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8 JOSEPH SUA

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO CIVIL DIVISION

APR 12 2021


VERONICA GONZALEZ, DEPUTY

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF SAN BERNARDINO
12 (UNLIMITED JURISDICTION)

13 JOSEPH SUA, as an "aggrieved employee" on
14 behalf of other similarly situated "aggrieved
15 employees" under the Labor Code Private
Attorney General Act of 2004,

16 *Plaintiff(s),*

17 vs.

18 ALVARADO RESTAURANT GROUP, LLC,
19 a Colorado limited liability company;
20 ALVARADO HOLDINGS, INC., a Colorado
21 corporation; and DOES 1 through 50,
22 inclusive,

23 *Defendant(s).*

Case No.: CIVDS2017887

**~~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



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1 Plaintiff JOSEPH SUA (hereafter "Plaintiff"), on behalf of himself, the State of
2 California, and other Aggrieved Employees, complains and alleges as follows:

3 **I. 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 ALVARADO RESTAURANT GROUP, LLC, a Colorado limited liability
7 company; ALVARADO HOLDINGS, INC., a Colorado corporation; and DOES 1-50, inclusive
(collectively "Defendants").

8 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
9 him, the State of California, and other similarly situated aggrieved current and former employees
10 who worked in California as hourly employees, including but not limited to managers, assistant
11 managers, shift leaders, food champions, service champions, and other employees of Defendants
12 in comparable positions, at any time during the period of June 5, 2018 to the present, for civil
13 penalties and other related relief. These claims are based on Defendants' alleged failures to (1)
14 provide all rest breaks and meal periods; (2) pay all wages for all hours worked; (3) pay all
15 "reporting time" wages; (4) indemnify for necessary work-related expenditures; (5) provide
16 accurate written wage statements; (6) timely pay wages earned during employment; (7) timely
17 pay wages upon termination of employment; and (8) issue accurate and complete itemized wage
18 statements. Accordingly, Plaintiff now seeks to recover civil penalties and related relief through
this representative action.

19 **II. JURISDICTION AND VENUE**

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

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

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

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



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therein.

III. THE PARTIES

7. Plaintiff JOSEPH SUA is a natural person and resident of the State of California. At all relevant times, Plaintiff was an “employee” within the meaning of Title 8 California Code of Regulations Section 11050 and an “aggrieved employee” within the meaning of Labor Code Section 2699(c).

8. Defendant ALVARADO RESTAURANT GROUP, LLC is a limited liability company organized and existing under the laws of Colorado based on Plaintiff’s information and belief.

9. Defendant ALVARADO HOLDINGS, INC. is a corporation organized and existing under the laws of Colorado based on Plaintiff’s information and belief.

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

A. THE AGGRIEVED EMPLOYEES

11. The “Aggrieved Employees” are all individuals Defendants employed in California and paid on an hourly basis, including but not limited to managers, assistant managers, shift leaders, food champions, service champions, and other hourly employees in comparable positions, at any time during the period of June 5, 2019 and entry of judgment (the “PAGA Period”).

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

13. At all relevant times, in perpetrating the acts and omissions alleged herein, Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack of a practice which resulted in Defendants not paying Plaintiff and other Aggrieved Employees



1 in accordance with applicable California labor laws as alleged herein.

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

7 **IV. FACTUAL ALLEGATIONS**

8 15. Defendants first hired Plaintiff as a non-exempt, hourly restaurant manager on or
9 about April 19, 2019 to prepare for the opening of Defendants' restaurant in Barstow, California.
10 Although Plaintiff's official first date of employment was May 1, 2019, Defendants required him
11 to interview and hire restaurant staff prior to his official start date. Plaintiff continuously worked
12 for Defendants in this capacity from the time of his hire until on or about March 23, 2020, when
13 his employment ended.

14 16. At all relevant times, Defendants paid Plaintiff and the Aggrieved Employees at
15 an hourly rate of pay and issued their wages on a bi-weekly basis. At all relevant times, Plaintiff
16 and the Aggrieved Employees were non-exempt employees entitled to the protections of both the
17 Labor Code and the Wage Order.

18 17. At relevant times, Defendants failed to provide Plaintiff and the Aggrieved
19 Employees adequate rest periods and premium wages for missed rest periods in violation of
20 California law. Due to high customer demand and low staffing levels, Defendants regularly failed
21 to permit Plaintiff and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break
22 every four hours or major portion thereof. Although Plaintiff expressed his concerns about
23 Defendants' low staffing levels to Defendants at the beginning of his employment, Defendants
24 did not make additional hires.

25 18. Instead, Defendants instructed Plaintiff and the Aggrieved Employees to work
26 through their rest periods. On Plaintiff's information and belief, Defendants did not seek an
27 exemption from the rest period protections of the Wage Order from the California Division of
28 Labor Standards Enforcement.

19. Additionally, at relevant times, Defendants failed to provide Plaintiff and the
Aggrieved Employees with an off-duty, 30-minute meal period before the end of the fifth hour
worked. Instead, Defendants regularly required Plaintiff and the Aggrieved Employees to work



1 through their meal periods.

2 20. Defendants required Plaintiff and the Aggrieved Employees to incur certain
3 business expenses in the course of performing their duties. Defendants required Plaintiff and the
4 Aggrieved Employees to use their personal mobile telephones to communicate with Defendants
5 and failed to reimburse them for this expense. Further, at relevant times, Defendants required
6 Plaintiff and the Aggrieved Employees to drive their personal vehicles from their assigned
7 restaurant to the bank in order to make deposits. Defendants failed to reimburse Plaintiff and the
8 Aggrieved Employees for such mileage.

9 21. Defendants also required Plaintiff and the Aggrieved Employees to perform work
10 while clocked out and failed to compensate them for this time. At the inception of Plaintiff's
11 employment, Defendants required Plaintiff to interview and hire restaurant employees while
12 clocked out for work and failed to compensate him for this time. Further, during the first few
13 months of employment, Defendants required Plaintiff and the Aggrieved Employees to travel
14 from Defendants' restaurant in Barstow, California to their training site in Bellflower, California.
15 On such occasions, Defendants failed to adequately compensate Plaintiff and the Aggrieved
16 Employees for all of this time spent in transit. Defendants paid Plaintiff and the Aggrieved
17 Employees for only three hours of travel time, despite the fact that Plaintiff's and the Aggrieved
18 Employees' travel times frequently took over four or even five hours.

