

1 **BIBIYAN LAW GROUP, P.C.**

David D. Bibiyan (SBN 287811)

2 *david@tomorrowlaw.com*

Diego Aviles (SBN 315533)

3 *diego@tomorrowlaw.com*

Sara Ehsani-Nia (SBN 326501)

4 *sara@tomorrowlaw.com*

8484 Wilshire Boulevard, Suite 500

Beverly Hills, California 90211

5 Tel: (310) 438-5555; Fax: (310) 300-1705

6 Attorneys for Plaintiff, MICHAEL ROBERT TAPIA, as
an aggrieved employee, and on behalf of all other
7 aggrieved employees

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Superior Court of California
County of Stanislaus
Clerk of the Court
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\$435 PAID

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF STANISLAUS**

10
11 MICHAEL ROBERT TAPIA, as an aggrieved
employee, and on behalf of all other aggrieved
12 employees under the Labor Code Private
Attorneys' General Act of 2004,

13
14 Plaintiffs,

15 v.

16 MERCER FOODS, LLC, a California limited
liability company; and DOES 1 through 100,
17 inclusive,

18 Defendants.
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CASE NO.: CV-21-000020

REPRESENTATIVE ACTION

**COMPLAINT UNDER THE LABOR
CODE PRIVATE ATTORNEYS'
GENERAL ACT OF 2004 FOR CIVIL
PENALTIES UNDER LABOR CODE
SECTIONS 210, 226.3, 558, 1197.1 and 2699**

DEMAND FOR JURY TRIAL

[Amount in Controversy Greater Than
\$25,000.00]

This case has been assigned to Judge Sandhu, Sonny S.
Dept. 24
Department _____, for all purposes including Trial.

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27 COMES NOW plaintiff MICHAEL ROBERT TAPIA ("Plaintiff"), on behalf of himself and
28 all others aggrieved, and alleges as follows:

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5. Specifically, Plaintiff seeks to recover PAGA civil penalties through a representative action permitted by PAGA and the California Supreme Court in, among other authorities, *Arias v. Superior Court* (2009) 46 Cal.4th 969. According to the same authorities, class certification of the PAGA allegations described herein is not required.

6. During the period beginning one (1) year preceding the provision of notice to the LWDA regarding the herein-described Labor Code violations (the “Civil Penalty Period”), Defendants violated, *inter alia*, Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 227.3, 246, *et seq.*, 432, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198.5, 2699, 2802, 2810.3, and 2810.5, among others.

7. Labor Code section 2699, subdivisions (a) and (g), authorizes aggrieved employees such as Plaintiff, on behalf of Plaintiff and all other aggrieved current and former employees within the statutory period, to bring a civil action to recover civil penalties pursuant to the procedures specified in Labor Code section 2699.3.

8. On or around August 10, 2020, Plaintiff provided written notice pursuant to Labor Code section 2699.3 online and by certified mail, with return receipt requested, of Defendants' violation of various, including the herein-described, provisions of the Labor Code, to the LWDA, as well as by certified mail, with return receipt requested to Defendants, and each of them.

9. Pursuant to Labor Code section 2699.3, subdivision (a)(2)(A), the LWDA did not provide notice of its intention to investigate Defendants' alleged violations within sixty-five (65) calendar days of the August 10, 2020 postmarked date of the herein-described notice sent by Plaintiff to the LWDA and Defendants.

PAGA REPRESENTATIVE ALLEGATIONS

10. At all relevant times mentioned herein, Defendants had and have a policy or practice of failing to pay overtime wages to Plaintiffs and other Aggrieved Employees in the State of California in violation of California state wage and hour laws as a result of, without limitation, Plaintiffs and other Aggrieved Employees working over eight (8) hours per day, forty (40) hours per week, and/or seven (7) straight workdays in a workweek without paying them proper overtime wages, as a result of, without limitation, failing to accurately track and/or pay for all hours actually

1 worked at the proper overtime rate of pay; engaging, suffering, or permitting employees to work off
2 the clock, including, without limitation, by requiring employees: to come early to work and leave
3 late work without being able to clock in for all that time, to suffer under Employer's control due to
4 lines for clocking in, to complete pre-shift tasks before clocking in and post-shift tasks after clocking
5 out, to don and doff uniforms and/or safety equipment off the clock, as well as monitoring a radio
6 at all times; failing to include all forms of remuneration, including non-discretionary bonuses,
7 incentive pay, shift rate differentials, and other forms of remuneration into the regular rate of pay
8 for the pay periods where overtime was worked and the additional compensation was earned for the
9 purpose of calculating the overtime rate of pay, to the detriment of Plaintiff and other Aggrieved
10 Employees.

