class action with respect to
23 Plaintiff’s claims for violations of California law;
- 24 B. An order that Plaintiff be appointed class representative;
- 25 C. An order that counsel for Plaintiff be appointed class counsel;
- 26 D. Unpaid wages;
- 27 E. Premium wages;
- 28 F. Statutory penalties;
- G. Civil Penalties;
- H. Declaratory relief;
- I. Actual damages;



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- J. Liquidated damages;
- K. Restitution;
- L. Pre-judgment interest and post-judgment interest;
- M. Costs of suit;
- N. Interest;
- O. Reasonable attorneys’ fees; and
- P. Such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

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

Respectfully submitted,
THE SPIVAK LAW FIRM

Dated: May 7, 2020

By 

DAVID SPIVAK
CARL KAPLAN
Attorneys for Plaintiff, ESTEBAN
HERNANDEZ and all others similarly situated



EXHIBIT A



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

March 3, 2020

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

RE: *Esteban Hernandez / Peluso Mexican Cheese*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Esteban Hernandez (hereafter “Hernandez”) provides notice on behalf of himself and of all individuals currently and formerly employed in California as hourly employees, including but not limited to cheese makers and other hourly employees in comparable positions (hereafter referred to collectively as “Aggrieved Employees”) by Peluso Mexican Cheese doing business as The Best Tasting Cheese (hereafter “Peluso”), a California corporation, of violations of California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1174.5, 1197, 1198, 2441, and 2802.

At all relevant times, Peluso has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Hernandez and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 8-2001 (hereafter “the Wage Order” or “Wage Order 5”), paragraph 2.F, and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

Peluso began to employ Hernandez on or about August 1, 2019 as a non-exempt hourly cheese maker at its factory and storefront, Hacienda Cheese, located in

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Los Banos, California. Hernandez continuously worked for Peluso from the time of his hire until on or about December 16, 2019, when his employment ended.

At all relevant times, Peluso employed Hernandez and the other Aggrieved Employees and issued their paychecks on a semi-monthly basis. At all relevant times, Peluso classified Hernandez and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and Wage Order.

At all relevant times, Peluso failed to provide Hernandez and the Aggrieved Employees adequate rest periods and compensation for missed rest periods in violation of California law. Peluso failed to permit Hernandez 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. Although Peluso permitted Hernandez and the Aggrieved Employees to take ten-minute rest breaks, Peluso frequently interrupted these breaks and required Hernandez and the Aggrieved Employees to return to work. Additionally, Peluso required Hernandez and the Aggrieved Employees to remain on the factory premises during their rest periods. Peluso 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, Peluso failed to provide Hernandez and the Aggrieved Employees with an off-duty, 30-minute meal period before the end of the fifth hour worked. Hernandez's supervisor Jose (last name unknown), regularly required Hernandez and the Aggrieved Employees to finish their assigned tasks – such as mixing cheese, shoveling cheese, and moving cheese into freezers – before clocking out for their meal periods. As a result, Peluso frequently provided only late meal periods to Hernandez and the Aggrieved Employees.

Peluso also required Hernandez and the Aggrieved Employees to perform work while clocked out. Peluso required Hernandez and the Aggrieved Employees to pass through a sanitization station and don their uniforms – including hair nets, beard nets, and boots – prior to clocking in. Due to inadequate space in Peluso's changing rooms, Hernandez and the Aggrieved Employees regularly had to wait in line in order to don their uniforms. Further, upon donning their uniforms, Peluso required Hernandez and the Aggrieved Employees to punch in to work

on a single machine. Due to the general disrepair of Peluso's timekeeping machine, Hernandez and the Aggrieved Employees would frequently need to punch in several times in order to receive a legible reading. All told, these procedures could take anywhere from five to fifteen minutes off the clock to complete. Peluso required Hernandez and the Aggrieved Employees to perform the same procedures at the end of their shifts.

Peluso further failed to provide fresh and pure drinking water to Hernandez and the Aggrieved Employees, despite the fact that the cheese factory could reach temperatures in excess of 100 degrees Fahrenheit.

Peluso also failed to timely pay Hernandez and the Aggrieved Employees their earned wages. Peluso paid Hernandez and the Aggrieved Employees on a semi-monthly basis. However, Peluso consistently issued Hernandez's and the Aggrieved Employees' paychecks one to two days late.

Additionally, Peluso failed to timely pay all wages to Hernandez and the Aggrieved Employees upon termination of their employment. Hernandez quit on December 16, 2019. However, Peluso failed to provide him with his final paycheck until December 20, 2019.

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

- a) Peluso failed to provide Hernandez and the other Aggrieved Employees with all timely, off-duty rest breaks and meal periods;
- b) Peluso failed to compensate Hernandez 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) Peluso failed to compensate Hernandez 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) Peluso failed to pay Hernandez 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) Peluso failed to provide Hernandez and the Aggrieved Employees with fresh and pure drinking water at reasonable and convenient times and places;
- f) Peluso failed to provide Hernandez and the Aggrieved Employees with accurate wage statements;
- g) Peluso failed to timely pay Hernandez and the Aggrieved Employees all earned and unpaid wages during employment;
- h) Peluso failed to timely pay Hernandez and the Aggrieved Employees who are former employees all earned and unpaid wages at the time of separation from employment; and
- i) Peluso willfully failed to maintain accurate employment records regarding Hernandez and the Aggrieved Employees.

