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

NOV 16 2020

8 Attorneys for Plaintiff Ashley Flores and all aggrieved employees

Nicole O'Dwyer
NICOLE O'DWYER, DEPUTY

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF SAN BERNARDINO**

11 ASHLEY FLORES, an individual, on behalf
12 of the State of California, as a private attorney
13 general,

14 **PLAINTIFF,**

15 **v.**

16 AVDC, INC., an Ohio Corporation; and
17 DOES 1 to 50, inclusive,

18 **DEFENDANTS.**

CASE NO. **CIV SB 2025388**

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

1. Penalties Pursuant to Labor Code § 2699,
et seq. for violations of Labor Code
§§ 201, 202, 203, 204, 210, 226(a), 226.3,
226.7, 510, 512, 558, 1194, 1197, 1197.1
and 1198 as well as IWC Wage Order Nos.
7-2001 and 9-2001

1. Plaintiff ASHLEY FLORES, on behalf of the people of the State of California and as an “aggrieved employee” acting as a private attorney general under the Labor Code Private Attorneys General Act of 2004, § 2698, *et seq.* (“PAGA”) complains of Defendant AVDC, Inc. (“Defendant” or “AVDC”) and the Doe Defendants and each of them, as follows:

I.

INTRODUCTION

2. This is a representative action brought pursuant to Labor Code § 2698, *et seq.*, on behalf of the State of California and several groups of aggrieved employees defined as follows:

- (1) all individuals who were employed by AVDC, Inc. as a non-exempt hourly employee for one or more pay periods from September 9, 2019 and continuing into the present. (“AVDC Minimum Wage Aggrieved Employees”);
- (2) all individuals who were employed by AVDC, Inc. or its predecessor or merged entities in California as a non-exempt, hourly employee or other similar position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from September 9, 2019 and continuing into the present. (“AVDC Overtime Aggrieved Employees”);
- (3) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from September 9, 2019 and continuing into the present. (“AVDC Meal Period Aggrieved Employees”);
- (4) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position and who underwent a security and/or bag check and/or who left the premises during a meal period from September 9, 2019 and continuing into the present. (“AVDC Security Check Meal Period Aggrieved Employees”);
- (5) all individuals who were employed by AVDC, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from September 9, 2019 and continuing into the present. (“AVDC Rest Period Aggrieved Employee”);
- (6) all individuals who were employed by AVDC, Inc., or its predecessor, merged or

1 related entities in California as a non-exempt hourly employee, or other similar
2 position, who worked one or more shifts of more than four (4) hours in length or
3 major fraction thereof and who underwent a security and/or bag check and/or who left
4 the premises during a rest period from September 9, 2019 and continuing into the
present. (“AVDC Security Check Rest Period Aggrieved Employee”);

5 (7) all individuals who were employed by AVDC, Inc. or its predecessor, merged or
6 related entities for one or more pay periods in California and whose employment
7 concluded at any time between one (1) year prior to the submission of this letter and
continuing into the present; (“AVDC Late Payment Aggrieved Employee”);

8 3. The groups referenced in paragraph 2 may also all collectively be referred to
9 herein as aggrieved employees, other aggrieved employees, and/or all aggrieved employees where
10 appropriate.

11 4. Plaintiff, on behalf of the State of California as a private attorney general brings
12 claims for alleged Labor Code violations committed against himself and all aggrieved employees
13 presently or formerly employed by Defendant during the liability period pursuant to Labor Code
14 § 2698, *et seq.* seeking penalties for Defendant violations of California Labor Code §§ 204, 210,
15 221, 226(a), 226(e), 226.3, 226.7, 510, 512, 558, 1194, 1197, 1197.1, and 1198 as well as IWC
16 Wage Order Nos. 7-2001 and 9-2001.¹

17 5. Based upon the allegations herein, Plaintiff and all aggrieved employees are
18 aggrieved employees within the meaning of Labor Code § 2698, *et seq.*

19 6. Plaintiff and all aggrieved employees worked for Defendant at one or more of its
20 locations in California. Plaintiff is a former employee of Defendant who worked at its distribution
21 center in Apple Valley during the statutory period applicable to these claims and ending in or
22 around late August 2020.

23 II.

24 **FACTUAL BACKGROUND**

25 7. Plaintiff and the aggrieved employees were at all times relevant hereto were
26 employed by AVDC, Inc. and the Doe Defendants. Plaintiff and the aggrieved employees were at

27
28 ¹ The PAGA claims involving the wage orders are limited to the extent that the violation of the Labor Code gives rise
to a violation of the Labor Code such as under Labor Code §§ 226.7 and 1198.

