

DAVID G. SPIVAK (SBN 179684)

david@spivaklaw.com

MARALLE MESSRELIAN (SBN 316974)

maralle@spivaklaw.com

THE SPIVAK LAW FIRM

16530 Ventura Blvd., Ste 203

Encino, CA 91436

Telephone (818) 582-3086

Facsimile (818) 582-2561

Attorneys for Plaintiff,

KRYSTAL THOMAS

(additional attorneys listed on the next page)

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

OCT 07 2020

BY

JESSICA MORALES, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

(UNLIMITED JURISDICTION)

KRYSTAL THOMAS, on behalf of herself and
as an "aggrieved employee" on behalf of other
"aggrieved employees" under the Labor Code
Private Attorneys General Act of 2004,

Plaintiff(s),

vs.

CHOICE PHYSICIANS NETWORK, INC., a
California corporation; DESERT PHYSICIANS
MANAGEMENT, LLC, a California
corporation, and DOES 1 through 50, inclusive,

Defendant(s).

Case No.: CIVDS2013964

**[PROPOSED] FIRST AMENDED
COMPLAINT FOR VIOLATIONS OF
THE LABOR CODE AND CIVIL
PENALTIES UNDER THE LABOR CODE
PRIVATE ATTORNEYS GENERAL ACT
OF 2004, LABOR CODE §§ 2698, ET SEQ.**

JURY TRIAL DEMANDED

BY FAX

SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

ADDITIONAL ATTORNEY FOR PLAINTIFF

WALTER HAINES (SBN 71075)
whaines@uelglaw.com
UNITED EMPLOYEES LAW GROUP
5500 Bolsa Ave, Suite 201
Huntington Beach, CA 92649
Telephone: (562) 256-1047
Facsimile: (562) 256-1006



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 Plaintiff KRYSTAL THOMAS (hereafter "Plaintiff"), on behalf of herself, the State of
2 California, and other Aggrieved Employees, complains and alleges as follows:

3 INTRODUCTION

4 1. Plaintiff brings this representative action based on alleged violations of the
5 California Labor Code and Industrial Welfare Commission Order No. 5-2001 (hereafter "the
6 Wage Order") against defendants CHOICE PHYSICIANS NETWORK, INC., DESERT
7 PHYSICIANS MANAGEMENT, LLC, and Does 1-50, inclusive (collectively "Defendants").

8 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
9 her, the State of California, and other similarly situated aggrieved current and former employees
10 in California, including but not limited to, case managers, and similarly situated employees (the
11 "Aggrieved Employees") for civil penalties and other related relief. These claims are based on
12 Defendants' alleged failures to (1) provide all rest and meal periods, (2) pay all wages for all
13 hours worked, (3) indemnify Plaintiff and the Aggrieved Employees for reasonable expenses
14 incurred during the course of performing their duties, (4), fairly compete, (5) provide accurate
15 written wage statements, and (6) timely pay final wages upon termination of employment.
16 Accordingly, Plaintiff now seeks to recover civil penalties and related relief through this
17 representative action.

18 JURISDICTION AND VENUE

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

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

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

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

29 PARTIES

30 7. Plaintiff currently resides in Victorville located in San Bernardino county,
31 California. Defendants first employed Plaintiff on or about April 8, 2019 to work as a case



1 manager. Plaintiff continuously worked for Defendants until July 3, 2019 when Defendants
2 terminated her employment. At all relevant times, Plaintiff was an "employee" within the
3 meaning of Title 8 California Code of Regulations Section 11050 and an "aggrieved employee"
4 within the meaning of Labor Code Section 2699(c).

5 8. Defendant CHOICE PHYSICIANS NETWORK, INC. is a corporation organized
6 and existing under the laws of California and therefore a citizen of California based on Plaintiff's
7 information and belief.

8 9. Defendant DESERT PHYSICIANS MANAGEMENT, LLC is a limited liability
9 company organized and existing under the laws of California and therefore a citizen of California
10 based on Plaintiffs' information and belief.

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

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

22 12. At all relevant times, in perpetrating the acts and omissions alleged herein,
23 defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
24 of a practice which resulted in Defendants not paying Plaintiff and other Aggrieved Employees
25 in accordance with applicable California labor laws as alleged herein.

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

31 ///



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Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

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FIRST (AND ONLY) CAUSE OF ACTION

CIVIL PENALTIES

(Lab. Code §§ 2698, et seq.)

(By Plaintiff, on behalf of herself and the other Aggrieved Employees, against all Defendants)

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

A. THE AGGRIEVED EMPLOYEES: The Aggrieved Employees are all persons employed by Defendants in California as hourly employees, including, but not limited to, case managers, and in other comparable positions, during the period of June 5, 2019 to the present (the "PAGA Period").

B. UNPROVIDED REST PERIODS

15. 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."

