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and as representative for the State of California on behalf of all other aggrieved employees

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

JENNIFER BURNHAM, on behalf of herself
and as representative for the State of California
on behalf of all other aggrieved employees,

Plaintiff,

v.

SELECT COMFORT RETAIL
CORPORATION, a Minnesota Corporation;
and DOES 1 through 10, Inclusive,

Defendants.

CASE NO. 37-2020-00020928-CU-OE-CTL
REPRESENTATIVE ACTION COMPLAINT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004
[Labor Code §§ 2698, et seq.]

1. Civil Penalties Pursuant to the PAGA for Failure to Pay Minimum, Regular, and Overtime Wages (Lab. Code §§ 2698, et seq.);
2. Civil Penalties Pursuant to the PAGA for Failure to Provide Meal Periods (Lab. Code §§ 2698, et seq.);
3. Civil Penalties Pursuant to the PAGA for Failure to Provide Rest Periods (Lab. Code §§ 2698, et seq.);
4. Civil Penalties Pursuant to the PAGA for Failure to Provide Accurate Itemized Wage Statements (Lab. Code §§ 2698, et seq.);
5. Civil Penalties Pursuant to the PAGA for Failure to Timely Pay Wages Due During Employment (Lab. Code §§ 2698, et seq.);
6. Civil Penalties Pursuant to the PAGA for Failure to Timely Pay Wages Due Upon Separation of Employment (Lab. Code §§ 2698, et seq.);

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7. Civil Penalties Pursuant to the PAGA for Failure to Reimburse Business-Related Expenses (Lab. Code §§ 2698, *et seq.*); and
8. Civil Penalties Pursuant to the PAGA for Failure to Maintain Accurate Records (Lab. Code §§ 2698, *et seq.*).

1 Plaintiff JENNIFER BURNHAM (“Plaintiff”), on behalf of herself and as representative for the
2 State of California, the California Labor and Workforce Development Agency (“LWDA”), and on
3 behalf of all other aggrieved employees, hereby alleges as follows:

4 I.

5 INTRODUCTION

6 1. Plaintiff brings this representative action pursuant to the Private Attorneys General Act of
7 2004 (“PAGA”), Labor Code sections 2698, *et seq.*, against SELECT COMFORT RETAIL
8 CORPORATION, a Minnesota Corporation, and DOES 1 through 10, Inclusive (collectively,
9 “Defendants”) to recover civil penalties arising out of Defendants’ labor code violations including
10 failure to: pay all wages; inform of and provide off-duty meal and rest periods; provide accurate
11 itemized wage statements; timely pay all wages due during and upon separation of employment;
12 reimburse necessary business-related expenses; and maintain accurate records.

13 2. Plaintiff has given written notice of these claims and allegations to the California Labor
14 and Workforce Development Agency (“LWDA”) on April 13, 2020. A true and correct copy of
15 Plaintiff’s Notice showing compliance with Labor Code section 2699.3 is attached hereto as **Exhibit**
16 **1**. As there has been no LWDA intervention within 65 days of that notice, Plaintiff asserts claims for
17 civil penalties as a representative for and on behalf of the State of California in a representative
18 capacity, as provided by the PAGA to the extent permitted by law, as an aggrieved non-exempt
19 employee. Plaintiff is an aggrieved employee and has standing to bring a representative action on
20 behalf of the State of California and the LWDA as a private attorney general.

21 3. Plaintiff asserts claims for civil penalties as a representative of the State of California, as
22 authorized by the PAGA, and to the extent permitted by law, on behalf of aggrieved employees who
23 held the positions identified herein and suffered one or more of the violations alleged. Labor Code §§
24 2698, *et seq.*, 2699.3(a)(2)(C).

25 4. Plaintiff seeks to represent all current and former non-exempt employees of Defendants
26 in California who suffered one or more of the alleged violations (“aggrieved employees”) during the
27 period one year and 65 days before this Complaint is filed until the start of trial in this matter (“PAGA
28 Period”).

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II.

JURISDICTION AND VENUE

5. Venue as to each Defendant is proper in this judicial district. Code of Civil Procedure section 395. Defendants conduct business and commit Labor Code violations in San Diego County, and each Defendant or Doe is within California for service of process. The unlawful acts alleged have a direct effect on aggrieved employees within California and within San Diego County.

6. This Court has jurisdiction over Plaintiff's claims because Defendants regularly conduct business in California; are alleged to have violated the law in California; Plaintiff's claims raise no federal question; and, PAGA civil penalty actions are not subject to federal jurisdiction.

7. This Court has jurisdiction over Plaintiff's and other aggrieved employees' claims under Labor Code sections 2698, *et seq.*

8. On information and belief, the California Superior Court has primary and original jurisdiction in this matter because there is no federal question at issue, as the issues herein are based solely on California statutes and law, including the California Labor Code, Industrial Welfare Commission Wage Orders, Code of Civil Procedure, Rules of Court, and Business and Professions Code.

III.

THE PARTIES

A. Plaintiff

9. Jennifer Burnham is over the age of eighteen (18) and was at all relevant times a California resident. Plaintiff was employed by Defendants as an hourly paid, non-exempt employee from approximately October 2014 through January 2020. Plaintiff worked at various locations, including Defendants' University Town Center, Santee, Eastlake, Otay Lakes, and Chula Vista California locations in the County of San Diego.

B. Defendants

10. Plaintiff is informed, believes, and alleges SELECT COMFORT RETAIL CORPORATION is a Minnesota Corporation and has conducted business, and employed Plaintiff and other aggrieved employees during the PAGA Period, in the County of San Diego.

12. Plaintiff is informed and believes each Defendant acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme, plan or policy, and the acts of each Defendant are legally attributable to the other Defendants.

GENERAL ALLEGATIONS

13. During the PAGA Period, Defendants conducted business in California and San Diego County, and employed Plaintiff and other aggrieved employees in the State of California.

14. During the PAGA Period, Plaintiff and other aggrieved employees of Defendants worked under the same policies, practices, and procedures relating to their employment.

15. Responsibilities for Plaintiff and other aggrieved employees include, among other things, assisting customers on the sales floor and selling beds, mattresses, pillows, sheets, blankets, and other bedding furniture.

16. During the PAGA Period, Plaintiff and other aggrieved employees were paid an hourly base rate, commission wages, and bonuses for meeting sales targets.

17. During the PAGA Period, Plaintiff and other aggrieved employees were not regularly provided duty-free 30-minute meal periods for shifts of five hours or more, which began before the end of the fifth hour of work, pursuant to the Labor Code, IWC Wage Order 7-2001, and all other applicable Wage Orders, or paid compensation in lieu thereof in the amount of one hour of pay at their regular rate of pay. Plaintiff contends that due to the demand of the job, Plaintiff and other aggrieved employees were not always able to take a 30-minute duty-free meal period for shifts of five hours or more. Furthermore, the meal periods provided to Plaintiff and other aggrieved employees were often short insofar as they were not at least 30 minutes in length, as required under California law.