11 11. At all relevant times mentioned herein, Defendants had and have a practice or policy
12 of failing to compensate Plaintiff and other Aggrieved Employees with minimum wages for all hours
13 worked or otherwise under Defendants' control as a result of, without limitation, failing to
14 accurately track and/or pay for all hours actually worked at their regular rate of pay that is above the
15 minimum wage; engaging, suffering, or permitting employees to work off the clock, including,
16 without limitation, by requiring employees: to come early to work and leave late work without being
17 able to clock in for all that time, to suffer under Employer's control due to long lines for clocking
18 in, to complete pre-shift tasks before clocking in and post-shift tasks after clocking out, to don and
19 doff uniforms and/or safety equipment off the clock, as well as monitoring a radio at all times, to
20 the detriment of Plaintiff and other Aggrieved Employees.

21 12. At all relevant times mentioned herein, Defendants had and have a policy or practice
22 of failing to provide Plaintiffs and other Aggrieved Employees a thirty (30) minute uninterrupted,
23 timely, and complete meal period for days on which the employee worked in excess of five (5) and
24 ten (10) hours per day without being afforded uninterrupted, timely, and complete 30-minute meal
25 periods or compensation in lieu thereof including, without limitation, by interrupting meal periods;
26 not providing timely meal periods; failing to provide first and second meal periods; providing short
27 meal periods; requiring that employees carry cellular telephones or radios during meal periods; not
28 permitting employees to leave the premises; otherwise requiring on-duty/on-call meal periods;

1 and/or auto-deducting meal periods that could not be auto-deducted by law or during which
2 employees worked, as required by California wage and hour laws

3 13. At all relevant times mentioned herein, Defendants had and have a policy or practice
4 of failing to provide Plaintiffs and other Aggrieved Employees paid, uninterrupted, timely, and
5 complete rest periods of at least ten (10) minutes per four (4) hours worked or major fractions
6 thereof, or compensation in lieu thereof, including, without limitation, by failing to provide rest
7 periods all together; interrupting them; requiring that employees carry cellular telephones or radios
8 during rest periods, not providing them in a timely fashion; and not permitting employees to leave
9 the premises; and/or otherwise requiring on-duty/on-call rest periods, as required by California wage
10 and hour laws.

11 14. At all relevant times mentioned herein, Defendants had and have a policy or practice
12 of failing to comply with Labor Code section 226, subdivision (a) by intentionally failing to furnish
13 Plaintiff and other Aggrieved Employees with itemized wage statements that accurately reflect gross
14 wages earned; total hours worked by the employee; net wages earned; all deductions; all applicable
15 hourly rates in effect during the pay period and the corresponding number of hours worked at each
16 hourly rate by the employee; and other such information as required by Labor Code section 226,
17 subdivision (a).

18 15. At all relevant times mentioned herein, Defendants had and have a policy or practice
19 of failing to comply with Labor Code section 226, subdivision (a) by intentionally failing to furnish
20 Plaintiff and other Aggrieved Employees with documents signed to obtain or hold employment
21 under Labor Code section 432, personnel records under Labor Code section 1198.5, and time records
22 under Labor Code section 1174, making it difficult for Plaintiff and other Aggrieved Employees to
23 calculate their unpaid wages and/or premium payments, to the detriment of Plaintiffs and other
24 Aggrieved Employees.

25 16. At all relevant times mentioned herein, Defendants had and have a policy or practice
26 of failing to timely pay Plaintiff and other Aggrieved Employees, among other wages, all wages
27 owed as a result of Employers' practice or policy of failing to pay, among other wages, overtime
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1 wages, minimum wages, premium wages, paid time off and vacation time owed as required by Labor
2 Code sections 201, 202, and 203.