19 22. Defendants also required Plaintiff and the Aggrieved Employees to remain on-call
20 while clocked out for work. Defendants regularly called Plaintiff's and the Aggrieved Employees'
21 personal mobile phones while they were clocked out for work and required them to respond to
22 questions from, and provide instructions to, employees currently on shift at Defendants'
23 restaurant. At relevant times, Defendants further required Plaintiff and the Aggrieved Employees
24 to report to work outside of their regularly scheduled shifts in order to correct orders or participate
25 in restaurant audits.

26 23. When Defendants scheduled Plaintiff and the Aggrieved Employees to open
27 Defendants' restaurant at the start of the workday, Defendants required them to perform premises
28 inspections before clocking in. Such premises inspections included driving around the perimeter
of Defendants' restaurant and checking for property damage, disarming the restaurant security
code, and turning on the restaurant lights. Additionally, when Defendants scheduled Plaintiff and
the Aggrieved Employees to close the restaurant, Defendants required them to clock out and then



1 wait until all other employees had left the restaurant before leaving their work stations.

2 24. For the reasons stated herein, Plaintiff alleges that as a result of Defendants'
3 unlawful practice and policies, Plaintiff and the Aggrieved Employees were:

- 4 A. Not provided with all off duty meal periods;
- 5 B. Not provided with all rest break periods as required by law;
- 6 C. Not paid one hour's pay for each workday in which Defendants failed to
7 provide them with one or more timely rest periods;
- 8 D. Not paid one hour's pay for each workday in which Defendants failed to
9 provide them with one or more timely meal periods;
- 10 E. Not paid for all hours worked at the correct rates of pay, including, but not
11 limited to, regular and overtime pay due to off-the-clock work;
- 12 F. Not paid additional "reporting time" wages on days during which they
13 communicated by phone with Defendants' management or on-duty employees or traveled to
14 Defendants' worksites outside of their scheduled work hours;
- 15 G. Not indemnified for all necessary business expenditures incurred during
16 the discharge of their duties;
- 17 H. Not provided with accurate and complete wage statements; and
- 18 I. Not timely paid all earned and unpaid wages during their employment with
19 Defendants and at the time such employment ended.

20 **V. FIRST (AND ONLY) CAUSE OF ACTION**

21 **CIVIL PENALTIES**

22 **(Lab. Code §§ 2698, *et seq.*)**

23 **(By Plaintiff, on behalf of himself and the other Aggrieved Employees, against all**
24 **Defendants)**

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

26 26. At all relevant times, Plaintiff and the Aggrieved Employees have been non-
27 exempt employees entitled to the protections of both the Labor Code and the Wage Order.

28 **A. FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS**

29 27. 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.

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

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

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

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

Rest Periods

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

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

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

Meal Periods

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



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1 Unless the employee is relieved of all duty during a 30 minute meal
2 period, the meal period shall be considered an 'on duty' meal
3 period and counted as time worked. An 'on duty' meal period shall
4 be permitted only when the nature of the work prevents an
5 employee from being relieved of all duty and when by written
6 agreement between the parties an on-the-job paid meal period is
7 agreed to. The written agreement shall state that the employee
8 may, in writing, revoke the agreement at any time."

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

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

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

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

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

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

34. Defendants intentionally failed to provide Plaintiff and the Aggrieved Employees
with all required 30-minute duty free meal periods and 10-minute rest periods in accordance with



1 the Wage Order. Plaintiff is informed and believes and thereon alleges that, at all relevant times
2 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
3 which resulted in Defendants not providing the Aggrieved Employees with all off-duty meal
4 periods and rest breaks required by California law.

5 **B. FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED**

6 35. Section 2 of the Wage Order defines “hours worked” as “the time during which an
7 employee is subject to the control of an employer, and includes all the time the employee is
8 suffered or permitted to work, whether or not required to do so[.]”

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

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

16 38. In relevant part, California Labor Code § 510 states,

17 Any work in excess of eight hours in one workday and any work in excess of 40
18 hours in any one workweek and the first eight hours worked on the seventh day
19 of work in any one workweek shall be compensated at the rate of no less than one
20 and one-half times the regular rate of pay for an employee. Any work in excess of
21 12 hours in one day shall be compensated at the rate of no less than twice the
22 regular rate of pay for an employee. In addition, any work in excess of eight hours
23 on any seventh day of a workweek shall be compensated at the rate of no less than
24 twice the regular rate of pay of an employee.

25 39. Section 3 of the Wage Order states:

26 (A) Daily Overtime - General Provisions

27 (1) The following overtime provisions are applicable to
28 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



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is compensated for such overtime at not less than:

(a) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

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

41. 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.

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

43. California Labor Code § 1197 makes it unlawful for an employer to pay an employee less than the minimum wage required under the applicable Wage Order for all hours



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1 worked during a payroll period.

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

4 45. In conjunction, these provisions of the California Labor Code require employers
5 to pay non-exempt employees no less than their agreed-upon or statutorily mandated wage rates
6 for all hours worked, including unrecorded hours when the employer knew or reasonably should
7 have known that employees were working during those hours. (See *Morillion v. Royal Packing*
8 *Co.* (2000) 22 Cal.4th 575, 585.)

9 46. Reporting time pay provides wages to nonexempt employees who report to work
10 but are permitted to work less than half the hours of their regular shift. Employees must be paid
11 for half the usual or scheduled day's work, but in no event for less than two (2) hours or more
12 than four (4) hours, at their regular rate of pay. Wage Order § 5(A); *Murphy v. Kenneth Cole*
13 *Prods., Inc.* (2007) 40 Cal. 4th 1094, 1111. Reporting time pay constitutes wages required by
14 law. *Kamar v. RadioShack Corp.*, No. CV 07-2252 AHM (AJWx), 2008 U.S. Dist. LEXIS 40581
15 at *15-16 (C.D. Cal. May 15, 2008) (citing *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal
16 4th 1094, 1111).

17 47. Plaintiff is informed and believes that, at all relevant times, Defendants have
18 applied centrally devised policies and practices to him and the Aggrieved Employees with respect
19 to working conditions and compensation arrangements.

20 48. At all relevant times during the applicable limitations period, Defendants paid
21 Plaintiff and the Aggrieved Employees at an hourly rate on a bi-weekly basis.

22 49. At all relevant times during the applicable limitations period, Defendants failed
23 to pay Plaintiff and the Aggrieved Employees for all hours worked at the correct rates of pay,
24 including, but not limited to, all regular and overtime wages for hours they worked while off-the-
25 clock.