1 Additionally, Plaintiff and other aggrieved employees regularly worked shifts of more than 10 hours
2 per day and were not provided with a second off-duty meal period of 30 minutes for each shift of more
3 than 10 hours. On information and belief, Plaintiff and other aggrieved employees did not waive their
4 right to receive meal periods, including second meal periods on eligible shifts of more than ten hours.

5 18. During the PAGA Period, Plaintiff and other aggrieved employees were not authorized
6 or permitted to take duty-free 10-minute rest periods for work periods of four (4) hours or major
7 fractions, pursuant to the Labor Code, IWC Wage Order 7-2001, and all other applicable Wage Orders,
8 nor paid compensation in lieu thereof in the amount of one hour of pay at their correct regular rate of
9 pay including all wage compensation during the pay period. Furthermore, Plaintiff and other aggrieved
10 employees regularly worked shifts of more than 10 hours per day and were not provided with a third
11 duty-free rest period of 10 minutes for each shift of more than 10 hours. On information and belief,
12 Plaintiff and other aggrieved employees did not waive their right to receive third rest periods on
13 eligible shifts of more than ten hours.

14 19. During the PAGA Period, Defendants knowingly and willfully failed to provide accurate
15 itemized wage statements to Plaintiff and other aggrieved employees, which did not include, among
16 other things, the accurate applicable rates of pay, including the overtime rate of pay, for all hours
17 worked. Additionally, because Defendants failed to compensate Plaintiff and other aggrieved
18 employees for all hours worked and for any non-compliant meal or rest period, the itemized wage
19 statements provided by Defendants to Plaintiff and other aggrieved employees were inaccurate. As a
20 result, the wage statements that Defendants furnished to Plaintiff and other aggrieved employees were
21 incomplete and inaccurate and failed to comply with the requirements of Labor Code section 226(a).

22 20. During the PAGA Period, Defendants had a consistent policy and practice of failing to
23 timely compensate Plaintiff and other aggrieved employees for all wages owed during and upon
24 separation of employment, in violation of California state wage and hour laws.

25 21. Plaintiff alleges Defendants failed to pay all wages due for all hours worked, including
26 hours worked responding to Defendants phone communications and emailing Defendants regarding
27 work.

28 22. Additionally, Defendants failed to pay Plaintiff and other aggrieved employees all wages

1 that were due and owing to them including meal and rest period premiums, and regular, minimum,
2 and overtime wages within the required time during their employment and upon their separation of
3 employment, in violation of the Labor Code and the applicable IWC Wage Order.

4 23. Defendants additionally failed to incorporate commissions paid to employees into the
5 employees' regular rate of pay. As a result, overtime wages that were paid by Defendants were
6 inaccurate and underpaid.

7 24. During the PAGA period, Defendants failed to reimburse Plaintiff and other aggrieved
8 employees for necessary business-related expenses incurred in direct consequence of the discharge of
9 their duties. Plaintiff and other non-exempt employees were required to use their personal cell phone
10 and personal computer for work-related purposes, including to communicate with Defendants.
11 Additionally, Defendants contacted Plaintiff and other aggrieved employees on their cell phones
12 regarding work. Although Plaintiff and other aggrieved employees incurred these necessary business-
13 related expenses in the discharge of their job duties for Defendants, Defendants failed to reimburse
14 non-exempt employees for these expenses in violation of California law.

15 25. By requiring Plaintiff and other aggrieved employees to work off-the-clock, including by
16 requiring them to work while clocked out for meals, Defendants did not keep required records showing
17 the accurate number of daily hours worked and wages earned by Plaintiff and other aggrieved
18 employees.

19 26. For purposes of this action, Plaintiff, as a representative of the State of California, will
20 seek to invoke Labor Code section 1195.5 which states: "The Division of Labor Standards
21 Enforcement shall determine, upon request, whether the wages of employees, which exceed the
22 minimum wages fixed by the commission, have been correctly computed and paid. For this purpose,
23 the division may examine the books, reports, contracts, payrolls and other documents of the employer
24 relative to the employment of employees. The division shall enforce the payment of any sums found,
25 upon examination, to be due and unpaid to the employees."

26 27. Labor Code section 2699(a) provides: "Notwithstanding any other provision of law, any
27 provision of this code that provides for a civil penalty to be assessed and collected by the Labor and
28 Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies,

1 or employees, for a violation of this code, may, as an alternative, be recovered through a civil action
2 brought by an aggrieved employee on behalf of himself or herself and other current or former
3 employees pursuant to the procedures specified in Section 2699.3.”

4 28. Labor Code section 2699(f)(2) states: “For all provisions of this code except those for
5 which a civil penalty is specifically provided, there is established a civil penalty for a violation of these
6 provisions, as follows... (2) If, at the time of the alleged violation, the person employs one or more
7 employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period
8 for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period
9 for each subsequent violation.”

10 29. Pursuant to California Labor Code section 558(a), “[a]ny employer or other person acting
11 on behalf of an employer who violates, or causes to be violated, a section of this chapter or any
12 provision regulating hours and days of work in any order of the Industrial Welfare Commission shall
13 be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each
14 underpaid employee for each pay period for which the employee was underpaid in addition to an
15 amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars
16 (\$100) for each underpaid employee for each pay period for which the employee was underpaid in
17 addition to an amount sufficient to recover underpaid wages.” Plaintiff seeks only to recover the civil
18 penalty provided for in section 558(a) for the violations alleged herein and **does not** seek to recover
19 underpaid wages.

20 30. Pursuant to California Labor Code section 558.1, Defendants are employers of Plaintiff,
21 and/or a person acting on behalf of Plaintiff’s employer, who violated, or caused to be violated, any
22 provision regulating minimum wages or hours and days of work in the applicable order of the Industrial
23 Welfare Commission, as well as California Labor Code sections 201, 202, 203, 226, 510, 512, 558, 1194,
24 1197.1, and 1198, and as such, are liable as an employer of Plaintiff and other aggrieved employees
25 employed in the State of California.

26 31. Plaintiff, as a representative of the general public and State of California, seeks to recover
27 all civil penalties under the PAGA, Labor Code sections 2699 and 2699(f)(2), for violations of sections
28 201-204, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and 2802

1 shown to have occurred, in an amount according to proof, as to those penalties that are otherwise only
2 available in public agency enforcement actions. The funds recovered will be distributed in accordance
3 with the PAGA, with 75% of penalties recovered distributed to the LWDA on and 25% distributed to
4 the aggrieved employees, subject to Court approval.

5 V.

6 **CAUSES OF ACTION**

7 **FIRST CAUSE OF ACTION**

8 **CIVIL PENALTIES PURSUANT TO THE PAGA FOR FAILURE TO PAY MINIMUM,**
9 **REGULAR, AND OVERTIME WAGES**
10 **[Labor Code §§ 2698, *et seq.*]**

11 32. Plaintiff hereby incorporates all preceding paragraphs of this Complaint.