3 17. At all relevant times herein, Defendants had and have a policy or practice of failing
4 to pay aggrieved employees their paid time off and vacation time owed upon separation of
5 employment as wages at their final rate of pay in violation of Labor Code section 227.3 and
6 applicable Wage Orders.

7 18. At all relevant times mentioned herein, Defendants have had a policy or practice of
8 failing and refusing, and continue to fail and refuse, to reimburse employees, including, without
9 limitation, Plaintiff and other Aggrieved Employees, with their costs incurred for purchasing
10 uniforms, separately laundering mandatory uniforms, for the purchase of tools and safety equipment,
11 for the purchase and maintenance of cellular phones and cellular phone plans, in direct consequence
12 of the discharge of their duties, or of their obedience to the directions of Employers, as required by
13 Labor Code 2802.

14 19. At all relevant times mentioned herein, Defendants have had a policy or practice of
15 failing to comply with the notice requirements of Labor Code section 2810.5 (*i.e.*, the Wage Theft
16 Protection Act of 2011) by, among other things, failing to provide Plaintiffs and other Aggrieved
17 Employees with the rates of pay and overtime rates of pay applicable to their employment;
18 allowances claimed as part of the minimum wage; the regular payday designated by Defendants; the
19 name, address, and telephone number of the workers' compensation insurance carrier; information
20 regarding paid sick leave; and other pertinent information required to be disclosed by Defendants
21 under Labor Code section 2810.5.

22 20. At all relevant times mentioned herein, Defendants failed to provide Plaintiff and
23 other Aggrieved Employees with the amount of paid sick leave required to be provided pursuant to
24 California law (including, without limitation Labor Code section 246, *et seq.*), and also did not
25 permit its use upon request as contemplated under California laws, to the detriment of Plaintiff and
26 all other Aggrieved Employees.

27 21. At all relevant times mentioned herein, Defendants have had a policy or practice of
28 failing to pay employees their wages in accordance with Labor Code Section 204, which requires

1 that: "[l]abor performed between the 1st and 15th days, inclusive, of any calendar month shall be
2 paid for between the 16th and 26th day of the month during which the labor was performed, and
3 labor performed between the 16th and the last day, inclusive of any calendar month, shall be paid
4 for between the 1st and 10th day of the following month."

5 22. Plaintiff, in Plaintiff's representative capacity, seeks civil penalties under Labor
6 Code sections 210, 226.3, 558, 1197.1, and 2699 for the herein-described acts, which violate the
7 California Labor Code as described above, including on behalf of Plaintiff and other Aggrieved
8 Employees pursuant to PAGA.

9 PARTIES

10 A. Plaintiff

11 23. Plaintiff is a resident of the State of California. At all relevant times herein, Plaintiff
12 is informed and believes, and based thereon alleges that Defendants employed Plaintiff as a non-
13 exempt employee, with duties that included, but were not limited to, replenishing raw goods, slicing
14 frozen fruit, confirming quality of goods, bagging and wrapping frozen foods. as well as driving a
15 forklift. Plaintiff is informed and believes that Plaintiff worked for Defendants from approximately
16 March of 2017 through approximately April of 2020.

17 B. Defendants

18 24. Plaintiff is informed and believes and based thereon alleges that defendant MERCER
19 is, and at all times relevant hereto was, a limited liability company organized and existing under and
20 by virtue of the laws of the State of California and doing business in the County of Stanislaus, State
21 of California.