26 50. Furthermore, at all relevant times, Defendants required Plaintiff and the
27 Aggrieved Employees to monitor their personal phones while clocked out for work. Defendants
28 regularly contacted Plaintiff and the Aggrieved Employees by phone outside of their working
hours – often late at night or very early in the morning – and required them to respond to questions
from, and provide instructions to, employees currently on shift at Defendants' restaurant. At
relevant times, Defendants further required Plaintiff and the Aggrieved Employees to report to



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1 work outside of their regularly scheduled shifts in order to correct orders or participate in
2 restaurant audits. Defendants not only failed to pay Plaintiff and the Aggrieved Employees for
3 this time spent working off-the-clock, but also failed to pay them the “reporting time” wages to
4 which they were entitled pursuant to Labor Code § 1198 and the Wage Order.

5 51. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
6 Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants’
7 failure to compensate the Aggrieved Employees for all hours worked, including, but not limited
8 to, regular and overtime hours at the correct rates of pay.

9 **C. FAILURE TO INDEMNIFY**

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

13 53. In relevant part Section 9 of the Wage Order states,

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

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

21 55. On information and belief, Plaintiff alleges on behalf of himself and the
22 Aggrieved Employees that Defendants required them to incur business expenses, including, but
23 not limited to, the use of personal mobile telephones to communicate with Defendants as a
24 necessary condition of employment. Defendants failed to indemnify Plaintiff and the Aggrieved
25 Employees for these expenses both during and after their employment ended. Further, at relevant
26 times, Defendants required Plaintiff and the Aggrieved Employees to travel from their assigned
27 restaurant to the bank in order to make deposits. Defendants failed to indemnify Plaintiff and the
28 Aggrieved Employees for their mileage related expenses both during their employment and after
such employment ended.

D. INCOMPLETE AND INACCURATE WAGE STATEMENTS

56. Pursuant to 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



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1 applicable hourly rates in effect during the pay period; and d) the corresponding number of hours
2 worked at each hourly rate by the employee.

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

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

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

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

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

18 E. The number of piece-rate units earned and the piece rate.

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

22 59. As alleged herein, Defendants failed to pay Plaintiff and the Aggrieved
23 Employees all wages owed, including, but not limited to, all regular and overtime wages owed
24 at the correct rates for work performed while off-the-clock. As a result, Defendants have failed
25 to properly and accurately itemize each employee’s gross wages earned, net wages earned, the
26 total hours worked, the corresponding number of hours worked at each rate by the employee and
27 other requirements of California Labor Code § 226. As a result, Defendants have violated
28 California Labor Code § 226.

60. Defendants’ failure to provide Plaintiff and the Aggrieved Employees with
accurate wage statements was knowing and intentional. Defendants had the ability to provide
Plaintiff and the Aggrieved Employees with accurate wage statements but intentionally provided



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wage statements that Defendants knew were not accurate.

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

E. UNTIMELY WAGES DURING EMPLOYMENT

62. Labor Code § 204 states

(a) All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. ...

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

(2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

(c) However, when employees are covered by a collective bargaining



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1 agreement that provides different pay arrangements, those
2 arrangements shall apply to the covered employees.

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

7 63. Defendants paid wages to employees on regular intervals. Defendants failed to
8 pay Plaintiff on such intervals for all wages earned and all hours worked including, but not
9 limited to, all premium wages for all rest breaks and/or off-duty meal periods that were not
10 provided, and all regular and overtime wages for work performed while off-the-clock. On
11 information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved
12 Employees on such intervals for all wages earned and all hours worked.

13 **F. UNTIMELY FINAL WAGES**

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

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

20 66. By failing to pay Plaintiff and the Aggrieved Employees all premium wages for
21 all late or missed rest breaks and /or meal periods, and all regular and overtime wages for work
22 Plaintiff and the Aggrieved Employees performed while off-the-clock, Defendants failed to
23 timely pay them all earned and unpaid wages in violation of Labor Code § 201 or § 202.

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

G. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS

68. Labor Code § 1174 states:

Every person employing labor in this state shall:

...

(c) Keep a record showing the names and addresses of all employees



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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.

69. Labor Code § 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) 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).

70. Section 7 of the Wage Order states,

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

1. Full name, home address, occupation, and social security number.
2. Birth date, if under 18 years, and designation as a minor.
3. Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
4. Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
5. Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
6. When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

72. On information and belief, Defendants have willfully failed to maintain the records required by § 1174 and the Wage Order, including, but not limited to, the total premium



wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Plaintiff and the Aggrieved Employees.

H. CIVIL PENALTIES SOUGHT

73. During the applicable time period, Defendants violated California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 512, 1198, and 2802.

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

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

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

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

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

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

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



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established by California Labor Code § 1197.1).

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

I. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS

76. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated June 5, 2020, Plaintiff gave written notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and Defendant Alvarado Restaurant Group, LLC of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. A true and correct copy of Plaintiff’s letter to the LWDA dated June 5, 2020 is attached hereto as **Exhibit A**. By letter dated November 22, 2020, Plaintiff gave supplemental written notice by certified mail to the LWDA and Defendants Alvarado Restaurant Group, LLC and Alvarado Holdings, Inc., of additional facts and theories to support the alleged violations of the California Labor Code. A true and correct copy of Plaintiff’s supplemental letter to the LWDA, dated September 22, 2020, is attached hereto as **Exhibit B**. The LWDA has not responded to Plaintiff’s letters.

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

VI. PRAYER FOR RELIEF

78. WHEREFORE, Plaintiff, on behalf of himself and the Aggrieved Employees, prays for relief and judgment against Defendants as follows:

- A. Civil penalties;
- B. Costs of suit;
- C. Reasonable attorneys’ fees; and
- D. Such other relief as the Court deems just and proper.

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VII. DEMAND FOR JURY TRIAL

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: February 10, 2021

By: _____

DAVID SPIVAK
CARL KAPLAN, Attorneys for Plaintiff,
JOSEPH SUA, and the Aggrieved
Employees



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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: *Joseph Sua / Palo Alto Inc., et al.*

To whom it may concern:

This notice concerns the following employers:

1. Palo Alto, Inc., a Colorado corporation; and
2. Alvarado Restaurant Group, LLC, a Colorado limited liability company

Collectively, the aforementioned employers are herein referred to as "Palo Alto."

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Joseph Sua (hereafter "Sua") provides notice on behalf of himself and of all individuals currently and formerly employed in California as hourly employees, including but not limited to managers, crew leaders, crew persons, bussers, servers, dishwashers, cooks, chefs, janitors, cashiers, and other hourly employees in comparable positions (hereafter referred to collectively as "Aggrieved Employees") by Palo Alto, of violations of California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, Palo Alto has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Sua and the Aggrieved Employees are "employees" within the meaning of Industrial

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Welfare Commission Order No. 5-2001 (hereafter “the Wage Order” or “Wage Order 5”), paragraph 2.F, and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

Palo Alto first hired Sua as a non-exempt, hourly restaurant manager on or about April 19, 2019 to prepare for the opening of its restaurant in Barstow, California. Although Sua’s official first date of employment was May 1, 2019, Palo Alto required him to interview and hire restaurant staff prior to his official start date. Sua continuously worked for Palo Alto in this capacity from the time of his hire until on or about March 23, 2020, when his employment ended.