12 33. Labor Code section 510 provides in pertinent part: “Eight hours of labor constitutes a
13 day’s work. Any work in excess of 8 hours in one workday and any work in excess of 40 hours in any
14 one workweek and the first eight hours worked on the seventh day of work in any one workweek shall
15 be compensated at the rate of no less than one and one-half times the regular rate of pay for an
16 employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than
17 twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any
18 seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of
19 pay of an employee.”

20 34. Labor Code section 1194(a) provides: “Notwithstanding any agreement to work for a
21 lesser wage, any employee receiving less than the legal minimum wage or the legal overtime
22 compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of
23 the full amount of this minimum wage or overtime compensation, including interest thereon,
24 reasonable attorney’s fees, and costs of suit.”

25 35. Labor Code section 1197 states: “The minimum wage for employees fixed by the
26 commission is the minimum wage to be paid to employees, and the payment of a less wage than
27 minimum wage so fixed is unlawful.”

28 36. Labor Code section 1197.1 states: “Any employer or other person acting either
individually or as an officer, agent, or employee of another person, who pays or causes to be paid to

any employee a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, and any applicable penalties imposed pursuant to Section 203. For any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid. For each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed.”

37. Labor Code section 1198 provides: “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.”

38. Labor Code section 1199, which is a statute listed for which PAGA default civil penalties are recoverable pursuant to Labor Code sections 2699.5 and 2699(f)(2), provides that: “Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars (\$100) or by imprisonment for not less than 30 days, or by both, who does any of the following: (a) Requires or causes an employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission; (b) Pays or causes to be paid to an employee a wage less than the minimum fixed by an order of the commission; [or] (c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission.”

39. Labor Code section 2699(a) provides: “Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.”

40. Labor Code section 2699(f)(2) provides: “For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these

1 provisions, as follows... (2) If, at the time of the alleged violation, the person employs one or more
2 employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period
3 for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period
4 for each subsequent violation.”

5 41. Labor Code section 2699.5 provides, in pertinent part that “provisions of subdivision (a)
6 of Section 2699.3 apply to any alleged violation of the following provisions: [Labor Code §§] ...1194,
7 1194.1” and allow for recovery of civil penalties pursuant to the PAGA.

8 42. During all or a substantial part of the PAGA Period, Defendants failed to pay minimum,
9 regular, and overtime wages for all hours worked in excess of 8 hours per day and/or 40 hours per
10 week, and all hours subject to Defendants’ control. Specifically, Defendants failed to pay for all hours
11 worked including hours worked by Plaintiff and other aggrieved employees during meal periods and
12 during hours worked off-the-clock responding to communications from Defendants, received via cell
13 phone 24/7. Defendants routinely and regularly contacted Plaintiff and other aggrieved employees via
14 telephone and/or text message for work related purposes while Plaintiff and other aggrieved employees
15 were off-the-clock without paying any compensation for these hours worked. Furthermore, Plaintiff
16 and other aggrieved employees were required to communicate with Defendants off-the-clock using
17 their personal email account without reimbursement for this expense.

18 43. Additionally, on information and belief, the Defendants paid Plaintiff and other non-
19 exempt employees commission wages and failed to incorporate these commission wages into the
20 employees’ regular rate of pay for purposes of calculating the accurate overtime rate of pay. As a
21 result, the overtime wages paid by Defendants were inaccurate and underpaid.

22 44. As a result of Defendants’ failure to pay overtime wages for hours worked in excess of
23 eight hours in one workday and any work in excess of 40 hours in any one workweek and the first
24 eight hours worked on the seventh day of work in any one workweek, Defendants, and each of them,
25 are liable for civil penalties within the applicable limitations period of Labor Code section 2699(f)(2)
26 for violations of Labor Code sections 1194 and 1194.2 in the amount of \$100 for each aggrieved
27 employee per pay period for the initial violation and \$200 for each subsequent violation, for
28 Defendants’ failure to pay Plaintiff and other aggrieved employees overtime wages.

46. Defendants' conduct also violates Wage Order 7-2001 by failing to pay minimum and overtime wages to employees.

47. Plaintiff, as a representative of the general public, will and does seek to recover any and all penalties under Labor Code section 2699(f)(2) for each and every violation of the Labor Code shown to exist or to have occurred, in an amount according to proof, as to those penalties that are otherwise only available in public agency enforcement actions. Funds will be distributed in accordance with the PAGA, with 75% of the civil penalties recovered being reimbursed to the LWDA on behalf of the State of California. The exact amount of the applicable penalty is all in an amount to be shown according to proof at trial.

48. Plaintiff hereby incorporates all preceding paragraphs of this Complaint.

49. Labor Code section 512(a) states in pertinent part: “[A]n 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. 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” Labor Code section 226.7(a) states that “no employer shall require any employee

1 to work during any meal or rest period mandated by an applicable order of the Industrial Welfare
2 Commission.”

3 50. Labor Code section 226.7(b) provides: “An employer shall not require an employee to
4 work during a meal...period mandated pursuant to an applicable statute, or applicable regulation,
5 standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health
6 Standards Board, or the Division of Occupational Safety and Health.”

7 51. Labor Code section 226.7(c) provides: “If an employer fails to provide an employee a
8 meal...period in accordance with a state law...the employer shall pay the employee one additional
9 hour of pay at the employee’s regular rate of compensation for each workday that the meal...period is
10 not provided.”

11 52. During the PAGA Period, Plaintiff and other aggrieved employees were not provided
12 with legally compliant, off-duty meal periods. Defendants regularly failed to provide a duty-free and
13 uninterrupted meal period before the end of the fifth hour of work and failed to provide a second meal
14 period on shifts of more than 10 hours, as required under California law. Furthermore, the meal periods
15 provided to Claimant and other aggrieved employees were often short insofar as they were not at least
16 30 minutes in length, as required under California law. On information and belief, Plaintiff and other
17 aggrieved employees did not waive their right to receive meal periods, including second meal periods
18 on eligible shifts of more than ten hours.

19 53. Plaintiff and other aggrieved employees were not provided the opportunity to take duty-
20 free uninterrupted meal periods. Defendants frequently scheduled only one employee to work in the
21 store during an entire workday. As such, Plaintiff and other aggrieved employees needed to remain on
22 duty to assist customers and did not have the opportunity to take duty-free meal breaks. Defendants
23 discouraged employees such as Plaintiff from reporting missed meal breaks and would penalize the
24 employees and the store if missed meal breaks were reported. Defendants directed Plaintiff not to
25 report meal break violations because it would negatively impact the store’s audit score. Therefore,
26 Defendants maintained a practice of discouraging employees from reporting missed meal breaks and
27 failed to provide legally compliant meal periods. Furthermore, Defendants failed to pay one (1) hour
28 of pay at the employee’s regular rate of compensation for each workday that the meal period was not

provided, in accordance with California law. To the extent that any meal period premiums were paid by Defendants, the rate of pay was incorrect because it failed to include commission wages.