16. In relevant part, Section 12 of the Wage Order states:
Rest Periods:

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

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

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

18. In addition, Labor Code Section 226.7 states

(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

19. Pursuant to the Labor Code and the Wage Order, Plaintiff and the Aggrieved Employees were entitled to be provided with rest breaks of at least ten minutes for each four hour period of work, or major fraction thereof.

20. Defendants failed to provide Plaintiff and the Aggrieved Employees with all required rest breaks in accordance with the Wage Order. Plaintiff is informed and believes and thereon alleges that, at relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants not providing the Aggrieved Employees with all rest breaks required by California law.

21. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees to continue working during their rest periods and Plaintiff's supervisor Juliet Wade and other managers were aware of this. Defendants required Plaintiff and the Aggrieved Employees to clock-out during their rest periods and assured them that Defendants would pay them for the time. However, Defendants often failed to pay them. Due to the excessive workload and Defendants' failure to hire sufficient staff members, including case managers, Defendants required Plaintiff and the Aggrieved Employees to work during their rest periods.

22. Defendants failed to pay Plaintiff the additional wages required by California Labor Code § 226.7 for all rest breaks not provided to her. Plaintiff is informed and believes and thereon alleges that, at relevant times within the applicable limitations period, Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants not providing the Aggrieved Employees with additional wages for all rest breaks not provided to them as required



1 by California Labor Code § 226.7.

2 23. As a result of Defendants' unlawful conduct, Plaintiff and the Aggrieved
3 Employees have suffered damages in amounts, subject to proof, to the extent they were not paid
4 additional wages owed for all rest breaks not provided to them.

5 24. By above mentioned reasons, Plaintiff and the Aggrieved Employees are entitled
6 to premium wages for workdays in which one or more rest breaks were not provided to them
7 pursuant to the California Labor Code § 226.7.

8 **C. UNPROVIDED MEAL PERIODS**

9 25. Labor Code § 1198 states,

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

15 26. In relevant part, Labor Code Section 512 states

16 "An employer may not employ an employee for a work period of more
17 than five hours per day without providing the employee with a meal period
18 of not less than 30 minutes, except that if the total work period per day of
19 the employee is no more than six hours, the meal period may be waived by
20 mutual consent of both the employer and employee. An employer may not
21 employ an employee for a work period of more than 10 hours per day
22 without providing the employee with a second meal period of not less than
23 30 minutes, except that if the total hours worked is no more than 12 hours,
24 the second meal period may be waived by mutual consent of the employer
25 and the employee only if the first meal period was not waived."

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

27 **Meal Periods:**

28 (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



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 written agreement shall state that the employee may, in writing,
2 revoke the agreement at any time.

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

8 28. Pursuant to the California Labor Code § 512 and the Wage Order, Plaintiff and the
9 Aggrieved Employees were entitled to be provided with uninterrupted meal periods of at least 30
10 minutes for each day they worked five or more hours.

11 29. During the relevant time period, Defendants failed to provide Plaintiff and the
12 Aggrieved Employees with all required meal periods in accordance with California Labor Code
13 § 512 and the Wage Order. Plaintiff is informed and believes and thereon alleges that, at relevant
14 times within the applicable limitations period, Defendants maintained a policy, practice, or a lack
15 of a policy which resulted in Defendants not providing the Aggrieved Employees with all meal
16 periods required by California Labor Code § 512 and the Wage Order.

17 30. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees
18 to continue working during their meal periods and Plaintiff's supervisor Juliet Wade and other
19 managers were aware of this. Due to the excessive workload and Defendants' failure to hire
20 sufficient staff members, including case managers, Defendants required Plaintiff and the
21 Aggrieved Employees to work during their meal periods.

22 31. Defendants failed to pay Plaintiff the additional wages required by California
23 Labor Code § 226.7 for all meal periods not provided to her. Plaintiff is informed and believes
24 and thereon alleges that, at relevant times within the applicable limitations period, Defendants
25 have maintained a policy, practice, or a lack of a policy which resulted in Defendants not
26 providing the Aggrieved Employees with additional wages for all meal periods not provided to
27 them as required by California Labor Code § 226.7.

28 32. As a result of Defendants' unlawful conduct, Plaintiff and the Aggrieved
Employees have suffered damages in amounts, subject to proof, to the extent they were not paid
additional wages owed for all meal periods not provided to them.

33. By reason of the above, Plaintiff and the Aggrieved Employees are entitled to
premium wages for workdays in which one or more meal periods were not provided to them



pursuant to California Labor Code § 226.7.

D. FAILURE TO PAY ALL WAGES FOR ALL HOURS WORKED AT THE CORRECT RATES OF PAY

34. Section 2(K) of the applicable Wage Order defines “hours worked” as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.”

35. 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.

36. 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.



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Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 37. Labor Code section 1197 makes it unlawful for an employer to pay an employee
2 less than the minimum wage required under the applicable Wage Order for all hours worked
3 during a payroll period.

4 38. California Labor Code § 1194 invalidates any agreement between an employer
5 and an employee to work for less than the minimum or overtime wage required under the
6 applicable Wage Order.