22 25. The true names and capacities, whether individual, corporate, associate, or otherwise,
23 of defendants sued herein as DOES 1 through 100, inclusive, are currently unknown to Plaintiff,
24 who therefore sues defendants by such fictitious names under Code of Civil Procedure section 474.
25 Plaintiff is informed and believes and based thereon alleges that each of the defendants designated
26 herein as DOE is legally responsible in some manner for the unlawful acts referred to herein.
27 Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of
28 the defendants designated hereinafter as DOES when such identities become known. Plaintiff is

1 informed and believes, and based thereon alleges, that each defendant acted in all respects pertinent
2 to this action, as the agent of the other defendant(s), carried out a joint scheme, business plan or
3 policy in all respects pertinent hereto, and the acts of each defendant are legally attributable to the
4 other defendants. Whenever, heretofore or hereinafter, reference is made to "Defendants," it shall
5 include MERCER, and any of their parent, subsidiary, or affiliated companies within the State of
6 California, as well as DOES 1 through 100 identified herein.

7 **FIRST CAUSE OF ACTION**

8 **(Civil Penalties Under Labor Code § 210 – Against All Defendants)**

9 26. Plaintiff re-alleges each and every allegation set forth in the preceding paragraphs
10 and incorporates each by reference as though fully set forth hereat.

11 27. At all relevant times herein, Labor Code section 204, requires and required that:
12 "[l]abor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for
13 between the 16th and 26th day of the month during which the labor was performed, and labor
14 performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for
15 between the 1st and 10th day of the following month."

16 28. At all relevant times herein, Labor Code section 210, subdivision (a) states and stated
17 that "[i]n addition to, and entirely independent and apart from, any other penalty provided in this
18 article, every person who fails to pay the wages of each employee as provided in Sections 201.3,
19 204, 204b, 204.1, 205, 205.5, and 1197.5, shall be subject to a civil penalty as follows: (1) For any
20 initial violation, one hundred dollars (\$100) for each failure to pay each employee" and "(2) For
21 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
22 each failure to pay each employee, plus 25 percent of the amount unlawfully withheld."

23 29. At all relevant times herein, Defendants have had a consistent policy or practice of
24 failing to pay Plaintiff and/or Aggrieved Employees during their employment on a timely basis as
25 per Labor Code section 204. Thus, pursuant to Labor Code section 210. Plaintiff and other
26 Aggrieved Employees are entitled to recover civil penalties for Defendants' violations of Labor
27 Code section 204, in the amount of one hundred dollars (\$100) for each Aggrieved Employee for
28 each initial violation per employee, and two hundred dollars (\$200) for each Aggrieved Employee

1 for each subsequent violation in connection with each payment that was made in violation of Labor
2 Code section 204.

3 **SECOND CAUSE OF ACTION**

4 **(Civil Penalties Under Labor Code § 226.3 – Against All Defendants)**

5 30. Plaintiff re-alleges each and every allegation set forth in the preceding paragraphs
6 and incorporates each by reference as though fully set forth hereat.

7 31. Defendants had and have a policy or practice of failing to comply with Labor Code
8 section 226, subdivision (a) by intentionally failing to furnish Plaintiff with itemized wage
9 statements that accurately reflect gross wages earned; total hours worked; net wages earned; the
10 name and address of each employer with whom they have been placed to work; all applicable hourly
11 rates in effect during the pay period and the corresponding number of hours worked at each hourly
12 rate; and other such information as required by Labor Code section 226, subdivision (a).

13 32. Labor Code section 226.3 states that “[a]ny employer who violates subdivision (a)
14 of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250)
15 per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for
16 each violation in a subsequent citation, for which the employer fails to provide the employee a wage
17 deduction statement or fails to keep the records required in subdivision (a) of Section 226.”

18 33. Labor Code section 226.3 further provides that “[t]he civil penalties provided for in
19 this section are in addition to any other penalty provided by law.”

20 34. Plaintiff is informed and believes, and based thereon alleges, that Defendants had
21 and have a policy or practice of failing to furnish non-exempt employees, including, without
22 limitation, Plaintiff, with itemized wage statements that accurately reflect gross wages earned; total
23 hours worked; net wages earned; all deductions; all applicable hourly rates in effect and the
24 corresponding number of hours worked at each hourly rate in effect during the pay period; and other
25 such information as required by Labor Code section 226, subdivision (a).

26 35. Pursuant to Labor Code section 226.3, Plaintiff and other Aggrieved Employees are
27 entitled to recover civil penalties for Defendants’ violation of Labor Code section 226, subdivision
28 (a) in the amount of two hundred fifty dollars (\$250) for each Aggrieved Employee per pay period

1 for the initial violation, and one thousand dollars (\$1,000) for each Aggrieved Employee per pay
2 period for each subsequent violation.