54. By failing to provide off-duty and uninterrupted meal periods of at least thirty (30) minutes for shifts of five (5) hours or more, which began before the end of the fifth hour of work, and failing to pay employees one hour of pay at their regular rate of pay for each workday a meal period was not provided, Defendants willfully violated Labor Code sections 226.7 and 558(a)(3), and Wage Order 7-2001.

55. By failing to provide a second off-duty and uninterrupted meal period of at least thirty (30) minutes for shifts of ten (10) hours or more and failing to pay employees one hour of pay at their regular rate of pay for each eligible workday a second meal period was not provided, Defendants willfully violated Labor Code sections 226.7 and 558(a)(3), and Wage Order 7-2001.

56. Labor Code section 2699(f)(2) provides for civil penalties for violations of the Labor Code for which there is no corresponding civil penalty, including Labor Code section 226.7. The civil penalty is \$100 for the initial violation and \$200 for each subsequent violation for each underpaid employee. Labor Code § 2699(f)(2).

57. Plaintiff, as a representative of the general public, seeks to recover all Labor Code section 2699(f)(2) penalties for each Labor Code section 226.7 or 512(a) violation, according to proof, as to those penalties otherwise only available in public agency enforcement actions. Funds will be distributed in accordance with the PAGA, with 75% of the civil penalties recovered being reimbursed to the LWDA on behalf of the State of California. The exact amount of the applicable penalty is all in an amount to be shown according to proof at trial.

THIRD CAUSE OF ACTION
CIVIL PENALTIES PURSUANT TO THE PAGA FOR FAILURE TO PROVIDE REST PERIODS
[Labor Code §§ 2698, *et seq.*]

58. Plaintiff hereby incorporates all preceding paragraphs of this Complaint.

59. The “Rest Period” Section of applicable IWC Wage Order states: “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 shall be based on the total hours worked daily

1 at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.” If an employer
2 fails to provide an employee a rest period in accordance with the applicable provision of the order, the
3 employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation
4 for each workday that the rest period is not provided.

5 60. Labor Code section 226.7(c) states: “If an employer fails to provide an employee a...rest
6 ...period in accordance with an applicable...order of the Industrial Welfare Commission...the
7 employer shall pay the employee one additional hour of pay at the employee’s regular rate of
8 compensation for each workday that the...rest...period is not provided.”

9 61. During the PAGA Period, Plaintiff and other aggrieved employees were not provided
10 with legally compliant, duty-free rest periods. Plaintiff, and on information and belief, other aggrieved
11 employees were often unable to take duty-free rest periods due to the demands of their job, as discussed
12 above. For example, if Plaintiff was the only employee working in the store for the entire workday,
13 she would need to remain on duty to assist customers. Defendants discouraged employees such as
14 Plaintiff from reporting missed rest breaks and would penalize the employees and the store if missed
15 rest breaks were reported. Defendants directed Plaintiff not to report rest break violations because it
16 would negatively impact the store’s audit score. Therefore, Defendants maintained a practice of
17 discouraging employees from reporting missed rest breaks and failed to provide legally compliant rest
18 periods. Furthermore, Defendants failed to pay one (1) hour of pay at the employee’s regular rate of
19 compensation for each workday that the rest period was not provided, in accordance with California
20 law. To the extent that any rest period premiums were paid by Defendants, the rate of pay was incorrect
21 because it failed to include commission wages.

22 62. By failing to authorize and permit Plaintiff to receive a duty-free rest period of at least
23 10 minutes for every four (4) hours or major fraction thereof worked per day, and by failing to provide
24 premium wages at the regular rate of pay when these periods were not permitted or authorized,
25 Defendants willfully violated Labor Code section 226.7 and Wage Order 7-2001.

26 63. By failing to provide a third duty-free rest period of at least thirty (10) minutes for shifts
27 of ten (10) hours or more and failing to pay employees one hour of pay at their regular rate of pay for
28 each eligible workday a third rest period was not provided, Defendants willfully violated Labor Code

sections 226.7 and 558(a)(3), and Wage Order 7-2001.

64. Labor Code section 2699(f)(2) provides for civil penalties for violations of the Labor Code for which there is no corresponding civil penalty, including Labor Code section 226.7. The civil penalty is \$100 for the initial violation and \$200 for each subsequent violation for each underpaid employee. Labor Code § 2699(f)(2).

65. Plaintiff, as a representative of the general public, seeks to recover all Labor Code section 2699(f)(2) penalties for each Labor Code section 226.7 violation, according to proof, as to those penalties otherwise only available in public agency enforcement actions. Funds will be distributed in accordance with the PAGA, with 75% of the civil penalties recovered being reimbursed to the LWDA on behalf of the State of California. The exact amount of the applicable penalty is all in an amount to be shown according to proof at trial.

FOURTH CAUSE OF ACTION
CIVIL PENALTIES PURSUANT TO THE PAGA FOR FAILURE TO PROVIDE
ACCURATE ITEMIZED WAGE STATEMENTS
[Labor Code §§ 2698, *et seq.*]

66. Plaintiff hereby incorporates all preceding paragraphs of this Complaint.

67. Labor Code section 226(a) provides: “An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing 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 the last four digits of his or her social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer. . .; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked

1 at each hourly rate by the employee...”

2 68. Furthermore, Labor Code section 226(e)(2)(A) states: “An employee is deemed to suffer
3 injury for purposes of this subdivision if the Employer fails to provide a wage statement.”

4 69. Labor Code section 226.3 provides: “Any employer who violates subdivision (a) of
5 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per
6 employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for each
7 violation in a subsequent citation, for which the employer fails to provide the employee a wage
8 deduction statement or fails to keep the records required in subdivision (a) of Section 226. The civil
9 penalties provided for in this section are in addition to any other penalty provided by law. In enforcing
10 this section, the Labor Commissioner shall take into consideration whether the violation was
11 inadvertent, and in his or her discretion, may decide not to penalize an employer for a first violation
12 when that violation was due to a clerical error or inadvertent mistake.”

13 70. During the PAGA period, Defendants knowingly and willfully failed to provide accurate
14 itemized wage statements to Plaintiff and other aggrieved employees, which did not include, among
15 other things, the correct applicable rates paid for all hours worked, including the accurate overtime
16 rate of pay in each pay period commission wages were paid.

17 71. Due to Defendants’ failure to pay for all hours worked and all meal and rest periods
18 premiums as required by the Labor Code, the wages and hours worked listed on each wage statement
19 provided to Plaintiff and other aggrieved employees were misstated and violated Sections 226(a)(1),
20 (2), (5), and (9). Defendants’ actions were intentional and willful.

21 72. Plaintiff has satisfied all prerequisites to serve as a representative of the general public to
22 enforce California’s labor laws, and the penalty provisions identified in Labor Code section 226.3.
23 Plaintiff, as a representative of the people of the State of California, seeks all penalties otherwise
24 capable of being collected by the Division of Labor Standards Enforcement (“DLSE”). Labor Code
25 section 2699.5 provides that Section 2699.3(a) applies to an alleged violation of Labor Code section
26 226.