1 all times pertinent hereto, non-exempt employees for the purposes of overtime, meal periods, and
2 rest periods. Plaintiff and all aggrieved employees were employed by Defendants within the
3 statutory PAGA period.

4 8. Upon information and belief, Plaintiff and the other aggrieved employees were
5 covered by California Industrial Welfare Commission Occupational Wage Order Nos. 7-2001
6 and/or 9-2001.

7 9. Labor Code § 1197 states the California requirement that employees must be paid
8 at least the minimum wage fixed by the Commission or by any applicable state or local law, and
9 any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles
10 “any employee receiving less than the legal minimum wage...to recover in a civil action the
11 unpaid balance of the full amount of this minimum wage.” IWC Wage Order Nos. 7-2001 and 9-
12 2001 obligates employers to pay each employee minimum wages for all hours worked.

13 10. At all times relevant hereto, Defendants required Plaintiff and all aggrieved
14 employees to regularly perform work-off-the-clock for which they did not receive any and/or
15 sufficient compensation. As part of their employment, Defendants required Plaintiff and all
16 aggrieved employees to go through security checks when entering and leaving the premises at the
17 start of their shift, if they attempted to go outside during a meal/rest period, and at the conclusion
18 of their shift. Although Defendants maintained a common policy and practice of requiring
19 Plaintiff and the all aggrieved employees to stand/wait in line for security checks in lines and
20 searched their bags and subjected them to other security measures regardless of whether or not
21 they brought a bag, Defendants failed to compensate Plaintiff and the other aggrieved employees
22 for such time and/or at a sufficient amount, which Plaintiff estimates took approximately 5-10
23 minutes per day.

24 11. Nor could Plaintiff and the other aggrieved employees report such time to the
25 Company’s due to Defendants policy and practice of making employees record their time by
26 swiping their badge on a time clock/machine that was not physically available until either after an
27 employee had undergone a security check or prior to undergoing a bag check (when entering the
28 premises) or had to be used prior to undergoing a security or bag check (when leaving the

premises). Further, due to technical limitations associated with those time clocks that were located on the premises, Plaintiff and the other aggrieved employees were frequently limited to using the same time clock to punch in/out even when a time clock was available on site.

12. Further, at all times relevant hereto, instead of paying Plaintiff and the minimum wage aggrieved employees for all hours worked and/or the time they were subject to Defendants' control during meal/rest periods, Defendants routinely required Plaintiff and the aggrieved employees to perform off-the-clock work. *See e.g. Kaanaana v. Barrett Business Services, Inc.*, 29 Cal.App.5th 778, 808 (2018) (affirming the award of PAGA penalties for violations of Labor Code § 512 where employees meal periods were interrupted and remanding to the trial court the amount of PAGA penalties that should be awarded based upon the minimum wage violations associated with the same interrupted meal periods.).

13. At all times relevant hereto, despite the fact that Defendants regularly and consistently required Plaintiff and the other aggrieved employees to undergo security and bag checks during meal and rest periods (including, but not limited to, searching employees bags containing food during the meal periods if they tried to reenter the premises), Defendants failed to pay Plaintiff minimum wages and overtime wages for this time in violation of Labor Code §§ 1194, 510, 558, 1197, 1197.1, and 1198.

14. Moreover, during the statutory period applicable to Plaintiff and the other aggrieved employees' PAGA claims, Plaintiff and the other aggrieved employees are subject to Defendants' control because they are confined to the employer's premises as they waited to undergo a security check and/or bag check. This includes during meal/rest periods where it is not possible for Plaintiff and the other aggrieved employees to leave the premises without first complying with Defendants' security and bag check policy and practice.

15. In addition, at all times relevant hereto, as part of Defendants security check policies and procedures, Defendants required employees to pass through a metal detector, have any bags searched, and to lift up their pant legs. Plaintiff and the other aggrieved employees were required by Defendants to submit to these security checks and bag searches on a regular and consistent basis not because of an optional service for their benefit, but for the company's own

1 inventory control, theft deterrence and/or liability mitigation purposes among other reasons.
2 Based upon information and belief, Defendants specifically employ “Asset Protection Officers”
3 whose job duties specifically include maintaining “physical security of a distribution center in
4 protecting company assets, property and associates” and who must “carry[] out shortage control
5 disciplines and programs.” The shortage/shrinkage control programs in effect at the Apple Valley
6 Distribution Center and other AVDC, Inc. distribution centers include conducting security and
7 bag checks for the benefit of Defendants at the start/end of their shifts and when entering and
8 leaving the premises during meal/rest periods. Accordingly, Plaintiff and the other aggrieved
9 employees should have received compensation for this time under both the control and suffer and
10 permitted to work clauses of the Labor Code and Wage Orders.²