7 39. Labor Code section 1198 makes it unlawful for an employer to employ an
8 employee under conditions that violate the Wage Order.

9 40. Employers must compensate non-exempt employees for “off-the-clock” work if
10 the employers knew or should have known that the employees were working those hours.
11 *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

12 41. At all relevant times, Defendants, including Plaintiff’s supervisor Juliet Wade ,
13 required Plaintiff and the Aggrieved Employees to continue working, performing tasks,
14 including, but not limited to, scheduling appointments, taking intake of patients, completing
15 interviews and preparing discharge summaries, after clocking out at the end of their scheduled
16 shifts. Defendants, however, failed to pay Plaintiff and the Aggrieved Employees for this off-the-
17 clock work.

18 42. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
19 Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants’
20 failure to compensate the Aggrieved Employees for all hours worked as required by California
21 law, including, but not limited to overtime wages for all overtime hours they worked.

22 43. As a result of Defendants’ unlawful conduct, Plaintiff and the other Aggrieved
23 Employees have suffered damages in an amount, subject to proof, to the extent they were not paid
24 the full amount of wages earned during each pay period during the applicable limitations period.

25 44. Pursuant to the Labor Code section 1194, Plaintiff, on behalf of herself and the
26 Aggrieved Employees, seeks to recover unpaid wages, liquidated damages in amounts equal to
27 the amounts of unpaid wages, interest thereon, and awards of reasonable costs and attorneys’ fees,
28 all in amounts subject to proof.

 45. Additionally, with respect to this cause of action, on behalf of herself and the
Aggrieved Employees, Plaintiff prays for an award of reasonable costs and attorneys’ fees,



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

including interest thereon, as permitted by law, all in amounts subject to proof.

E. FAILURE TO INDEMNIFY

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

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

When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.

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

49. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees to incur business expenses during their employment. Defendants often did not reimburse Plaintiff and the Aggrieved Employees for their gas mileage, nor did it provide them with transportation. Additionally, Defendants required Plaintiff and the Aggrieved Employees to use their personal mobile phones for work-related communications. Defendants, however, failed to reimburse them for such expenses, nor did it provide them with mobile phones.

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

F. INCOMPLETE AND INACCURATE WAGE STATEMENTS

51. Pursuant to the California Labor Code § 226(a), Plaintiff and the Aggrieved Employees were entitled to receive, bi-weekly or at the time of each payment of wages, an accurate itemized statement showing: a) gross wages earned; b) net wages earned; c) all applicable hourly rates in effect during the pay period; and d) the corresponding number of hours worked at each hourly rate by the employee.

52. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer injury if the employer fails to provide a wage statement. Also, an employee is deemed to suffer injury if the employer fails to provide accurate and complete information as required by California



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Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
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1 Labor Code § 226(a) and the employee cannot “promptly and easily determine” from the wage
2 statement alone one or more of the following:

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

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

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

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

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

17 54. Defendants failed to state on the itemized wage statements that they issued to
18 Plaintiff and the Aggrieved Employees, the accurate wages earned and hours worked, including
19 overtime wages and hours, that Plaintiff and the Aggrieved Employees earned for unprovided rest
20 and meal periods and off-the-clock work, as described above. Also, Defendants failed to state on
21 the itemized wage statements that they issued to Plaintiff and the Aggrieved Employees, the
22 premium wages, Plaintiff and the Aggrieved Employees earned for unprovided rest and meal
23 periods described above. Consequently, Defendants failed to provide Plaintiff and the Aggrieved
24 Employees with accurate and complete wage statements that properly and accurately itemize
25 Plaintiff’s and the other Aggrieved Employees’ gross and net wages earned and the total hours
26 worked.

27 55. Defendants’ failure to provide Plaintiff and the Aggrieved Employees with
28 accurate wage statements was knowing and intentional. Defendants had the ability to provide
29 Plaintiff and the Aggrieved Employees with accurate wage statements but intentionally provided
30 wage statements that Defendants knew were not accurate.

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



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Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
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1 Plaintiff and the Aggrieved Employees have suffered injury. Their legal rights to receive accurate
2 wage 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 of
7 inaccurate information about wages to state and federal government agencies. Further, Plaintiff
8 and the Aggrieved Employees were not able to ascertain from the wage statements whether
9 Defendants complied with their obligations under California Labor Code § 226(a).

10 **G. UNTIMELY FINAL WAGES**

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

13 58. Labor Code § 202 provides that all earned and unpaid wages of an employee who
14 quits after providing at least 72-hours notice before quitting are due and payable at the time of
15 quitting and that all earned and unpaid wages of an employee who quits without providing at least
16 72-hours notice before quitting are due and payable within 72 hours.

17 59. By failing to pay earned overtime and premium wages to Plaintiff and the
18 Aggrieved Employees, Defendants failed to timely pay them all earned and unpaid wages in
19 violation of Labor Code § 201 or § 202.