27 73. Labor Code section 226.3 provides for civil penalties for violations of Section 226. The
28 civil penalty is \$250 for the initial violation and \$1,000 for each subsequent violation.

1 74. Plaintiff, as a representative of the general public, seeks to recover all Labor Code section
2 2699(f)(2) penalties for each Labor Code section 226 violation, according to proof, as to those
3 penalties otherwise only available in public agency enforcement actions. Funds recovered will be
4 distributed in accordance with the PAGA, with 75% of penalties recovered provided to the LWDA on
5 behalf of the State of California.

6
7 **FIFTH CAUSE OF ACTION**
8 **PAGA CIVIL PENALTIES PURSUANT TO THE PAGA FOR FAILURE TO TIMELY PAY**
9 **WAGES DUE DURING EMPLOYMENT**
10 **[Labor Code §§ 2698, *et seq.*]**

11 75. Plaintiff incorporates all preceding paragraphs of this Complaint.

12 76. Labor Code section 204(a) requires employers to pay wages earned by employees within
13 strict time requirements. Defendants had a policy, practice, and procedure of willfully failing to pay
14 all earned wages of Defendants' employees twice during each calendar month, on days designated in
15 advance by the employer as the regular paydays.

16 77. Defendants failed to pay Plaintiff and other aggrieved employees all minimum, regular,
17 and overtime wages and all meal and rest period premium wages during their employment, as required
18 by Labor Code section 204.

19 78. Labor Code sections 2698, *et seq.* impose upon Defendants, and each of them, a penalty
20 of one hundred dollars (\$100.00) for each aggrieved employee per pay period for the initial violation
21 and two hundred (\$200.00) for each aggrieved employee per pay period for each subsequent violation
22 of Labor Code sections 204 and 1198.

23 79. Labor Code section 2699(f)(2) provides for civil penalties for violations of the Labor
24 Code for which there is no corresponding civil penalty, including Labor Code section 204. The civil
25 penalty is \$100 for the initial violation and \$200 for each subsequent violation for each underpaid
26 employee. Labor Code § 2699(f)(2).

27 80. Plaintiff, as a representative of the general public, seeks to recover all penalties under
28 Labor Code section 2699(f)(2) for each and every violation of Labor Code section 204(a), in an amount
according to proof, as to those penalties that are otherwise only available in public agency enforcement
actions. Funds recovered will be distributed in accordance with the PAGA, with 75% of penalties

1 recovered provided to the LWDA on behalf of the State of California.

2 **SIXTH CAUSE OF ACTION**
3 **CIVIL PENALTIES PURSUANT TO THE PAGA FOR FAILURE TO TIMELY PAY**
4 **WAGES DUE UPON SEPARATION**
5 **[Labor Code §§ 2698, *et seq.*]**

6 81. Plaintiff hereby incorporates all preceding paragraphs of this Complaint.

7 82. Labor Code sections 201-203 require employers to pay wages earned by employees
8 within strict time requirements. Defendants had a policy, practice, and procedure of willfully failing
9 to pay the earned wages of Defendants' former employees. If an employer willfully fails to timely and
10 fully pay all final wages the employer must, as a penalty, continue to pay an employee's wages for 30
11 days, or until the back wages are paid in full.

12 83. Defendants failed to pay Plaintiff and other aggrieved employees who ended their
13 employment with the Defendant all wages, including minimum, regular, overtime, and meal and rest
14 period premium wages, as required by Labor Code sections 201-203.

15 84. Labor Code section 256 states: "The Labor Commissioner shall impose a civil penalty in
16 an amount not exceeding 30 days pay as waiting time under the terms of Section 203."

17 85. Labor Code section 2699(f)(2) provides for civil penalties for violations of the Labor
18 Code for which there is no corresponding civil penalty, including Labor Code section 203. The civil
19 penalty is \$100 for the initial violation and \$200 for each subsequent violation for each underpaid
20 employee. Labor Code § 2699(f)(2).

21 86. Plaintiff, as a representative of the general public, seeks to recover all Labor Code section
22 2699(f)(2) penalties for each Labor Code section 201-203 violation, according to proof, as to those
23 penalties otherwise only available in public agency enforcement actions. Funds recovered will be
24 distributed in accordance with the PAGA, with 75% of penalties recovered provided to the LWDA on
25 behalf of the State of California.

26 **SEVENTH CAUSE OF ACTION**
27 **CIVIL PENALTIES PURSUANT TO THE PAGA FOR FAILURE TO REIMBURSE**
28 **BUSINESS-RELATED EXPENSES**
[Labor Code §§ 2698, *et seq.*]

87. Plaintiff hereby incorporates all preceding paragraphs of this Complaint.

1 88. Labor Code section 2802 provides: “An employer shall indemnify his or her employees
2 for all necessary expenditures or losses incurred by the employee in direct consequence of the
3 discharge of his or her duties...[.]”

4 89. Labor Code section 2804 provides that this statutory right cannot be waived.

5 90. Labor Code section 2699(f)(2) provides: “For all provisions of this code except those for
6 which a civil penalty is specifically provided, there is established a civil penalty for a violation of these
7 provisions, as follows: ... (2) If, at the time of the alleged violation, the person employs one or more
8 employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period
9 for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period
10 for each subsequent violation.”

11 91. Aggrieved employees are entitled to pursue civil penalties under the PAGA for violations
12 of Labor Code section 2802. Labor Code § 2699.5.

13 92. Defendants violated the above statutes throughout the applicable statutory period by
14 failing to reimburse Plaintiff and other aggrieved employees for necessary expenditures incurred in
15 direct consequence of discharging their duties, including expenses incurred by Plaintiff and aggrieved
16 employees for use of their personal cell phones and computers. Plaintiff and other aggrieved
17 employees were required to communicate with Defendants on a regular basis for work-related
18 purposes, which Defendants knew or should have known. Defendants frequently contacted Plaintiff
19 and other aggrieved employees on personal cell phones and via email on personal computers. Plaintiff
20 and other aggrieved employees were required to download applications such as GroupMe and
21 Workday onto their personal call phone accounts, to be used to discharge their duties for the
22 Defendants, without reimbursement for these business-related expenses.

23 93. Plaintiff, as a representative of the general public, will and does seek to recover any and
24 all penalties for each and every violation, in an amount according to proof, as to those penalties that
25 are otherwise only available in public agency enforcement actions. Funds recovered will be distributed
26 in accordance with PAGA, with 75% of the penalties recovered being reimbursed to the State of
27 California and the Labor and Workforce Development Agency (“LWDA”).

28 ///

EIGHTH CAUSE OF ACTION
PAGA CIVIL PENALTIES FOR FAILURE TO MAINTAIN ACCURATE RECORDS
[Labor Code §§ 2698, *et seq.*]

94. Plaintiff hereby incorporates all preceding paragraphs of this Complaint.

95. Labor Code section 1174(d) provides: “Every person employing labor in this state shall: 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 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.”