3 **THIRD CAUSE OF ACTION**

4 **(Violation of Labor Code § 558 – Against All Defendants)**

5 36. Plaintiff re-alleges each and every allegation set forth in the preceding paragraphs
6 and incorporates each by reference as though fully set forth hereat.

7 37. Pursuant to Labor Code section 558, subdivision (a): “Any employer or other person
8 acting on behalf of an employer who violates, or causes to be violated . . . any provision regulating
9 hours and days of work in any of the Industrial Welfare Commission” shall be subject to a civil
10 penalty as follows:

11 (1) For any initial violation, fifty dollars (\$50) for each underpaid employee and for each
12 pay period for which the employee was underpaid in addition to an amount sufficient
13 to recover underpaid wages;

14 (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid
15 employee for each pay period for which the employee was underpaid in addition to
16 an amount sufficient to recover underpaid wages;

17 (3) Wages recovered pursuant to this section shall be paid to the affected employee.”

18 38. Plaintiff is informed and believes, and based thereon allege, that Defendants, and
19 each of them, violated, or caused to be violated, the Labor Code sections described herein, including
20 causing Plaintiff and other Aggrieved Employees not to: be paid overtime wages and minimum
21 wages; receive meal and rest periods or compensation in lieu thereof; be paid timely wages during
22 their employment and after their employment separation; receive accurate, itemized wage
23 statements; be provided with the opportunity to inspect employment records; be provided with
24 notice as required under Labor Code section 2810.5; be provided with the proper accrual and use of
25 paid sick leave; and/or be paid out all paid time off and/or vacation wages owed at the proper rate
26 of pay.

27 39. As a direct and proximate result of the herein-described Labor Code violations,
28 pursuant to Labor Code section 558, Plaintiff and other Aggrieved Employees are entitled to recover

1 civil penalties for Defendants' herein-described Labor Code violations in the amount fifty dollars
2 (\$50) for each Aggrieved Employee per pay period for the initial violation, and one hundred dollars
3 (\$100) for each Aggrieved Employee per pay period for each subsequent violation.

4 **FOURTH CAUSE OF ACTION**

5 **(Violation of Labor Code § 1197.1 – Against All Defendants)**

6 40. Plaintiff re-alleges each and every allegation set forth in the preceding paragraphs
7 and incorporates each by reference as though fully set forth hereat.

8 41. Pursuant to Labor Code section 1197.1, subdivision (a): "Any employer or other
9 person acting either individually or as an officer, agent, or employee of another person, who pays
10 or causes to be paid to any employee a wage less than the minimum fixed by an applicable state or
11 local law, or by an order of the commission shall be subject to a civil penalty, restitution of wages,
12 liquidated damages payable to the employee, and any applicable penalties imposed pursuant to
13 Section 203 as follows:

14 (1) For any initial violation that is intentionally committed, one hundred dollars
15 (\$100) for each underpaid employee for each pay period for which the
16 employee is underpaid. This amount shall be in addition to an amount
17 sufficient to recover underpaid wages, liquidated damages pursuant to Section
18 1194.2, and any applicable penalties imposed pursuant to Section 203.

19 (2) For each subsequent violation for the same specific offense, two hundred fifty
20 dollars (\$250) for each underpaid employee for each pay period for which the
21 employee is underpaid regardless of whether the initial violation is
22 intentionally committed. This amount shall be in addition to an amount
23 sufficient to recover underpaid wages, liquidated damages pursuant to Section
24 1194.2, and any applicable penalties imposed pursuant to Section 203.

25 (3) Wages, liquidated damages, and any applicable penalties imposed pursuant to
26 Section 203, recovered pursuant to this section shall be paid to the affected
27 employee."