11 16. At all times relevant hereto, through its policy and practice of requiring Plaintiff
12 and the aggrieved employees to undergo security and bag checks, Defendants clearly violated
13 Labor Code § 1194. As a result of Defendants’ policy and practices described above, Defendants
14 regularly failed to pay Plaintiff and all aggrieved employees for all hours worked in violation of
15 Labor Code §§ 1194 and 1197. Accordingly, Plaintiff is an aggrieved employee within the
16 meaning PAGA and Defendants have violated Labor Code §§ 1194 and 1197 with respect to
17 Plaintiff and the aggrieved employees.

18 17. Labor Code § 1197.1 authorizes employees who are paid less than the minimum
19 fixed by an applicable state or local law, or by an order of the commission a civil penalty,
20 restitution of wages, and liquidate damages as follows: (1) for any initial violation that is
21 intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay
22 period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the
23 same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay
24 period for which the employee is underpaid regardless of whether the initial violation is
25 intentionally committed. As set forth above, Defendant failed to compensate Plaintiff and all
26 aggrieved employees for all hours worked.

27
28 ² Plaintiff hereby incorporates these factual allegations as it relates to all claims and Labor Code sections identified herein.

1 18. Labor Code § 510 requires an employer to compensate an employee who works
2 more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight
3 (8) hours worked on the seventh consecutive day no less than one and one-half times the regular
4 rate of pay for an employee. Further, Labor Code § 510 obligates employers to compensate
5 employees at no less than twice the regular rate of pay when an employee works more than
6 twelve (12) hours in a day or more than eight (8) hours on the seventh consecutive day of work.
7 In accordance with Labor Code § 1194, Plaintiff and the other aggrieved employees could not
8 agree to work for a lesser wage.

9 19. In addition, Labor Code § 1197 states the California requirement that employees
10 must be paid at least the minimum wage fixed by the Commission or by any applicable state or
11 local law, and any payment of less than the minimum wage is unlawful.

12 20. Similarly, Labor Code § 1198 provides that “the maximum hours of work and the
13 standard conditions of labor fixed by the commission shall be the maximum hours of work and
14 the standard conditions of labor for employees. The employment of any employee for longer
15 hours than those fixed by the order or under conditions of labor prohibited by the order is
16 unlawful.”

17 21. As discussed in detail above, Defendants failed to pay Plaintiff and the other
18 aggrieved employees for all hours worked based upon its unlawful security check and bag check
19 policies and failure to pay wages during interrupted meal/rest periods. Since many of the hours
20 Plaintiff and the other aggrieved employees did not receive compensation for whatsoever were
21 hours worked in excess of eight (8) hours in a day and/or forty (40) hours in a week, Plaintiff and
22 the aggrieved employees were not paid for all hours worked. In addition, as Defendants failed to
23 include all hours worked when determining whether or not Plaintiff and the aggrieved employees
24 worked more than eight (8) hours in a day and/or forty (40) hours in a week, Defendants regularly
25 and consistently misclassified overtime hours as regular hours.

26 22. Labor Code § 1197.1 authorizes employees who are paid less than the minimum
27 fixed by an applicable state or local law, or by an order of the commission a civil penalty,
28 restitution of wages, and liquidate damages as follows: (1) for any initial violation that is

1 intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay
2 period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the
3 same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay
4 period for which the employee is underpaid regardless of whether the initial violation is
5 intentionally committed. As set forth above, Defendant failed to compensate Plaintiff and all
6 aggrieved employees for all overtime wages and/or at the proper rates. Accordingly, through
7 PAGA and to the extent permitted by law Plaintiff and all aggrieved employees are entitled to
8 recover civil penalties for violations of Labor Code § 1197.1.

9 23. Further, Labor Code § 558 imposes a penalty upon employers “who violates, or
10 causes to be violated...any provision regulating hours and days of work in any order of the
11 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
12 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
13 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For
14 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
15 period for which the employee was underpaid...” Based upon the above factual allegations,
16 Plaintiff and the aggrieved employees are entitled to recover civil penalties under Labor Code §
17 558 and not any underpaid wages. *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019).