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

At relevant times, Palo Alto failed to provide Sua and the Aggrieved Employees adequate rest periods and premium wages for missed rest periods in violation of California law. Due to high customer demand and low staffing levels, Palo Alto regularly failed to permit Sua and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof. Although Sua expressed his concerns about Palo Alto’s low staffing levels to Palo Alto’s district manager, Lisa Reyes, at the beginning of his employment, Palo Alto did not make additional hires. Instead, Palo Alto instructed Sua and the Aggrieved Employees to work through their rest periods. Palo Alto did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. Additionally, at relevant times, Palo Alto failed to provide Sua and the Aggrieved Employees with an off-duty, 30-minute meal period before the end of the fifth hour worked. Instead, Palo Alto regularly required Sua and the Aggrieved Employees to work through their meal periods.

Palo Alto required Sua and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. Palo Alto required Sua and the Aggrieved Employees to use their personal mobile telephones to communicate with Palo Alto and failed to reimburse them for this expense.

Palo Alto also required Sua and the Aggrieved Employees to perform work while clocked out and failed to compensate them for this time. At the inception of his employment, Palo Alto required Sua to interview and hire restaurant employees while clocked out for work and failed to compensate him for this time. Further, during the first few months of employment, Palo Alto required Sua and the Aggrieved Employees to travel from Palo Alto's restaurant in Barstow, California to its training site in Bellflower, California. On such occasions, Palo Alto failed to adequately compensate Sua and the Aggrieved Employees for all of this time spent in transit. Palo Alto paid Sua and the Aggrieved Employees for three hours of travel time, despite the fact that Plaintiff's and the Aggrieved Employees' travel times frequently took over four or even five hours.

Palo Alto also required Sua and the Aggrieved Employees to remain on-call while clocked out for work. Palo Alto regularly called Plaintiff's and the Aggrieved Employees' personal mobile phones while they were clocked out for work and required them to respond to questions from, and provide instructions to, employees currently on shift at Palo Alto's restaurant. At relevant times, Palo Alto further required Sua and the Aggrieved Employees to report to work outside of their regularly scheduled shifts in order to correct orders or participate in restaurant audits.

When Palo Alto scheduled Sua and the Aggrieved Employees to open Palo Alto's restaurant at the start of the workday, Palo Alto required them to perform premises inspections before clocking in. Such premises inspections included driving around the perimeter of Palo Alto's restaurant and checking for property damage, disarming the restaurant security code, and turning on the restaurant lights. Additionally, when Palo Alto scheduled Sua and the Aggrieved Employees to close the restaurant, Palo Alto required them to clock out and then wait until all other employees had left the restaurant before leaving their work stations.

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

- a) Palo Alto failed to provide Sua and the other Aggrieved Employees with all timely, off-duty rest breaks and meal periods;
- b) Palo Alto failed to compensate Sua and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more meal periods required by law;
- c) Palo Alto failed to compensate Sua and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more rest breaks required by law;
- d) Palo Alto failed to pay Sua and the other Aggrieved Employees for all hours worked at the correct rates of pay including, but not limited to, minimum, regular and overtime pay due to off-the-clock work;
- e) Palo Alto failed to pay Sua and the other Aggrieved Employees additional "reporting time" wages on days during which they communicated by phone with Palo Alto management or on-duty employees or traveled to Palo Alto's worksites outside of their scheduled work hours.
- f) Palo Alto failed to indemnify Sua and the other Aggrieved Employees for all necessary business expenditures incurred during the discharge of their duties;
- g) Palo Alto failed to provide Sua and the Aggrieved Employees with accurate wage statements;
- h) Palo Alto failed to timely pay Sua and the Aggrieved Employees all earned and unpaid wages during employment;

- i) Palo Alto failed to timely pay Sua and the Aggrieved Employees who are former employees all earned and unpaid wages at the time of separation from employment; and
- j) Palo Alto willfully failed to maintain accurate employment records regarding Sua and the Aggrieved Employees.

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

The Wage Order

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

At all relevant times during the applicable limitations period, Palo Alto employed Sua and the other Aggrieved Employees as non-exempt, hourly managers, crew leaders, crew persons, bussers, servers, dishwashers, cooks, chefs, janitors, cashiers, and employees in comparable positions. Accordingly, Sua and the other Aggrieved Employees are entitled to the protections provided under the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

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

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

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

Meal Periods:

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

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

...

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

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

Rest Periods:

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

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

California Labor Code § 226.7 states:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Section 17 of the Wage Order states:

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

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

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

1. \$100 for each aggrieved employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

Failure to Indemnify 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.”

At relevant times during the applicable limitations period, Palo Alto required Sua and the Aggrieved Employees to use personal mobile telephones to

communicate Palo Alto as a necessary condition of employment. Palo Alto failed to indemnify Sua and the Aggrieved Employees for expenses associated with the use of their personal mobile phones both during and after their employment ended.

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

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

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

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

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

In relevant part, California Labor Code § 1194 states,

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an

employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

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

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

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

At all relevant times during the applicable limitations period, Palo Alto knowingly failed to pay Sua and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, all regular and overtime wages for hours they worked while off-the-clock.

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

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

2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalties set by California Labor Code § 1197.1).

Failure to Pay Reporting Time Pay
(Labor Code § 1198)

Under Section 5 of the Wage Order,

Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

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.

As described above, at all relevant times, Palo Alto required Sua and the Aggrieved Employees to monitor their personal phones while clocked out for work. Palo Alto regularly contacted Sua and the Aggrieved Employees by phone outside of their working hours – often late at night or very early in the morning – and required them to respond to questions from, and provide instructions to, employees currently on shift at Palo Alto’s restaurant. At relevant times, Palo Alto further required Sua and the Aggrieved Employees to report to work outside of their regularly scheduled shifts in order to correct orders or participate in restaurant audits. Palo Alto not only failed to pay Sua and the Aggrieved Employees for this time spent working off-the-clock, but also failed to pay them the “reporting time” wages to which they were entitled pursuant to Labor Code § 1198 and the Wage Order.