Accordingly, Hernandez now seeks civil penalties on behalf of himself and the other Aggrieved Employees based on Peluso's alleged violations of the California Labor Code and the Wage Order.

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The Wage Order

The Wage Order applies to “all persons employed in the industries handling products after harvest whether paid on a time, piece rate, commission, or other basis[.]” Wage Order § 1. The Wage Order defines “Industries Handling Products After Harvest” to include:

“any industry, business, or establishment operated for the purpose of grading, sorting, cleaning, drying, cooling, icing, packing, dehydrating, cracking, shelling, candling, separating, slaughtering, picking, plucking, shucking, pasteurizing, fermenting, ripening, molding, or otherwise preparing any agricultural, horticultural, egg, poultry, meat, seafood, rabbit, or dairy product for distribution, and includes all the operations incidental thereto.”

§ 2(H).

At all relevant times during the applicable limitations period, Peluso employed Hernandez and the other Aggrieved Employees as cheese makers and employees in comparable positions. Accordingly, Hernandez 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.

Peluso has intentionally and improperly failed to provide all duty-free rest breaks and/or meal periods free from any work or duties to Hernandez and the other Aggrieved Employees as required by law. Peluso did not pay premium wages to Hernandez 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, Peluso violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Hernandez seeks civil penalties on behalf of himself 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 in addition to an amount sufficient to recover underpaid wages (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)).

Failure to Provide Drinking Water
(Lab Code §§ 2441, and 1198)

Pursuant to California Labor Code § 2441(a), “Every employer of labor in [California] shall, without making a charge therefor, provide fresh and pure drinking water to his or her employees during working hours. Access to the drinking water shall be permitted at reasonable and convenient times and places.”

At all relevant times, Peluso failed to provide Hernandez and the Aggrieved Employees with free access to fresh and pure drinking water, despite the high temperatures in the cheese factory, which could exceed 100 degrees Fahrenheit.

Accordingly, Hernandez seeks civil penalties on behalf of himself and the other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of California Labor Code § 2441, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay
(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 (7th) 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, Peluso knowingly failed to pay Hernandez 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 the work they performed prior to clocking in at the beginning of their shifts and after clocking out at the end of their shifts.

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

1. \$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));
2. \$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
3. \$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).

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Failure to Provide Accurate Written Wage Statements
(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, Peluso 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. Peluso failed to state in the wage statements it issued to Hernandez 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 while clocked out.

Accordingly, Hernandez now seeks civil penalties for the Labor Code violations that Peluso has committed against himself 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, Peluso frequently failed to timely pay any wages to Hernandez and the Aggrieved Employees. Peluso regularly issued paychecks to Hernandez and the Aggrieved Employees one to two days after the checks were due. Further, Peluso failed to provide Hernandez and the other Aggrieved Employees all wages owed, including, but not limited to, all premium wages for missed, interrupted, or late meal and rest periods, as well as all regular and overtime wages for work performed off-the-clock. As a result, Peluso failed to pay Hernandez and the other Aggrieved Employees all wages within the time periods set by California Labor Code § 204. As a result, Peluso has violated California Labor

Code § 204. Because of Peluso's failures to fully pay Hernandez and the other Aggrieved Employees within the time periods set by California Labor Code § 204, Peluso failed to timely pay all wages due during employment.

Accordingly, Hernandez seeks civil penalties on behalf of himself 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, Peluso failed to provide Hernandez and the other Aggrieved Employees all wages owed at the time of resignation or termination including, but not limited to, regular and overtime wages they earned for work they performed off-the-clock during missed or interrupted meal periods. As a result, Peluso failed to pay Hernandez and other Aggrieved Employees all wages within the time periods set by California Labor Code §§ 201, 202 and 203. As a result, Peluso has violated California Labor Code §§ 201, 202 and 203.

Accordingly, Hernandez seeks civil penalties on behalf of himself 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)).

Failure to Maintain Accurate Employment Records
(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.

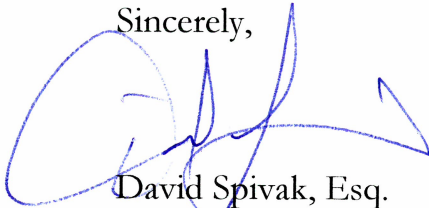
Peluso has willfully failed to maintain the records required by § 1174 and the Wage Order, including but not limited to, the all premium wages earned for missed meal and rest periods and all regular and overtime wages earned for all hours worked. Accordingly, Hernandez seeks civil penalties from Peluso on behalf of himself 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)).

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,



David Spivak, Esq.
david@spivaklaw.com

cc: Esteban Hernandez
Walter Haines, Esq.

LWDA / Peluso Mexican Cheese

3/3/2020

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Peluso Mexican Cheese, a California corporation
c/o Henry M. Guerrero
Agent for Service of Process
1247 Highland Avenue, Suite 5
National City, CA 91950