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

23 61. Plaintiff is informed and believes that Defendants' failure to timely pay Plaintiff
24 and the Aggrieved Employees all of their earned and unpaid wages have been willful in that, at
25 all relevant times, Defendants have deliberately maintained policies and practices that violate the
26 requirements of the Labor Code and the Wage Order even though, at all relevant times, they have
27 had the ability to comply with those legal requirements.

28 62. By failing to pay earned minimum, regular, overtime, and premium wages to
Plaintiff and the Aggrieved Employees, Defendants failed to timely pay them all earned and
unpaid wages in violation of Labor Code § 201 or § 202.

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(818) 582-2561 Fax
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1 **H. UNTIMELY WAGES DURING EMPLOYMENT**

2 63. Labor Code § 204 states

3 (a) All wages, other than those mentioned in Section 201, 201.3, 202,
4 204.1, or 204.2, earned by any person in any employment are due
5 and payable twice during each calendar month, on days designated
6 in advance by the employer as the regular paydays. Labor
7 performed between the 1st and 15th days, inclusive, of any calendar
8 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. ...

9 (b) (1) Notwithstanding any other provision of this section, all
10 wages earned for labor in excess of the normal work period shall
11 be paid no later than the payday for the next regular payroll period.

12 (2) An employer is in compliance with the requirements of
13 subdivision (a) of Section 226 relating to total hours worked by the
14 employee, if hours worked in excess of the normal work period
15 during the current pay period are itemized as corrections on the
16 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.

17 (c) However, when employees are covered by a collective bargaining
18 agreement that provides different pay arrangements, those
19 arrangements shall apply to the covered employees.

20 (d) The requirements of this section shall be deemed satisfied by the
21 payment of wages for weekly, biweekly, or semimonthly payroll if
the wages are paid not more than seven calendar days following the
close of the payroll period.

22 64. Defendants paid wages to employees on regular intervals. Defendants failed to pay
23 Plaintiff on such intervals for all wages earned and all hours worked. On information and belief,
24 Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such intervals for
25 all wages earned and all hours worked.

26 **I. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS**

27 65. Labor Code § 1174 states:

28 Every person employing labor in this state shall:



1 ...
2 (c) Keep a record showing the names and addresses of all employees
3 employed and the ages of all minors.

4 (d) Keep, at a central location in the state or at the plants or
5 establishments at which employees are employed, payroll records showing
6 the hours worked daily by and the wages paid to, and the number of piece-
7 rate units earned by and any applicable piece rate paid to, employees
8 employed at the respective plants or establishments. These records shall be
9 kept in accordance with rules established for this purpose by the
10 commission, but in any case shall be kept on file for not less than three
11 years. An employer shall not prohibit an employee from maintaining a
12 personal record of hours worked, or, if paid on a piece-rate basis, piece-
13 rate units earned.

14 66. Labor Code § 1174.5 states:

15 Any person employing labor who willfully fails to maintain the records
16 required by subdivision (c) of Section 1174 or accurate and complete
17 records required by subdivision (d) of Section 1174, or to allow any
18 member of the commission or employees of the division to inspect records
19 pursuant to subdivision (b) of Section 1174, shall be subject to a civil
20 penalty of five hundred dollars (\$500).

21 67. Section 7 of Wage Order states,

22 (a) Every employer shall keep accurate information with respect to each
23 employee including the following:

- 24 1. Full name, home address, occupation and social security
25 number.
- 26 2. Birth date, if under 18 years, and designation as a minor.
- 27 3. Time records showing when the employee begins and ends each
28 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.

68. On information and belief, Plaintiff alleges that Defendants failed to maintain
accurate employment records for Plaintiff and the Aggrieved Employees.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 **J. CIVIL PENALTIES SOUGHT**

2 69. During the applicable time period, Defendants violated California Labor Code §§
3 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802.

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

7 71. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiffs and the Aggrieved
8 Employees are entitled to recover civil penalties for each of the Defendants' violations of
9 California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and
10 2802 during the applicable limitations period in the following amounts:

11 A. For violations of California Labor Code § 204, one hundred dollars
12 (\$100.00) for each Aggrieved Employee for each initial violation and two hundred dollars
13 (\$200.00) for each Aggrieved Employee for each subsequent violation (penalty amounts
14 established by California Labor Code § 210).

15 B. For violations of California Labor Code § 226(a), two hundred fifty dollars
16 (\$250.00) for each Aggrieved Employee for initial violation and one thousand dollars (\$1,000.00)
17 for each Aggrieved Employee for each subsequent violation (penalty amounts established by
18 California Labor Code § 226.3).

19 C. For violations of California Labor Code §§ 510 and 512, fifty dollars
20 (\$50.00) for each Aggrieved Employee for initial violation and one hundred dollars (\$100.00) for
21 each Aggrieved Employee for each subsequent violation (penalty amounts established by
22 California Labor Code § 558).

23 D. For violations of California Labor Code § 1197, one hundred dollars
24 (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two hundred
25 fifty dollars (\$250.00) for each Aggrieved Employee for each subsequent violation, per pay period
26 (regardless of whether the initial violations were intentionally committed) (penalty amounts
27 established by California Labor Code § 1197.1).