Accordingly, Sua seeks civil penalties on behalf of himself and the Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

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

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

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

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

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

Failure to Timely Pay Wages During Employment

(Lab. Code § 204)

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

As alleged herein, Palo Alto consistently failed to timely pay all wages to Sua and the Aggrieved Employees. Palo Alto failed to provide Sua and the other Aggrieved Employees all wages owed, including, but not limited to, all premium wages for missed, interrupted, or late meal and rest periods, and all regular and overtime wages for work they performed off-the-clock. As a result, Palo Alto failed to pay Sua and the other Aggrieved Employees all wages within the time periods set by California Labor Code § 204. As a result, Palo Alto has violated California Labor Code § 204. Because of Palo Alto's failure to fully pay Sua and the other Aggrieved Employees within the time periods set by California Labor Code § 204, Palo Alto failed to timely pay all wages due during employment.

Accordingly, Sua seeks civil penalties on behalf of himself and Aggrieved Employees as follows:

- (1) \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204; and
- (2) \$200 for each Aggrieved Employee for each subsequent violation of California Labor Code § 204 (penalties set by Labor Code § 210).

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

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

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

As alleged herein, Palo Alto failed to provide Sua and the other Aggrieved Employees all wages owed at the time of resignation or termination including, but not limited to, regular and overtime wages they earned for work performed off-the-clock. As a result, Palo Alto failed to pay Sua and other Aggrieved Employees all wages within the time periods set by California Labor Code §§ 201, 202 and 203. As a result, Palo Alto has violated California Labor Code §§ 201, 202 and 203.

Accordingly, Sua seeks civil penalties on behalf of himself and the other Aggrieved Employees as follows: \$100 for each Aggrieved Employee per pay period in which initial violations of California Labor Code §§ 201, 202 and 203 occurred, and \$200 for each Aggrieved Employee per pay period in which

subsequent violations occurred (penalties set by California Labor Code § 2699(f)(2)).

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

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

Every person employing labor in this state shall:

...

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

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

Section 7 of Wage Order states,

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

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.

- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

Palo Alto has willfully failed to maintain the records required by § 1174 and the Wage Order, including, but not limited to, all premium wages for missed, interrupted, or late meal and rest periods and all regular and overtime wages for work they performed off-the-clock. Accordingly, Sua seeks civil penalties from Palo Alto on behalf of himself and the other Aggrieved Employee as follows:

1. \$500 for each aggrieved employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and
2. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Joseph Sua
Walter Haines, Esq.

Palo Alto, Inc.
c/o Rosa Herrera
Agent for Service of Process
31 Coffman Avenue, Long Beach Naval Station
Long Beach, CA 90822

Alvarado Restaurant Group, LLC
c/o Corporate Creations Network Inc.
Agent for Service of Process
4640 Admiralty Way, 5th Floor
Marina Del Ray, CA 90292

EXHIBIT B



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

September 22, 2020

Attn: PAGA Administrator

Labor and Workforce Development Agency

Attn: PAGA Administrator

<http://dir.tflaforms.net>

Via Electronic Submission

RE: *Joseph Sua / Alvarado*

To whom it may concern:

This is a supplemental and corrective notice of Labor Code violations regarding the matter of *Joseph Sua / Alvarado Inc., et al.* The original notice incorrectly included Palo Alto Inc. as an employer. Joseph Sua has since come to understand that Palo Alto Inc. merged into Alvarado Holdings, Inc. prior to the inception of his employment. The original notice, dated June 5, 2020, is enclosed herewith.

This notice concerns the following employers:

1. Alvarado Holdings, Inc., a Colorado corporation; and
2. Alvarado Restaurant Group, LLC, a Colorado limited liability company

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

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Joseph Sua (hereafter "Sua") provides notice on behalf of himself and of all individuals currently and formerly employed in California as hourly employees, including but not limited to managers, assistant managers, shift leaders, food champions, service champions, and other hourly

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employees in comparable positions (hereafter referred to collectively as “Aggrieved Employees”) by Alvarado, of violations of California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802.

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

Statement of Facts

Alvarado first hired Sua as a non-exempt, hourly restaurant manager on or about April 19, 2019 to prepare for the opening of its restaurant in Barstow, California. Although Sua’s official first date of employment was May 1, 2019, Alvarado required him to interview and hire restaurant staff prior to his official start date. Sua continuously worked for Alvarado in this capacity from the time of his hire until on or about March 23, 2020, when his employment ended.

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

At relevant times, Alvarado failed to provide Sua and the Aggrieved Employees adequate rest periods and premium wages for missed rest periods in violation of California law. Due to high customer demand and low staffing levels, Alvarado regularly failed to permit Sua and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof. Although Sua expressed his concerns about Alvarado’s low staffing levels to Alvarado’s district manager, Lisa Reyes, at the beginning of his employment, Alvarado did not make additional hires. Instead, Alvarado instructed Sua and the Aggrieved Employees to work through their rest periods. Alvarado did not seek an exemption from the rest period protections

of the Wage Order from the California Division of Labor Standards Enforcement. Additionally, at relevant times, Alvarado failed to provide Sua and the Aggrieved Employees with an off-duty, 30-minute meal period before the end of the fifth hour worked. Instead, Alvarado regularly required Sua and the Aggrieved Employees to work through their meal periods.

Alvarado required Sua and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. Alvarado required Sua and the Aggrieved Employees to use their personal mobile telephones to communicate with Alvarado and failed to reimburse them for this expense. Further, at all relevant times, Alvarado required Sua and the Aggrieved Employees to drive their personal vehicles from their assigned restaurant to the bank in order to make deposits. Alvarado failed to reimburse Sua and the Aggrieved Employees for such mileage.

Alvarado also required Sua and the Aggrieved Employees to perform work while clocked out and failed to compensate them for this time. At the inception of his employment, Alvarado required Sua to interview and hire restaurant employees while clocked out for work and failed to compensate him for this time. Further, during the first few months of employment, Alvarado required Sua and the Aggrieved Employees to travel from Alvarado's restaurant in Barstow, California to its training site in Bellflower, California. On such occasions, Alvarado failed to adequately compensate Sua and the Aggrieved Employees for all of this time spent in transit. Alvarado paid Sua and the Aggrieved Employees for three hours of travel time, despite the fact that Plaintiff's and the Aggrieved Employees' travel times frequently took over four or even five hours.

Alvarado also required Sua and the Aggrieved Employees to remain on-call while clocked out for work. Alvarado regularly called Plaintiff's and the Aggrieved Employees' personal mobile phones while they were clocked out for work and required them to respond to questions from, and provide instructions to, employees currently on shift at Alvarado's restaurant. At relevant times, Alvarado further required Sua and the Aggrieved Employees to report to work

outside of their regularly scheduled shifts in order to correct orders or participate in restaurant audits.