18 24. Labor Code § 512 requires employers to provide employees with thirty (30)
19 minute uninterrupted and duty-free meal period within the first five (5) hours of work. Moreover,
20 an employee who works more than ten (10) hours per day is entitled to receive a second thirty
21 (30) minute uninterrupted and duty-free meal period. Pursuant to Labor Code § 512, an employer
22 may not employ an employee for a work period of more than ten (10) hours, without providing
23 the employee with a second meal period of not less than thirty (30) minutes. Moreover, the
24 second meal period may not be waived if the total hours worked is more than twelve (12) hours.

25 25. Under Labor Code § 512, if an employer maintains a uniform policy that does not
26 authorize and permit the amount of meal time called for under the law (as specified in the
27 applicable Wage Order), “it has violated the wage order and is liable.” *Brinker Rest. Corp. v. Sup.*
28 *Ct.*, 53 Cal.4th 1004, 1033 (2012).

1 26. As explained in detail above, Defendants required Plaintiff and all aggrieved
2 employees to go through security checks when entering and leaving the premises at the start of
3 their shift, if they attempted to go outside during a meal/rest period, and at the conclusion of their
4 shift. Although Defendants maintained a common policy and practice of requiring Plaintiff and
5 the all aggrieved employees to stand/wait in line for security checks in lines and searched their
6 bags and subjected them to other security measures regardless of whether or not they brought a
7 bag, Defendants failed to relieve employees of all control during meal periods and disincentivized
8 and discouraged Plaintiff and the aggrieved employees from taking and/or receiving lawful thirty
9 (30) minute, duty-free meal periods and/or allowing Plaintiffs to use the entirety of their meal
10 period for their own purposes. Since Plaintiff and the other aggrieved employees could not leave
11 the premises without undergoing a security and/or bag check, Defendants never relinquished
12 control over Plaintiff and the other aggrieved employees. Such conduct is unlawful and requires
13 an employer to provide both a meal period premium and to pay the employee for the wages
14 associated with unlawful search. Through Defendants' policy and practice of conducting security
15 and bag searches on employees who were on breaks, Defendants violated Labor Code §§ 226.7,
16 512 and 1198.³

17 27. Defendants also actively interfered with and discouraged employees from
18 receiving lawful meal periods through its unlawful security check and bag check policies and
19 practices. Requiring employees to go through security and bag checks while attempting to leave
20 the premises to eat, make phone calls, smoke and/or perform other activities was intended and
21 had the effect of discouraging employees from taking off-premises and duty-free meal periods.
22 Plaintiff and the other aggrieved employees' ability to take meal/rest periods was impeded and
23 discouraged because they were required to forgo parts of their meal periods in order to go outside.
24 *See Hamilton v. Wal-Mart Stores, Inc.*, No. 5:17-cv-01415-AB (KKx)), 2019 U.S. Dist. LEXIS
25 77699, at *12 (C.D.Cal. Mar. 4, 2019) ("Walmart's security check arguably 'impedes or

26 _____
27 ³ Similarly, Labor Code § 1198 provides that "the maximum hours of work and the standard conditions of labor fixed
28 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."

discourages' associates from taking an "uninterrupted 30-minute break" because employees have only two options: leave the premises and go through the security check even though the security check may eat up some part of their meal break or stay inside the facility."). In order to prevail on her meal period claims, Plaintiff and the State of California need not "show the security check 'actually prevent[s]' associates from taking meal breaks or 'off-site meal breaks...Plaintiffs need only present evidence...that the security check 'imped[s] or discourages them from doing so.'" *Id.* (citing *Brinker*, 53 Cal. 4th at 1038-40).

28. Labor Code § 226.7 provides "an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission ("IWC"). Similarly, IWC Wage Order Nos. 7-2001 and 9-2001 prohibit an employer from "employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order Nos. 7-2001 and 9-2001 further obligate employers to provide an employee to "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. Accordingly, for each day that Plaintiff and all aggrieved employees did not receive compliant meal periods, they are entitled to receive meal period premiums pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 7-2001 and 9-2001.

29. Further, even when Defendants paid Plaintiff and the other aggrieved employees meal period premiums for non-compliant meal periods during the statutory period applicable to their claims, Defendants still violated Labor Code §§ 226.7, 512, and 1198 by failing to comply with California's meal period laws. *See e.g. Kim v. Reins International California, Inc.*, 9 Cal.5th 73, 84 (2020) ("employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy 'does not excuse a section 226.7 violation.'" (quoting *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244, 1256 (2012)). Thus, Defendants are still liable for PAGA penalties even if it paid them a meal or rest period premium because Plaintiff and the aggrieved employees were regularly not authorized and permitted to take a timely first meal period, an uninterrupted meal period, discouraged and/or impeded duty-free meal periods by continuing to exercise control over

1 employees through their security and bag check policies and/or provide lawful second meal
2 periods.