28 E. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,



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Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
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(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 1198, and 2802, one hundred dollars (\$100.00) for each Aggrieved Employee per pay period for
2 each initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay
3 period for each subsequent violation (penalty amounts established by California Labor Code §
4 2699(f)(2)).

5 F. For the violations of California Labor Code § 1174, \$500 for each
6 Aggrieved Employee for each violation of California Labor Code § 1174 (penalty amounts
7 established by California Labor Code § 1174.5).

8 **K. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS**

9 72. Plaintiff has complied with the procedures for bringing suit specified in California
10 Labor Code § 2699.3. By letter dated June 5, 2020, Plaintiff gave written notice by certified mail
11 to the Labor and Workforce Development Agency ("LWDA") and Defendants of the specific
12 provisions of the California Labor Code alleged to have been violated, including the facts and
13 theories to support the alleged violations. A true and correct copy of Plaintiff's notice to the
14 LWDA dated June 5, 2020 is attached hereto as **Exhibit A**. The LWDA has not responded to
15 Plaintiff's letter.

16 73. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
17 Employees are entitled to an award of civil penalties, reasonable attorney's fees and costs in
18 connection with their claims for civil penalties.

19 **PRAYER FOR RELIEF**

20 74. WHEREFORE, Plaintiff, on behalf of herself and the Aggrieved Employees,
21 prays for relief and judgment against Defendants as follows:

- 22 A. Civil penalties;
- 23 B. Costs of suit; and
- 24 C. Reasonable attorneys' fees.

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Encino, CA 91436
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(818) 582-2561 Fax
SpivakLaw.com

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and other Aggrieved Employees, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: September 21, 2020

By



DAVID SPIVAK
MARALLE MESSRELIAN,
Attorneys for Plaintiff, KRYTAL THOMAS,
and the Aggrieved Employees



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION, AND CERTIFIED MAIL

June 5, 2020

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

Re: *Krystal Thomas / Choice Physicians Network, Inc., Desert Physicians Management, LLC and Manmohan Nayyar, M.D.*

To Whom It May Concern:

This notice concerns the following employers:

1. Choice Physicians Network, Inc.;
2. Desert Physicians Management, LLC; and,
3. Manmohan Nayyar, M.D.

Collectively, the aforementioned employers are referred to herein as "Choice". Manmohan Nayyar, M.D. (individual) is also identified pursuant to the Labor Code § 558.1(b).

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*, Krystal Thomas (hereafter "Thomas") provides notice on behalf of herself and on behalf of all individuals currently and formerly employed in California as hourly employees, including but not limited to case managers, and similarly situated employees (hereafter "Aggrieved Employees"), by Choice, of alleged violations of Labor Code sections 201-203, 204, 226, 226.7, 510, 512, 558.1, 1174, 1194, 1197, 1198 and 2802.

16530 VENTURA BLVD., STE 203
ENCINO, CA 91436

TEL (818) 582-3086
FAX (818) 582-2561

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

Statement of Facts

On or about April 8, 2019, Choice employed Thomas to work in California as a case manager. She continuously worked for Choice as a non-exempt, hourly employee until July 3, 2019 when her employment was terminated. Choice paid Thomas and the other Aggrieved Employees a salary on hourly basis.

At all relevant times, Choice, including Thomas’ supervisor Juliet Wade , required Thomas and the Aggrieved Employees to continue working, performing tasks, including, but not limited to, scheduling appointments, taking intake of patients, completing interviews and preparing discharge summaries, after clocking out at the end of their scheduled shifts. Choice, however, failed to pay Thomas and the other Aggrieved Employees for this off-the-clock work.

At all relevant times, Choice failed to provide Thomas and the other Aggrieved Employees with uninterrupted meal and rest periods. Choice required Thomas and the Aggrieved Employees to continue working during their meal and rest periods and Thomas’ supervisor Juliet Wade and other managers were aware of this. Choice required Thomas and the Aggrieved Employees to clock-out during their rest periods and assured them that Choice would pay them for the time. However, Choice often failed to pay them. Due to the excessive workload and Choice’s failure to hire sufficient staff members, including case managers, Choice required Thomas and the other Aggrieved Employees to work during their meal and rest periods. This resulted in interrupted and on-duty meal and rest periods. Choice failed to pay premium wages for days on which it failed to provide Thomas and the Aggrieved Employees with uninterrupted meal and rest periods.

At all relevant times, Choice required Thomas and the Aggrieved Employees to incur business expenses during their employment. Choice often did not reimburse Thomas and the Aggrieved Employees for their gas mileage, nor did it provide them with transportation. Additionally, Choice required Thomas and the Aggrieved Employees to use their personal mobile phones for work-related communications. Choice, however, failed to reimburse them for such expenses, nor did it provide them with mobile phones.