When Alvarado scheduled Sua and the Aggrieved Employees to open Alvarado's restaurant at the start of the workday, Alvarado required them to perform premises inspections before clocking in. Such premises inspections included driving around the perimeter of Alvarado's restaurant and checking for property damage, disarming the restaurant security code, and turning on the restaurant lights. Additionally, when Alvarado scheduled Sua and the Aggrieved Employees to close the restaurant, Alvarado required them to clock out and then wait until all other employees had left the restaurant before leaving their work stations.

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

- a) Alvarado failed to provide Sua and the other Aggrieved Employees with all timely, off-duty rest breaks and meal periods;
- b) Alvarado failed to compensate Sua and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more meal periods required by law;
- c) Alvarado failed to compensate Sua and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more rest breaks required by law;
- d) Alvarado failed to pay Sua and the other Aggrieved Employees for all hours worked at the correct rates of pay including, but not limited to, minimum, regular and overtime pay due to off-the-clock work;
- e) Alvarado failed to pay Sua and the other Aggrieved Employees additional "reporting time" wages on days during which they

communicated by phone with Alvarado management or on-duty employees or traveled to Alvarado's worksites outside of their scheduled work hours.

- f) Alvarado failed to indemnify Sua and the other Aggrieved Employees for all necessary business expenditures incurred during the discharge of their duties;
- g) Alvarado failed to provide Sua and the Aggrieved Employees with accurate wage statements;
- h) Alvarado failed to timely pay Sua and the Aggrieved Employees all earned and unpaid wages during employment;
- i) Alvarado failed to timely pay Sua and the Aggrieved Employees who are former employees all earned and unpaid wages at the time of separation from employment; and
- j) Alvarado willfully failed to maintain accurate employment records regarding Sua and the Aggrieved Employees.

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

The Wage Order

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

At all relevant times during the applicable limitations period, Alvarado employed Sua and the other Aggrieved Employees as non-exempt, hourly managers, crew leaders, crew persons, bussers, servers, dishwashers, cooks,

chefs, janitors, cashiers, and employees in comparable positions. Accordingly, Sua and the other Aggrieved Employees are entitled to the protections provided under the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

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

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

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

Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30-minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
- (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.
- ...
- (D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

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

Rest Periods:

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

California Labor Code § 226.7 states:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Section 17 of the Wage Order states:

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

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

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

1. \$100 for each aggrieved employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved

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

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

Failure to Indemnify 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.”

At relevant times during the applicable limitations period, Alvarado required Sua and the Aggrieved Employees to use personal mobile telephones to communicate Alvarado as a necessary condition of employment. Alvarado failed to indemnify Sua and the Aggrieved Employees for expenses associated with the use of their personal mobile phones both during and after their employment ended. Further, at relevant times, Alvarado required Sua and the Aggrieved Employees to travel from their assigned restaurant to the bank in order to make deposits. Alvarado failed to indemnify Sua and the Aggrieved Employees for their mileage related expenses both during their employment and after such employment ended.

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

///

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

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

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

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

In relevant part, California Labor Code § 1194 states,

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

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

(A) Daily Overtime - General Provisions

- (1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee’s

regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half ($1 \frac{1}{2}$) 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.
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

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

With respect to overtime wages, the regular rate of pay under California law must include "all remuneration for employment paid to, on behalf of, the employee." O.L. 2002.06.14 (quoting 29 U.S.C. § 207(e)). This requirement

includes, but is not limited, to, non-discretionary bonuses. See, e.g., *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904–05. Commissions and bonuses must be included in the regular rate whether they are the sole source of the employee’s compensation or are in addition to a guaranteed salary or hourly rate. 29 C.F.R. §§778.117, 778.208. See *Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

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

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

At all relevant times during the applicable limitations period, Alvarado knowingly failed to pay Sua and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, all regular and overtime wages for hours they worked while off-the-clock.

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

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California labor Code § 2699(f)(2)); and

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

Failure to Pay Reporting Time Pay
(Labor Code § 1198)

Under Section 5 of the Wage Order,

Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

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.

As described above, at all relevant times, Alvarado required Sua and the Aggrieved Employees to monitor their personal phones while clocked out for work. Alvarado regularly contacted Sua and the Aggrieved Employees by phone outside of their working hours – often late at night or very early in the morning – and required them to respond to questions from, and provide instructions to, employees currently on shift at Alvarado's restaurant. At relevant times, Alvarado further required Sua and the Aggrieved Employees to

report to work outside of their regularly scheduled shifts in order to correct orders or participate in restaurant audits. Alvarado not only failed to pay Sua and the Aggrieved Employees for this time spent working off-the-clock, but also failed to pay them the “reporting time” wages to which they were entitled pursuant to Labor Code § 1198 and the Wage Order.

Accordingly, Sua seeks civil penalties on behalf of himself and the Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

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

- 1) Gross wages earned
- 2) Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission;
- 3) The number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
- 4) All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- 5) Net wages earned;
- 6) The inclusive dates of the period for which the employee is paid;

- 7) The name of the employee and only the last four digits of his or her social security number or an employee identification number;
- 8) The name and address of the legal entity that is the employer; and
- 9) All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

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

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

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

California Labor Code § 204 states that all wages (other than those mentioned in Labor Code sections 201-202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following

month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

As alleged herein, Alvarado consistently failed to timely pay all wages to Sua and the Aggrieved Employees. Alvarado failed to provide Sua and the other Aggrieved Employees all wages owed, including, but not limited to, all premium wages for missed, interrupted, or late meal and rest periods, and all regular and overtime wages for work they performed off-the-clock. As a result, Alvarado failed to pay Sua and the other Aggrieved Employees all wages within the time periods set by California Labor Code § 204. As a result, Alvarado has violated California Labor Code § 204. Because of Alvarado's failure to fully pay Sua and the other Aggrieved Employees within the time periods set by California Labor Code § 204, Alvarado failed to timely pay all wages due during employment.

Accordingly, Sua seeks civil penalties on behalf of himself and Aggrieved Employees as follows:

- (1) \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204; and
- (2) \$200 for each Aggrieved Employee for each subsequent violation of California Labor Code § 204 (penalties set by Labor Code § 210).

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

Under California Labor Code § 201, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under California Labor Code § 202, if an employee, not having a written contract for a definite period, quits his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of

law, an employee who quits without providing a seventy-two (72) hour notice shall be entitled to receive payment by mail if he or she so requests at a designated mailing address. *Id.* The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within seventy-two (72) hours of the notice of quitting. *Id.*

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

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

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

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

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

Every person employing labor in this state shall:

...