3 30. For instance, although Plaintiff only worked for Defendants for an approximate 3
4 month period in the summer of 2020, the wage statements issued by Defendants to Plaintiff
5 indicate that even without taking into account the security/bag check related meal period issues,
6 she did not receive proper lawful meal periods on at least six (6) occasions. Defendants engaged
7 in the same policies and practices with respect to all aggrieved employees and denoted some—but
8 not necessarily all—of such instances by providing meal period premiums under the pay code
9 “Adj Meal Period Penalty.”

10 31. Further, Labor Code § 558 imposes a penalty upon employers “who violates, or
11 causes to be violated...any provision regulating hours and days of work in any order of the
12 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
13 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
14 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For
15 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
16 period for which the employee was underpaid in addition to an amount sufficient to recover
17 underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected
18 employee.” For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil
19 penalties and not any underpaid wages pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019).

20 32. With respect to Rest Periods, Labor Code § 226.7 provides “an employer shall not
21 require an employee to work during a meal or rest or recovery period mandated pursuant to an
22 applicable statute, or applicable regulation, standard, or order of the Industrial Welfare
23 Commission (“IWC”). Under IWC Wage Order Nos. 7-2001 and 9-2001, an employer must
24 authorize and permit all employees to take ten (10) minute duty free rest periods for every major
25 fraction of four hours worked. *See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257,
26 269 (concluding that “during rest periods employers must relieve employees of all duties and
27 relinquish control over how employees spend their time.”).

1 33. Pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 7-2001 and 9-2001,
2 Defendant failed to provide Plaintiff and all Rest Period Aggrieved Employees with duty-free rest
3 periods of not less than ten (10) minutes for every major fraction of four (4) hours worked.
4 Instead, Defendants regularly and consistently required Plaintiff and the other aggrieved
5 employees to undergo security and bag checks during meal and rest periods (including, but not
6 limited to, searching employees bags containing food during the meal periods if they tried to
7 reenter the premises).

8 34. During the statutory period applicable to their claims, Defendants required
9 Plaintiff and all aggrieved employees to go through security checks when entering and leaving the
10 premises at the start of their shift, if they attempted to go outside during a meal/rest period, and at
11 the conclusion of their shift. Although Defendants maintained a common policy and practice of
12 requiring Plaintiff and the all aggrieved employees to stand/wait in line for security checks in
13 lines and searched their bags and subjected them to other security measures regardless of whether
14 or not they brought a bag, Defendants failed to relieve employees of all control during rest
15 periods and disincentivized and discouraged Plaintiff and the aggrieved employees from taking
16 and/or receiving lawful duty-free rest periods and/or from using all ten (10) minutes for their own
17 purposes.

18 35. At all times relevant hereto, when Plaintiff and the aggrieved employees attempted
19 to go outside, they were required to go through security and bag checks while leaving the
20 premises and reentering such that they were never relieved of their job duties. For instance,
21 Defendants searched Plaintiff when she attempted to reenter the premises among other unlawful
22 conduct. Such conduct is unlawful and requires an employer to provide both a rest period
23 premium and to pay the employee for the wages associated with unlawful search. Through
24 Defendants' policy and practice of conducting security and bag searches on employees who were
25 on breaks, Defendants violated Labor Code §§ 226.7 and 1198.

26 36. Moreover, at all times relevant hereto, Defendants also actively interfered with and
27 discouraged employees from receiving lawful rest periods through its unlawful security check and
28 bag check policies and practices. Requiring employees to go through security and bag checks

1 while attempting to leave the premises to eat, make phone calls, smoke and/or perform other
2 activities was intended and had the effect of discouraging employees from taking off-premises
3 and duty-free rest periods. Plaintiff and the other aggrieved employees' ability to take meal/rest
4 periods was impeded and discouraged because they were required to forgo parts of their meal and
5 rest periods in order to go outside.