Choice failed to state on the itemized wage statements that it issued to Thomas and the Aggrieved Employees the accurate wages earned and hours worked, including overtime wages and hours, that Thomas and the Aggrieved Employees earned for unprovided rest and meal periods and off-the-clock work, as described above. Also, Choice failed state on the itemized wage statements that it issued to Thomas and the Aggrieved Employees the premium wages Thomas and the Aggrieved Employees earned for unprovided rest and meal periods described above. Consequently, Choice failed to provide Thomas and the Aggrieved Employees with accurate and complete wage statements that properly and accurately itemize Thomas' and the other Aggrieved Employees' gross and net wages earned and the total hours worked. As a consequence of Choice's willful failure to pay Thomas and the other formerly employed Aggrieved Employees the earned wages described above, Choice failed to timely pay Thomas and the other Aggrieved Employees all earned and unpaid wages during, and upon termination of, their employment.

For the reasons stated herein, Thomas alleges the following violations of the California Labor Code and the Wage Order 5 on behalf of herself and the other Aggrieved Employees:

- (a) Choice failed to pay Thomas and the other Aggrieved Employees all wages earned for all hours worked at the correct rates of pay;
- (b) Choice failed to provide Thomas and the Aggrieved Employees all meal periods and rest periods in compliance with California laws;

- (c) Choice failed to compensate Thomas and the Aggrieved Employees at one hour's pay for each day in which they were not provided their rest breaks as required by law;
- (d) Choice failed to compensate Thomas and the Aggrieved at one hour's pay for each day in which they were not provided their meal periods as required by law;
- (e) Choice failed to indemnify Thomas and the Aggrieved Employees for their business expenses;
- (f) Choice failed to provide Thomas and the other Aggrieved Employees with accurate wage statements; and
- (g) Choice failed to timely pay Thomas and the other Aggrieved Employees all earned and unpaid wages during their employment and at the time such employment ended.

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

The Wage Order

The Wage Order applies to "all persons employed in the public housekeeping industry whether paid on a time, piece rate, commission, or other basis[.]" § 1. The Wage Order defines "Public Housekeeping Industry" to include

"any industry, business, or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the Commission, and includes, but is not limited to the following: ... Hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board

or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care...”

§ 2(P)(4). At all relevant times during the applicable limitations period, Choice provided medical care and employed Thomas and the Aggrieved Employees to work at its facilities. Accordingly, Thomas and the Aggrieved employees are entitled to the protections provided under the Wage Order.

Failure to Provide Meal Periods and Rest Breaks
(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, Labor Code section 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.

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

Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and 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.

Within the health care industry, the term “hours worked” means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act (“FLSA”). Wage Order 5, § 2(K). The FLSA does not define the phrase “hours worked.” However, it is defined by federal regulations:

...As a general rule the term “hours worked” will include: (a) All time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, ... in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in part 785 of this chapter (interpretative bulletin on “hours worked”) and part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). ...

29 C.F.R. § 778.223.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (1944) 321 U. S. 590). Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity.

Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co. v. Wantock* (1944) 323 U.S. 126; *Skidmore v. Swift* (1944) 323 U.S. 134. The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680.

29 C.F.R. § 785.7.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell v. Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard v. Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945))

29 C.F.R. § 785.18.

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. *Culkin v. Glenn L. Martin, Nebraska Co.*, 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson v. Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs v. Joshua Hendy Corp.*, 183 F. 2d 515 (C.A. 9, 1950), 187 F. 2d

447 (C.A. 9, 1951); *Walling v. Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Lofton v. Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell v. Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass v. Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956)).

29 C.F.R. § 785.19. "It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period." *Id.* Respiratory therapists required to wear pagers and respond to patient emergencies during meal breaks are entitled to payment from their employer for meal breaks because their employer has not fully relieved them of their responsibilities during those times. *Hoffman v. St. Joseph's Hosp.*, 1998 U.S. Dist. LEXIS 7911 (N.D. Ga. Apr. 14, 1998); see also *Havrilla v. United States*, 125 Fed. Cl. 454, 2016 U.S. Claims LEXIS 192 (Mar. 14, 2016) (employees required to work during half hour meal break given that they had to stay at the facility and be available to respond to requests to return or check out weapons and equipment); *Wahl v. Wichita*, 701 F. Supp. 1530, 1988 U.S. Dist. LEXIS 15015 (D. Kan. Dec. 21, 1988) (Police officers stated a claim under the Fair Labor Standards Act where they alleged that they were not paid for meal periods but were required to remain within a certain area, respond to emergencies and citizen requests, and remain accessible).

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. Wage Order 5, § 11(D).

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

Rest Periods:

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

California Labor Code § 226.7 states:

- (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
- (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the

Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

In relevant part, Labor Code §558.1 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, §§203, 226, 226.7, 1193.6, 1194 for 2802, may be held liable as the employer for such violation.

(a) 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.”

At all relevant times herein, Manmohan Nayyar, M. D., Inc. owned and operated Choice and caused the Labor Code and Wage Order violations as alleged herein. As such, he employed Thomas and the Aggrieved Employees, and at all relevant times functioned as “owner” of Choice.