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

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

Section 7 of Wage Order states,

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

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.
- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

Alvarado has willfully failed to maintain the records required by § 1174 and the Wage Order, including, but not limited to, all premium wages for missed, interrupted, or late meal and rest periods and all regular and overtime wages for work they performed off-the-clock. Accordingly, Sua seeks civil penalties from Alvarado on behalf of himself and the other Aggrieved Employee as follows:

1. \$500 for each aggrieved employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and
2. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

///

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Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g) (1) in a civil action should the LWDA decline to pursue this

LWDA / Alvarado

09/22/20

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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: Joseph Sua
Walter Haines, Esq.

Alvarado Holdings, Inc.
c/o Linda G. Alvarado
Agent for Service of Process
P.O. Box 40366
Denver, CO 80204

Alvarado Restaurant Group, LLC
c/o Scott Fanning
Fisher Phillips, LLP
10 S Wacker Dr # 3450,
Chicago, IL 60606



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: *Joseph Sua / Palo Alto Inc., et al.*

To whom it may concern:

This notice concerns the following employers:

1. Palo Alto, Inc., a Colorado corporation; and
2. Alvarado Restaurant Group, LLC, a Colorado limited liability company

Collectively, the aforementioned employers are herein referred to as "Palo Alto."

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Joseph Sua (hereafter "Sua") provides notice on behalf of himself and of all individuals currently and formerly employed in California as hourly employees, including but not limited to managers, crew leaders, crew persons, bussers, servers, dishwashers, cooks, chefs, janitors, cashiers, and other hourly employees in comparable positions (hereafter referred to collectively as "Aggrieved Employees") by Palo Alto, of violations of California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, Palo Alto has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Sua and the Aggrieved Employees are "employees" within the meaning of Industrial

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Welfare Commission Order No. 5-2001 (hereafter “the Wage Order” or “Wage Order 5”), paragraph 2.F, and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

Palo Alto first hired Sua as a non-exempt, hourly restaurant manager on or about April 19, 2019 to prepare for the opening of its restaurant in Barstow, California. Although Sua’s official first date of employment was May 1, 2019, Palo Alto required him to interview and hire restaurant staff prior to his official start date. Sua continuously worked for Palo Alto in this capacity from the time of his hire until on or about March 23, 2020, when his employment ended.

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

At relevant times, Palo Alto failed to provide Sua and the Aggrieved Employees adequate rest periods and premium wages for missed rest periods in violation of California law. Due to high customer demand and low staffing levels, Palo Alto regularly failed to permit Sua and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof. Although Sua expressed his concerns about Palo Alto’s low staffing levels to Palo Alto’s district manager, Lisa Reyes, at the beginning of his employment, Palo Alto did not make additional hires. Instead, Palo Alto instructed Sua and the Aggrieved Employees to work through their rest periods. Palo Alto did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. Additionally, at relevant times, Palo Alto failed to provide Sua and the Aggrieved Employees with an off-duty, 30-minute meal period before the end of the fifth hour worked. Instead, Palo Alto regularly required Sua and the Aggrieved Employees to work through their meal periods.

Palo Alto required Sua and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. Palo Alto required Sua and the Aggrieved Employees to use their personal mobile telephones to communicate with Palo Alto and failed to reimburse them for this expense.

Palo Alto also required Sua and the Aggrieved Employees to perform work while clocked out and failed to compensate them for this time. At the inception of his employment, Palo Alto required Sua to interview and hire restaurant employees while clocked out for work and failed to compensate him for this time. Further, during the first few months of employment, Palo Alto required Sua and the Aggrieved Employees to travel from Palo Alto's restaurant in Barstow, California to its training site in Bellflower, California. On such occasions, Palo Alto failed to adequately compensate Sua and the Aggrieved Employees for all of this time spent in transit. Palo Alto paid Sua and the Aggrieved Employees for three hours of travel time, despite the fact that Plaintiff's and the Aggrieved Employees' travel times frequently took over four or even five hours.

Palo Alto also required Sua and the Aggrieved Employees to remain on-call while clocked out for work. Palo Alto regularly called Plaintiff's and the Aggrieved Employees' personal mobile phones while they were clocked out for work and required them to respond to questions from, and provide instructions to, employees currently on shift at Palo Alto's restaurant. At relevant times, Palo Alto further required Sua and the Aggrieved Employees to report to work outside of their regularly scheduled shifts in order to correct orders or participate in restaurant audits.

When Palo Alto scheduled Sua and the Aggrieved Employees to open Palo Alto's restaurant at the start of the workday, Palo Alto required them to perform premises inspections before clocking in. Such premises inspections included driving around the perimeter of Palo Alto's restaurant and checking for property damage, disarming the restaurant security code, and turning on the restaurant lights. Additionally, when Palo Alto scheduled Sua and the Aggrieved Employees to close the restaurant, Palo Alto required them to clock out and then wait until all other employees had left the restaurant before leaving their work stations.

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

- a) Palo Alto failed to provide Sua and the other Aggrieved Employees with all timely, off-duty rest breaks and meal periods;
- b) Palo Alto failed to compensate Sua and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more meal periods required by law;
- c) Palo Alto failed to compensate Sua and the other Aggrieved Employees at one hour's pay for each day in which they were not provided one or more rest breaks required by law;
- d) Palo Alto failed to pay Sua and the other Aggrieved Employees for all hours worked at the correct rates of pay including, but not limited to, minimum, regular and overtime pay due to off-the-clock work;
- e) Palo Alto failed to pay Sua and the other Aggrieved Employees additional "reporting time" wages on days during which they communicated by phone with Palo Alto management or on-duty employees or traveled to Palo Alto's worksites outside of their scheduled work hours.
- f) Palo Alto failed to indemnify Sua and the other Aggrieved Employees for all necessary business expenditures incurred during the discharge of their duties;
- g) Palo Alto failed to provide Sua and the Aggrieved Employees with accurate wage statements;
- h) Palo Alto failed to timely pay Sua and the Aggrieved Employees all earned and unpaid wages during employment;

- i) Palo Alto failed to timely pay Sua and the Aggrieved Employees who are former employees all earned and unpaid wages at the time of separation from employment; and
- j) Palo Alto willfully failed to maintain accurate employment records regarding Sua and the Aggrieved Employees.