96. Labor Code section 1174.5 provides: “Any person employing labor who willfully fails to maintain accurate and complete records required by subdivision (d) of Section 1174, shall be subject to a civil penalty of five hundred dollars.”

97. Labor Code section 1175 provides: “Any person, or officer or agent thereof, is guilty of a misdemeanor who: (a) Neglects or refuses to furnish the information requested under the provisions of Section 1174; (b) Refuses access to his place of business or employment to any member of the commission or employee of the Division of Labor Standards Enforcement when administering or enforcing this chapter; (c) Hinders such member, or employee in securing information authorized by Section 1174; [or] (d) Fails to keep any of the records required by Section 1174.”

98. IWC Wage Order 7-2001, section 7 obligates an employer to keep accurate information of wages earned and paid including applicable overtime, rest period and gratuity wages. IWC Wage Order 7-2001, section 7(A)(3) states in pertinent part: “Every employer shall keep accurate information with respect to each employee including the following: ... (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.”

99. During all or a substantial portion of the PAGA Period, Defendants failed to accurately record all hours worked by Plaintiff and other aggrieved employees and failed to record all accurate wages to be paid.

100. As a result, Defendants willfully violated the Labor Code and are liable to Plaintiff, and

1 other aggrieved employees, for civil penalties as required by Labor Code section 1174(d) or, in the
2 alternative, section 2699(f)(2).

3 101. As a proximate result of the aforementioned violations, Plaintiff has been damaged in an
4 amount according to proof at time of trial, but not in an amount in excess of the jurisdiction of this
5 Court.

6 102. Plaintiff, as a representative of the general public, will and does seek to recover any and
7 all civil penalties for each and every violation, in an amount according to proof, as to those penalties
8 that are otherwise only available in public agency enforcement actions. Civil penalties recovered will
9 be distributed in accordance with the PAGA, with 75% of civil penalties recovered provided to the
10 LWDA on behalf of the State of California.

11 **PRAYER FOR RELIEF**

12 Plaintiff prays for judgment as follows:

13 A. That this action be maintained as a Representative Action under the PAGA, and Plaintiff
14 and her counsel be provided with all enforcement capability as if the action were brought by the
15 California Division of Labor Standards Enforcement;

16 B. For recovery of all civil penalties permitted by Labor Code section 2699, for unpaid
17 minimum, regular, and overtime wages pursuant to Labor Code section 1194, according to proof;

18 C. For recovery of civil penalties permitted by Labor Code section 2699, for unpaid meal
19 period premiums earned pursuant to Labor Code section 226.7, according to proof;

20 D. For recovery of civil penalties permitted by Labor Code section 2699 for unpaid rest
21 period premiums earned pursuant to Labor Code section 226.7, according to proof;

22 E. For recovery of civil penalties permitted by Labor Code section 2699, for inaccurate
23 itemized wage statements pursuant to Labor Code sections 226 and 226.3, according to proof;

24 F. For recovery of civil penalties pursuant to Labor Code section 2699(f)(2) for failing to
25 timely pay all wage due pursuant to Labor Code section 204(a).

26 G. For recovery of civil penalties permitted by Labor Code section 2699(f)(2) for failing to
27 timely pay all final wages due pursuant to Labor Code sections 201-202;

28 H. For recovery of civil penalties permitted by Labor Code section 2699(f)(2) for failing to

1 pay statutory waiting time penalties due pursuant to Labor Code section 203;

2 I. For recovery of all civil penalties as permitted by Labor Code section 2699, for failing to
3 reimburse all necessary business-related expenses incurred, pursuant to Labor Code sections 2802 and
4 2804;

5 J. For Pre-Judgment and Post-Judgment interest;

6 K. For the Plaintiff to be recognized by the Court as serving as a Representative of the
7 LWDA, that she be deemed an “aggrieved employee” and to proceed in this PAGA Action, and to be
8 awarded some form of enhanced compensation for bringing this action should she prevail and provide
9 benefit to the State of California or other “aggrieved employees,” subject to the Court’s discretion;

10 L. Attorneys’ fees and costs of suit, including expert fees and fees pursuant to California
11 Labor Code sections 226, 1194, 2699.3, and all other applicable state laws including Code of Civil
12 Procedure section 1021.5; and,

13 M. Such other relief as this Court deems necessary, just, equitable, and proper.

14 COHELAN KHOURY & SINGER
15 LAW OFFICES OF SAHAG MAJARIAN II

16
17 Dated: June 18, 2020

18 By: 
Michael Singer, Esq.
Marta Manus, Esq.

19 Attorneys for Plaintiff Jennifer Burnham, on behalf of
20 herself and as representative for the State of California on
21 behalf of all other aggrieved employees
22
23
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25
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27
28

EXHIBIT 1

COHELAN KHOURY & SINGER

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

TIMOTHY D. COHELAN, APLC*
ISAM C. KHOURY, APC
DIANA M. KHOURY, APC
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(*Also admitted in the District of Columbia)
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KRISTINA DE LA ROSA

(† Also admitted in Illinois)

April 13, 2020

NOTICE VIA ONLINE SUBMISSION

California Labor and Workforce Development Agency

VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT

Select Comfort Retail Corporation
1001 3rd Avenue South
Minneapolis, MN 55404-1096

Select Comfort Retail Corporation
c/o CSC-Lawyers Incorporating Service
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

Re: Notice pursuant to California Labor Code sections 2698, *et seq.*, the Private Attorneys General Act ("PAGA"), sent by Jennifer Burnham on behalf of herself and all other aggrieved employees of Select Comfort Retail Corporation in the State of California

Dear PAGA Administrator and Select Comfort Retail Corporation:

This letter shall serve as Jennifer Burnham's (hereafter "Claimant") *Notice* pursuant to the California Private Attorneys General Act ("PAGA"), California Labor Code sections 2698, *et seq.*, regarding her wage and hour claims against her employer Select Comfort Retail Corporation (hereinafter referred to as the "Employer"). Claimant submits this notice on behalf of herself individually and all current and former non-exempt employees ("aggrieved" employees) employed by the Employer in the State of California during the one-year and 65-day period preceding the filing of this written notice.

This letter serves as Claimant's written notice pursuant to Labor Code section 2699.3(a)(A)(1) providing the Labor and Workforce Development Agency (hereafter "LWDA") the opportunity to investigate the alleged claims contained herein. If the LWDA does not intend to investigate the alleged violations, Claimant intends to file a representative action for PAGA *civil penalties* on behalf of herself and all other non-exempt employees of the Employer, seeking civil penalties pursuant to the PAGA. A copy of this notice is being sent to the Employer by certified mail at the addresses above.

Claimant and other non-exempt employees are subject to the same employment policies and practices alleged herein which impermissibly deny non-exempt employees (i.e. "aggrieved employees") their rights pursuant to the California Labor Code and applicable IWC Wage Order and resulted in the violations set forth below.