Choice, knowingly and intentionally, failed to provide Thomas and the Aggrieved Employees with timely, uninterrupted and duty-free meal and rest periods. Further, Choice failed to pay Thomas and the Aggrieved Employees premium wages on workdays it failed to provide them with meal and rest periods.

Accordingly, Thomas now seeks civil penalties for these Labor Code violations that Choice has committed against her and the Aggrieved Employees as follows:

1. \$100 for each aggrieved employee for each initial violation of California Labor Code section 226.7, and \$200 for each aggrieved

employee for each subsequent violation, per pay period (penalties set by California Labor Code section 2699(f)(2));

2. \$50 for each aggrieved employee for each initial violation of California Labor Code section 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 section 558); and
3. \$100 for each aggrieved employee for each initial violation of California Labor Code section 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code section 2699(f)(2)).

Failure To Pay Wages For All Hours Worked
(Lab. Code §§ 510, 1194, 1197, and 1198)

In relevant part, Labor Code section 1194 states:

- (a) 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.

Under Labor Code section 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, 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.

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

Within the health care industry, the term “hours worked” means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act (“FLSA”). Wage Order 5, § 2(K). The FLSA does not define the phrase “hours worked.” However, it is defined by federal regulations:

...As a general rule the term “hours worked” will include: (a) All time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, ... in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in part 785 of this chapter (interpretative bulletin on “hours worked”) and part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). ...

29 C.F.R. § 778.223.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (1944) 321 U. S. 590). Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that “an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer’s property may be treated by the parties as a benefit to the employer.” *Armour & Co. v. Wantock* (1944) 323 U.S. 126; *Skidmore v. Swift* (1944) 323 U.S. 134. The workweek ordinarily includes “all the time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.” *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680.

29 C.F.R. § 785.7.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell v. Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard v. Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945)).

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29 C.F.R. § 785.18.

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. *Culkin v. Glenn L. Martin, Nebraska Co.*, 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson v. Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs v. Joshua Hendy Corp.*, 183 F. 2d 515 (C.A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling v. Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Lofton v. Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell v. Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass v. Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

29 C.F.R. § 785.19. "It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period." *Id.* Respiratory therapists required to wear pagers and respond to patient emergencies during meal breaks are entitled to payment from their employer for meal breaks because their employer has not fully relieved them of their responsibilities during those times. *Hoffman v. St. Joseph's Hosp.*, 1998 U.S. Dist. LEXIS 7911 (N.D. Ga. Apr. 14, 1998); see also *Havrilla v. United States*, 125 Fed. Cl. 454, 2016 U.S. Claims LEXIS 192 (Mar. 14, 2016) (employees required to work during half hour meal break given that they had to stay at the facility and be available to respond to requests to return or check out weapons and equipment); *Wahl v. Wichita*, 701 F. Supp. 1530, 1988 U.S. Dist. LEXIS 15015 (D. Kan. Dec. 21, 1988) (Police officers stated a claim under the Fair

Labor Standards Act where they alleged that they were not paid for meal periods but were required to remain within a certain area, respond to emergencies and citizen requests, and remain accessible).

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, Choice knowingly and intentionally required Thomas and the Aggrieved Employees to work off-the-clock without pay, including during periods after their scheduled stop times and after they clocked out for meal and rest periods due to shortage of staff to cover their work and excessive workload as explained above. Thus, Choice failed to compensate Thomas and the Aggrieved Employees for all wages for all hours worked as required under the aforementioned California law. As a result, Choice is in violation of relevant California Labor Code sections and Wage Order 5.

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

1. \$50 for each aggrieved employee for each initial violation of California Labor Code § 510, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each aggrieved employee for each initial violation of California Labor Code section 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code section 2699(f)(2));
3. \$100 for each underpaid hourly employee for each initial violation of California Labor Code § 1197, and \$250 for each underpaid employee for each subsequent violation per pay period (regardless of whether

the initial violations were intentionally committed), in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203 (penalties set by Labor Code § 1197.1); and

4. \$100 for each aggrieved employee per pay period in which initial violations of § 1194 occurred, and \$200 for each aggrieved employee per pay period in which subsequent violations of § 1194 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Provide Accurate Wage Statements
(Lab. Code § 226)

Labor Code section 226(a) requires an employer to provide an employee, either semi-monthly or at the time of each wage payment, with an accurate and itemized written wage statement that shows:

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 his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement;
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.

In relevant part, Labor Code §558.1 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, §§203, 226, 226.7, 1193.6, 1194 for 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.”

At all relevant times herein, Manmohan Nayyar, M. D., Inc. owned and operated Choice and caused the Labor Code and Wage Order violations as alleged herein. As such, he employed Thomas and the Aggrieved Employees, and at all relevant times functioned as “owner” of Choice.