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

The Wage Order

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

At all relevant times during the applicable limitations period, Palo Alto employed Sua and the other Aggrieved Employees as non-exempt, hourly managers, crew leaders, crew persons, bussers, servers, dishwashers, cooks, chefs, janitors, cashiers, and employees in comparable positions. Accordingly, Sua and the other Aggrieved Employees are entitled to the protections provided under the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

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

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

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

Meal Periods:

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

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

...

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

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

Rest Periods:

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

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

California Labor Code § 226.7 states:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Section 17 of the Wage Order states:

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

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

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

1. \$100 for each aggrieved employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

Failure to Indemnify 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.”

At relevant times during the applicable limitations period, Palo Alto required Sua and the Aggrieved Employees to use personal mobile telephones to

communicate Palo Alto as a necessary condition of employment. Palo Alto failed to indemnify Sua and the Aggrieved Employees for expenses associated with the use of their personal mobile phones both during and after their employment ended.

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

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

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

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

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

In relevant part, California Labor Code § 1194 states,

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an

employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

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

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

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

At all relevant times during the applicable limitations period, Palo Alto knowingly failed to pay Sua and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, all regular and overtime wages for hours they worked while off-the-clock.

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

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

2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalties set by California Labor Code § 1197.1).

Failure to Pay Reporting Time Pay
(Labor Code § 1198)

Under Section 5 of the Wage Order,

Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

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.

As described above, at all relevant times, Palo Alto required Sua and the Aggrieved Employees to monitor their personal phones while clocked out for work. Palo Alto regularly contacted Sua and the Aggrieved Employees by phone outside of their working hours – often late at night or very early in the morning – and required them to respond to questions from, and provide instructions to, employees currently on shift at Palo Alto’s restaurant. At relevant times, Palo Alto further required Sua and the Aggrieved Employees to report to work outside of their regularly scheduled shifts in order to correct orders or participate in restaurant audits. Palo Alto not only failed to pay Sua and the Aggrieved Employees for this time spent working off-the-clock, but also failed to pay them the “reporting time” wages to which they were entitled pursuant to Labor Code § 1198 and the Wage Order.

Accordingly, Sua seeks civil penalties on behalf of himself and the Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

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

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

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

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

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

Failure to Timely Pay Wages During Employment

(Lab. Code § 204)

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

As alleged herein, Palo Alto consistently failed to timely pay all wages to Sua and the Aggrieved Employees. Palo Alto failed to provide Sua and the other Aggrieved Employees all wages owed, including, but not limited to, all premium wages for missed, interrupted, or late meal and rest periods, and all regular and overtime wages for work they performed off-the-clock. As a result, Palo Alto failed to pay Sua and the other Aggrieved Employees all wages within the time periods set by California Labor Code § 204. As a result, Palo Alto has violated California Labor Code § 204. Because of Palo Alto's failure to fully pay Sua and the other Aggrieved Employees within the time periods set by California Labor Code § 204, Palo Alto failed to timely pay all wages due during employment.

Accordingly, Sua seeks civil penalties on behalf of himself and Aggrieved Employees as follows:

- (1) \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204; and
- (2) \$200 for each Aggrieved Employee for each subsequent violation of California Labor Code § 204 (penalties set by Labor Code § 210).

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

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

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

As alleged herein, Palo Alto failed to provide Sua and the other Aggrieved Employees all wages owed at the time of resignation or termination including, but not limited to, regular and overtime wages they earned for work performed off-the-clock. As a result, Palo Alto failed to pay Sua and other Aggrieved Employees all wages within the time periods set by California Labor Code §§ 201, 202 and 203. As a result, Palo Alto has violated California Labor Code §§ 201, 202 and 203.

Accordingly, Sua seeks civil penalties on behalf of himself and the other Aggrieved Employees as follows: \$100 for each Aggrieved Employee per pay period in which initial violations of California Labor Code §§ 201, 202 and 203 occurred, and \$200 for each Aggrieved Employee per pay period in which

subsequent violations occurred (penalties set by California Labor Code § 2699(f)(2)).

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

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

Every person employing labor in this state shall:

...

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

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

Section 7 of Wage Order states,

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

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.

- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

Palo Alto has willfully failed to maintain the records required by § 1174 and the Wage Order, including, but not limited to, all premium wages for missed, interrupted, or late meal and rest periods and all regular and overtime wages for work they performed off-the-clock. Accordingly, Sua seeks civil penalties from Palo Alto on behalf of himself and the other Aggrieved Employee as follows:

1. \$500 for each aggrieved employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and
2. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

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

David Lind

david@spivaklaw.com

cc: Joseph Sua
Walter Haines, Esq.

Palo Alto, Inc.
c/o Rosa Herrera
Agent for Service of Process
31 Coffman Avenue, Long Beach Naval Station
Long Beach, CA 90822

Alvarado Restaurant Group, LLC
c/o Corporate Creations Network Inc.
Agent for Service of Process
4640 Admiralty Way, 5th Floor
Marina Del Ray, CA 90292

1 **PROOF OF SERVICE**

2
3 State of California,
4 County of Los Angeles

5 1. I am a citizen of the United States and am employed in the County
6 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.

7 2. I am familiar with the practice of The Spivak Law Firm, for
8 collection and processing of correspondence for mailing with the United
9 States Postal Service. It is the practice that correspondence is deposited
with the United States Postal Service the same day it is submitted for
mailing.

10 On Wednesday, February 10, 2021, I served the foregoing document
described as **[PROPOSED] FIRST AMENDED COMPLAINT FOR VIOLATIONS OF THE LABOR**
11 **CODE AND CIVIL PENALTIES UNDER THE LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF**
12 **2004, LABOR CODE §§ 2698, ET SEQ.** on interested parties by placing a true and
correct copy thereof enclosed in a sealed envelope, with postage fully
prepaid, addressed as follows:

13
14 Raúl E. Zermeño, Esq.
15 Anet Drapalski, Esq.
16 Fisher & Phillips LLP
17 444 South Flower Street, Suite 1500
Los Angeles, California 90071
rzermeno@fisherphillips.com
adrapalski@fisherphillips.com

18 ____ (BY MAIL) I caused such an envelope to be mailed by placing it for
collection and mailing, in the course of ordinary business practice, with
19 other correspondence of The Spivak Law Firm, 16530 Ventura Blvd., Suite 203,
Encino, California 91436.

20 XXXX (BY EMAIL) Based on a court order or an agreement of the parties to
21 accept electronic service, I caused the documents to be sent to the persons
at the electronic service addresses listed above from my electronic service
22 address jessica@spivaklaw.com.

23 EXECUTED on Wednesday, February 10, 2021, at Los Angeles, California.

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

25
26 ____ (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.

27
28 
JESSICA BENCOMO