28 / / /

1 42. Plaintiff is informed and believes, and based thereon alleges, that Defendants caused
2 Plaintiff and Aggrieved Employees not to be paid minimum wages as a result of Defendants, without
3 limitation, routinely failing to pay Plaintiff or other Aggrieved Employees' wages for all hours
4 worked or otherwise under Defendants' control due to, without limitation, routinely failing to
5 accurately track and/or pay for all hours actually worked at their regular rate of pay that is above the
6 minimum wage; engaging, suffering, or permitting employees to work off the clock, including,
7 without limitation, by requiring employees: to come early to work and leave late work without being
8 able to clock in for all that time, to suffer under Employer's control due to long lines for clocking
9 in, to complete pre-shift tasks before clocking in and post-shift tasks after clocking out, to don and
10 doff uniforms and/or safety equipment off the clock, as well as monitoring a radio at all times.

11 43. As a direct and proximate result of the herein-described Labor Code violations,
12 pursuant to Labor Code section 1197.1, Plaintiff and other Aggrieved Employees are entitled to
13 recover civil penalties for Defendants' herein-described Labor Code violations in the amount one
14 hundred dollars (\$100) for each Aggrieved Employee per pay period for the initial violation, and
15 two hundred and fifty dollars (\$250) for each Aggrieved Employee per pay period for each
16 subsequent violation.

17 **FIFTH CAUSE OF ACTION**

18 **(Civil Penalties Under Labor Code § 2699 – Against All Defendants)**

19 44. Plaintiff re-alleges each and every allegation set forth in the preceding paragraphs
20 and incorporates each by reference as though fully set forth hereat.

21 45. Pursuant to Labor Code section 2699, subdivision (a), notwithstanding any other
22 provision of law, any provision of the Labor Code that provides for a civil penalty to be assessed
23 and collected by the LWDA or any of its departments, divisions, commissions, boards, agencies or
24 employees for a violation of the Labor Code may, as an alternative, be recovered through a civil
25 action brought by an aggrieved employee on behalf of himself or herself and other current or former
26 employees pursuant to the procedures specified in Labor Code section 2699.3.

27 46. Pursuant to Labor Code section 2699, subdivision (f), for all provisions of the Labor
28 Code except those for which a civil penalty is specifically provided, the established civil penalty for

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

5 47. Plaintiff is informed and believes and based thereon alleges that Defendants, and
6 each of them, violated the Labor Code sections described herein, including, without limitation, for
7 the failure to: pay overtime wages and minimum wages; provide meal and rest periods or
8 compensation in lieu thereof; provide accurate, itemized wage statements; pay timely wages during
9 employment and after employment separation; provide employees the opportunity to inspect
10 employment records; reimburse Aggrieved Employees for costs incurred in furtherance of their
11 work duties; provide notice as required under Labor Code section 2810.5; provide the proper accrual
12 and use of paid sick leave; paying employees all owed paid time off and vacation time owed by
13 separation at the proper rate of pay; entitling Plaintiff and other Aggrieved Employees to civil
14 penalties for each of these Labor Code violations in the amounts set forth in Labor Code section
15 2699, subdivision (f).

16 48. Moreover, Plaintiff and other Aggrieved Employees within the State of California
17 whom he seeks to represent are entitled to an award of reasonable attorneys' fees and costs in
18 connection with their herein-described claims for civil penalties.

19 **REQUEST FOR JURY TRIAL**

20 49. Plaintiff hereby requests a trial by jury.

21 **PRAYER**

22 **WHEREFORE**, on behalf of Plaintiff and Aggrieved Employees. Plaintiff prays for
23 judgment against Defendants as follows:

- 24 A. An award of civil penalties pursuant to Labor Code sections 210, 226.3, 558,
25 1197.1, and 2699;
- 26 B. An award of reasonable attorneys' fees and costs pursuant to Labor Code sections
27 210, 226.3, 558, 1197.1, and 2699;
- 28 C. Pre-judgment and post-judgment interest;

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D. For costs of suit incurred herein; and

E. Such other and further relief as the Court deems just and proper.

Dated: January 4, 2021

BIBIYAN LAW GROUP, P.C.

BY:



DIEGO AVILES

Attorneys for Plaintiff MICHAEL ROBERT
TAPIA on behalf of himself and all others
aggrieved

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