Choice failed to state on the itemized wage statements that it issued to Thomas and the Aggrieved Employees the accurate wages earned and hours worked, including overtime wages and hours, that Thomas and the Aggrieved Employees earned for unprovided rest and meal periods and off-the-clock work, as described above. Also, Choice failed state on the itemized wage statements that it issued to Thomas and the Aggrieved Employees the premium wages Thomas and the Aggrieved Employees earned for unprovided rest and meal periods described above. Consequently, Choice failed to provide Thomas and the Aggrieved Employees with accurate and complete wage statements that properly and accurately itemize Thomas’ and the other Aggrieved Employees’ gross and net wages earned and the total hours worked.

Accordingly, Thomas seeks civil penalties for the Labor Code violations that Choice has committed against her and the other Aggrieved Employees in the amount of \$250 for each aggrieved employee for each initial violation of California Labor Code section 226(a), and \$1,000 for each aggrieved employee for each subsequent violation (penalties set by California Labor Code section 226.3).

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

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

In relevant part, Labor Code §558.1 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, §§203, 226, 226.7, 1193.6, 1194 for 2802, may be held liable as the employer for such violation.

(c) 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.”

At all relevant times herein, Manmohan Nayyar, M. D., Inc. owned and operated Choice and caused the Labor Code and Wage Order violations as alleged herein. As such, he employed Thomas and the Aggrieved Employees, and at all relevant times functioned as “owner” of Choice.

As described above, Choice required Thomas and the other Aggrieved Employees to incur business expenses such as mileage and mobile phone expenses, for which, it failed to indemnify them. Accordingly, Thomas seeks civil penalties on behalf of herself and other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of California Labor Code § 2802, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code section 204 states all wages (other than those mentioned in Labor Code sections 201 and 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.

Because of Choice's knowing and intentional failures to pay Thomas and the Aggrieved Employees wages for off-the-clock work, including, but not limited to, interrupted meal and rest periods, work after clocking out at the end of shifts, and premium wages for unprovided rest and meal periods within the time periods set by California Labor Code § 204, Choice failed to timely pay all wages due during employment.

Accordingly, Thomas seeks civil penalties on behalf of herself and the Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of California Labor Code § 204, and \$200 for each aggrieved employee, plus 25% of the amount unlawfully withheld from each aggrieved employee, for each subsequent violations (penalties set by Labor Code § 210).

Failure to Timely Pay Wages Upon Termination
(Lab. Code §§ 201-203)

Under Labor Code section 201, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under section 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 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. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting.

Under Labor Code section 203, if an employer willfully fails to pay, without abatement or reduction, in accordance with sections 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 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.

By willfully failing to pay wages to Thomas and the Aggrieved Employees as set forth above, Choice is liable for violations of Labor Code §§ 201, 202, and 203. Further, Choice failed to pay Thomas and the Aggrieved Employees their final wages when it terminated their employment. Accordingly, on behalf of herself and the Aggrieved Employees, Thomas seeks civil penalties from Choice as follows:

1. For violations of Labor Code section 201, \$100 per aggrieved employee for each of the pay periods in which initial violations of section 201 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of section 201 occurred (penalties set by Labor Code section 2699(f)(2));

2. For violations of Labor Code section 202, \$100 per aggrieved employee for each of the pay periods in which initial violations of section 202 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of section 202 occurred (penalties set by Labor Code section 2699(f)(2)); and
3. For violations of Labor Code section 203, \$100 per aggrieved employee for each of the pay periods in which initial violations of section 203 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of section 203 occurred (penalties set by Labor Code section 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174, 1174.5 & 1198)

Labor Code section 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.

Labor Code section 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

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

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Conclusion

As noted above, this letter constitutes the required notice under the Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code section 2699(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: Krystal Thomas

Walter Haines, Esq.

Choice Physicians Network, Inc.
C/o Manmohan Nayyar, M.D.,
(Chief Executive Officer and
Agent for Service of Process)
18564 US Highway 18, Suite 105,
Apple Valley, CA 92307
Fax: (760) 949-3123

Desert Physicians Management, LLC
C/o Manmohan Nayyar, M.D.,
(Agent for Service of Process)
18564 US Highway 18, Suite 105,
Apple Valley, CA 92307
Fax: (760) 949-3123

LWDA / Choice

6/5/2020

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Manmohan Nayyar, M.D.
18564 US Highway 18, Suite 105,
Apple Valley, CA 92307
Fax: (760) 949-3123

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1. I am a citizen of the United States and am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to the within action. My business address is 16530 Ventura Blvd., Suite 203, Encino, California 91436.

On Wednesday, September 23, 2020, caused to have electronically served the following document described as **[PROPOSED] FIRST AMENDED COMPLAINT FOR VIOLATIONS OF THE LABOR CODE AND CIVIL PENALTIES UNDER THE LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF 2004, LABOR CODE §§ 2698, ET SEQ.** on interested parties with the email listed below:

XXXX (BY EMAIL) I caused the documents to be sent to the persons at the electronic service addresses listed above from my electronic service address breck@spivaklaw.com or boyama@spivaklaw.com.

XXXX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

[Signature]