FACTUAL STATEMENT

The Employer, Select Comfort Retail Corporation, is a retailer of household furniture,

selling beds, mattresses, pillows, sheets, blankets, and other bedding furniture. Claimant worked for the Employer as an hourly paid, non-exempt employee from October 2014 through January 2020. During Claimant's employment, she was paid an hourly base rate, commission wages, and bonuses for meeting sales targets.

For reasons set forth herein, Claimant alleges the following violations of the California Labor Code and the applicable IWC Wage Order on behalf of herself and all other non-exempt employees of the Employer. Claimant alleges the Employer failed to pay all wages due for all hours worked including hours worked during meal periods and hours worked off-the-clock, failed to provide legally compliant and off-duty meal and rest breaks, failed to provide Claimant and other non-exempt employees with accurate itemized wage statements listing the correct hours worked and all correct applicable rates of pay, and failed to reimburse for all necessarily incurred business expenses incurred in the discharge of the job duties for the Employer.

Accordingly, Claimant now seeks civil penalties on behalf of herself and other aggrieved employees employed as a non-exempt employee based on the Employer's alleged violations of the California Labor Code and applicable IWC Wage Order. Claimant's claims are set forth in further detail below.

FAILURE TO PAY MINIMUM, REGULAR, AND OVERTIME WAGES

(Labor Code §§ 218, 510, 1194, 1197, 1197.1, 1198, and 1199(c) and the "Minimum Wages" and "Hours and Days of Work" Sections of the Applicable Wage Order)

Labor Code section 510 provides in pertinent part: "Eight hours of labor constitutes a day's work. Any work in excess of 8 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."

Labor Code section 1194(a) states: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

Labor Code section 1198 provides: "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."

Labor Code section 1199, which is a statute listed for which PAGA default civil penalties are recoverable pursuant to Labor Code sections 2699.5 and 2699(f)(2), provides that:

Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars (\$100) or by imprisonment for not less than 30 days, or by both, who does any of the following:

- (a) Requires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission.
- (b) Pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission.
- (c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission.

Labor Code section 1197 states: “The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful. This section does not change the applicability of local minimum wage laws to any entity.”

Labor Code section 1197.1 states: “Any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, and any applicable penalties imposed pursuant to Section 203. For any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid. For each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed.”

Pursuant to the “Hours & Days of Work” Section of the applicable Wage Order, an employer may not pay non-exempt employees less than the applicable overtime rate for all overtime hours worked.

Pursuant to the “Minimum Wages” and “Hours & Days of Work” Sections of the applicable Wage Order, an employer may not pay employees less than the applicable minimum wage for all hours worked and provides that an employer may not pay non-exempt employees less than the applicable overtime rate for all overtime hours worked.

The Employer violated Labor Code sections 218, 510, 1194, 1197, and 1198, and the “Minimum Wages” and “Hours and Days of Work” Sections of the Applicable Wage Order because it did not pay Claimant and other aggrieved current and former employees all minimum, regular, and overtime wages for all hours worked. The Employer failed to pay for all hours worked including hours worked by Claimant and other aggrieved employees during meal periods and hours worked off-the-clock responding to communications from the Employer received via cell phone 24/7. The Employer routinely and regularly contacts Claimant and other aggrieved

employees via telephone and/or text message while Claimant and other aggrieved employees are off-the-clock for work-related purposes without paying any compensation for these hours worked. Furthermore, Claimant and other aggrieved employees are required to communicate with the Employer off-the-clock using their personal email account off-the-clock. Additionally, on information and belief, the Employer paid Claimant and other non-exempt employees commission wages and failed to incorporate these commission wages into the employees' regular rate of pay for purposes of calculating the accurate overtime rate of pay. As a result, the overtime wages paid by the Employer are inaccurate and underpaid.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of all aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PROVIDE MEAL AND REST PERIODS

(Labor Code §§ 226.7, 512, and 1198, and the "Meal Period" and "Rest Period" Sections of the applicable IWC Wage Order)

Labor Code section 512(a) states in pertinent part: "[A]n 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. 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" Labor Code section 226.7(a) states that "no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission."

The "Rest Period" Section of applicable IWC Wage Order states: "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 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." If an employer failed to provide an employee a rest period in accordance with the applicable provision of the order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation of each workday that the rest period is not provided.

Labor Code section 226.7(c) states: "[I]f an employer failed to provide an employee a meal period or rest period in accordance with an applicable order of the IWC, 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."

The Employer failed to provide Claimant and other aggrieved employees with legally compliant meal and rest periods on eligible workdays. The Employer regularly failed to provide a duty-free and uninterrupted meal period before the end of the fifth hour of work and failed to provide a second meal period on shifts of more than 10 hours, as required under California law. Furthermore, the meal periods provided to Claimant and other aggrieved employees were often short insofar as they were not at least 30 minutes in length, as required under California law. On information and belief, Claimant and other aggrieved employees did not waive their right to receive meal periods, including second meal periods and third rest periods on eligible shifts of

more than ten hours. On information and belief, the Employer failed to provide Claimant and other aggrieved employees with legally compliant off-duty meal periods and duty-free rest periods as required by Labor Code sections 226.7 and 512, and sections 11 and 12 of the applicable IWC Wage Order. Claimant and other aggrieved employees were not provided the opportunity to take duty-free uninterrupted meal and rest periods. The Employer frequently schedules only one employee to work in the store during an entire workday. As such, employees must remain on duty to assist customers and do not have the opportunity to take duty-free meal and rest breaks. The Employer discourages employees such as Claimant from reporting missed meal and rest breaks and will penalize the employees and the store if missed meal and rest breaks are reported. The Employer directed Claimant not to report meal and rest break violations because it would negatively impact the store's audit score. Therefore, the Employer maintained a practice of discouraging employees from reporting missed meal and rest breaks and failed to provide legally compliant meal and rest periods. Furthermore, the Employer failed to pay one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal and/or rest period was not provided, in accordance with California law. To the extent that any meal or rest period premiums were paid by the Employer, the rate of pay was incorrect because it failed to include commission wages.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of herself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO REIMBURSE BUSINESS-RELATED EXPENSES
(Labor Code §§ 2802 and 2804, and the "Tools and Equipment" section of the applicable IWC Wage Order)

Labor Code section 2802(a) provides that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

Labor Code section 2802(c) states that "[f]or purposes of [2802], the term "necessary expenditures or losses" shall include all reasonable costs, including, but not limited to attorney's fees incurred by the employee enforcing the rights granted by [2802]."

Section 9(b) of the applicable IWC Wage Order states in pertinent part: "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."

Labor Code section 2802 prohibits employers, such as the Employer, from shifting their cost of doing business onto the employee. California Labor Code section 2802 states that employers must "indemnify" an employee for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." This means that if the expense in question is "necessary" for performance of the job, the employer must reimburse the employee 100% of the

cost. An expense is considered “necessary” if it directly results from the employee’s performance of his or her work duties. An expense is also “necessary” if it occurs because the employee is following the directions given by the employer.

“Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled to under the laws of this State.” Cal. Labor Code § 2804.

The Employer failed to comply with Labor Code section 2802 and the applicable IWC Wage Order by failing to reimburse Claimant and other aggrieved employees for necessary business-related expenses incurred in direct consequence of the discharge of his or her duties. Claimant and other non-exempt employees are required to use their personal cell phone for work-related purposes, including to communicate with the Employer on their days off. Additionally, the Employer required Claimant and other aggrieved employees to download multiple applications on their personal cell phones for work-related purposes. Such applications included GroupMe and Workday. Furthermore, Claimant and other aggrieved employees are required to use their personal email accounts and computer to communicate with the Employer, without reimbursement for this expense. Although Claimant and other aggrieved employees incur business-related expenses in the discharge of their job duties for the Employer, the Employer failed to reimburse non-exempt employees for necessary business-related expenses in violation of California law.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of all aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS

(Labor Code §§ 226(a), 226.3, 1198, and 2699, and the
“Records” Section of the Applicable Wage Order)

Labor Code section 226(a) states in pertinent part: “An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing 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 the last four digits of his or her social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer. . .; 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...”

Furthermore, Labor Code section 226(e)(2)(A) states: “An employee is deemed to suffer injury for purposes of this subdivision if the Employer failed to provide a wage statement.”

Labor Code section 226.3 imposes an additional civil penalty on the employer of \$250.00 per employee per violation of Labor Code section 226(a) in an initial citation and \$1,000.00 per employee for each violation in a subsequent citation. In addition, Labor Code section 226(e) imposes a penalty of the greater of all actual damages or \$50 for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of \$4,000, and Claimant is entitled to an award of costs and reasonable attorney’s fees.

Claimant alleges that the Employer failed to provide Claimant and other non-exempt employees with accurate itemized wage statement complying with the requirements of the Labor Code section 226(a) and applicable IWC Wage Order. The wage statements provided by the Employer to non-exempt employees, including Claimant, fail to state the correct number applicable rates paid for all hours worked, including failing to state the accurate overtime rate of pay in each pay period commission wages were paid. On information and belief, the Employer failed to issue accurate itemized wage statements to all other non-exempt employees employed by the Employer in California.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of all aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

**FAILURE TO TIMELY PAY WAGES DUE DURING AND UPON TERMINATION OF
EMPLOYMENT**

(Labor Code §§ 201, 202, 203, 204, 256, 1198, and 2699)

Labor Code section 201 states: “If an Employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.” Labor Code section 202 states: “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 72 hours thereafter, unless the employee has given 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.”

Labor Code section 203(a) states, in relevant part: “If an Employer willfully failed to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, 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 thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents herself or herself to avoid payment to his or her, or who refuses to receive the payment when fully tendered to his or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.”

Labor Code section 204(a) states, in pertinent part: “All wages . . . earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.” The “Minimum Wages” Section of the applicable Wage Order further states “every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period.”

Labor Code section 256 states: “The Labor Commissioner shall impose a civil penalty in an amount not exceeding 30 days of pay as waiting time under the terms of Section 203.”

As detailed above, the Employer failed to pay Claimant and other aggrieved employees all wages that were due and owing to them including meal and rest period premiums, and regular, minimum, and overtime wages within the required time during their employment and upon their separation of employment, in violation of the Labor Code and the applicable IWC Wage Order because of the violations alleged herein. Additionally, the Employer failed to timely pay aggrieved employees all wages due upon separation of employment. As a result, the Employer violated the above sections of the Labor Code.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of all aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

**CIVIL PENALTIES FOR VIOLATION OF
THE LABOR CODE AND IWC WAGE ORDERS**
(Labor Code §§ 558, 558.1, and 1197.1)

Labor Code section 558 subjects any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of Part 2, Chapter 1, of the Labor Code or any provision regulating hours and days of work in any IWC Wage Order to a civil penalty in the amount of \$50 for any initial violation for each pay period in which an employee is underpaid in addition to an amount sufficient to recover underpaid wages, and \$100 for each subsequent violation in addition to an amount sufficient to recover underpaid wages, which shall be paid to each affected employee.

Labor Code section 558.1(a) states: “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, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the Employer for such violation.” Labor Code section 558.1 expressly defines “employer or other person acting on behalf of an employer” to include a “natural person who is an owner, director, officer, or managing agent of the employer.”

Accordingly, Claimant will pursue civil penalty or other lawful remedies for herself and other current and former non-exempt employees, including recovery of attorney’s fees, costs, and civil penalties to the extent allowed by law. However, pursuant to the recent California Supreme Court decision in *ZB, N.A. v. Superior Court* (2019) 8 Cal. 5th 175, 252 Cal. Rptr. 3d

228, 448 P.3d 239, Claimant does not seek underpaid wages as part of any anticipated PAGA action.

DUTIES OF EMPLOYER

(Labor Code §§ 1174, 1174.5, 1175, and 1198, and the Applicable Wage Order)

Labor Code section 1174 describes certain duties of every employer in this state. Subsection (d) of this labor code section requires that payroll records show the hours worked daily by employees and the corresponding wages to be paid for the hours worked. The Employer violated this requirement by its failure to list the correct rate of pay. Labor Code section 1174.5 imposes a civil penalty of \$500 for an employer's failure to maintain accurate and complete records. This civil penalty is addition to the civil penalty of \$100 per pay period, per aggrieved employee that would be imposed pursuant to Labor Code section 2699 for a violation of Labor Code section 1174(d). Furthermore, Claimant and all other aggrieved current and former employees are entitled to collect 25% of the penalty imposed pursuant to Section 2699.

The Employer failed to accurately record all accurate hours worked by Claimant and other aggrieved employees and failed to record all accurate wages to be paid.

Claimant will pursue all remedies on behalf of herself and other current and former employees, including recovery of attorney's fees, costs, damages and penalties to the extent allowed by law.

ATTORNEY'S FEES, COSTS, INTEREST AND PENALTIES

(Labor Code §§ 226(e) and 2699(g)(1))

Labor Code sections 226(e) and 2699(g)(1) give employees the right to recover in a civil action, penalties, including interest thereon, reasonable attorney's fees, and costs of suit.

Pursuant to Labor Code sections 2699, *et seq.*, aggrieved employees are entitled to collect 25% of the penalty assessed. Accordingly, the Employer is liable for these items.

Labor Code section 226(e)(1) provides "[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees."

Labor Code section 2699(g)(1) provides "[e]xcept as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of herself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3.

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Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part."

Claimant has already incurred costs and attorney's fees and will continue to incur costs as a result of the Employer's unlawful actions.

CONCLUSION

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

Sincerely,
COHELAN KHOURY & SINGER



Marta Manus, Esq.

cc:

Via Email Only

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