6 37. Further, at all times relevant hereto even when Defendants paid Plaintiff and the
7 other aggrieved employees rest period premiums, Defendants still violated Labor Code §§ 226.7,
8 512, and 1198 by failing to comply with California's meal period laws. *See e.g. Kim v. Reins*
9 *International California, Inc.*, 9 Cal.5th 73, 84 (2020) ("employers can pay an additional hour of
10 wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have
11 held that payment of this statutory remedy 'does not excuse a section 226.7 violation.'") (*quoting*
12 *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244, 1256 (2012)). Thus, Defendants are still
13 liable for PAGA penalties even if it paid them a rest period premium because Plaintiff and the
14 aggrieved employees were regularly not authorized and permitted to take lawful duty-free rest
15 periods.

16 38. Further, Labor Code § 558 imposes a penalty upon employers "who violates, or
17 causes to be violated...any provision regulating hours and days of work in any order of the
18 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
19 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
20 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For
21 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
22 period for which the employee was underpaid..." Based upon the above factual allegations,
23 Plaintiff and the aggrieved employees are entitled to recover civil penalties under Labor Code §
24 558 and not any underpaid wages. *ZB, N.A. v. Sup. Ct.*, 8 Cal.5th 175 (2019) and not any
25 underpaid wages.

26 39. Labor Code § 226 obligates employers, semi-monthly or at the time of each
27 payment to furnish an itemized wage statement in writing showing:

28 (1) gross wages earned;

- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (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 other than a social security number;
- (8) the name and address of the legal entity that is the employer...;
- (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...

40. Similarly, Labor Code § 226(e) provides:

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

(2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

41. Labor Code § 226(a)(1), (2), (5), and (9) require employers semimonthly or at the time or each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing the gross wages earned, the total hours worked by the employee, all deductions, the net wages earned, as well as all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

1 42. Due to Defendants' failure to pay Plaintiff and all aggrieved employees all
2 minimum wages, overtime wages, meal period premiums, and rest period premiums, the wage
3 statements issued by Defendants do not indicate the correct amount of gross wages earned, the
4 total hours worked, the net wages earned, all applicable hourly rates in effect during the pay
5 period and the corresponding number of hours worked at each hourly rate. Thus, Plaintiff is an
6 aggrieved employee within the meaning of PAGA and Defendants have violated Labor Code
7 §226(a)(1), (2), (5), and (9) with respect to Plaintiff and all aggrieved employees.

8 43. Labor Code § 226.3 provides that "[a]ny employer who violates subdivision (a) of
9 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250)
10 per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee
11 for each violation in a subsequent citation, for which the employer fails to provide the employee a
12 wage deduction statement or fails to keep the required in subdivision (a) of Section 226." To the
13 extent that Labor Code § 226.3 applies, Plaintiff also seeks such penalties on behalf of herself and
14 the other aggrieved employees.

15 44. Labor Code § 204 expressly requires that "[a]ll wages...earned by any person in
16 any employment are due and payable twice during each calendar month, on days designated in
17 advance by the employer as the regular paydays." Defendant pays Plaintiff and all aggrieved
18 employees on a weekly basis.

19 45. Due to Defendants' failure to pay Plaintiff and all aggrieved employees all
20 minimum wages, overtime wages, meal period premiums, and rest period premiums, Defendants
21 failed to timely pay Plaintiff and all aggrieved employees all wages owed within seven (7) days
22 of the close of the payroll period in accordance with Labor Code § 204(d) on a regular and
23 consistent basis.

24 46. Labor Code § 210 provides that "in addition to, an entirely independent and apart
25 from, any other penalty provided in this article, every person who fails to pay the wages of each
26 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
27 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
28 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for

1 each failure to pay each employee, plus 25% of the amount unlawfully withheld.” As a result of
2 the faulty compensation policies and practices described in detail above and Defendants’ failure
3 to pay Plaintiff all aggrieved employees within seven (7) days of the close of the payroll period,
4 the State of California is entitled to recover penalties under Labor Code § 210 through PAGA.
5 *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of
6 Labor Code section 210 penalties under PAGA due to the employer’s failure to timely pay wages
7 at the proper rate in accordance with a local wage ordinance).

8 47. Pursuant to Labor Code §§ 201-202, an employer must provide an employee
9 wages at the time of discharge or within up to seventy-two (72) hours of their resignation. Labor
10 Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is
11 discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30
12 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

13 48. As described in detail above, Defendants failed to pay Plaintiff and other
14 aggrieved employees whose employment concluded all wages owed, including but not limited to
15 minimum wages, overtime wages, meal period premiums, and rest period premiums within the
16 time constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation.
17 Thus, as result of Defendants’ faulty policies described above, Plaintiff and all aggrieved
18 employees left their employment with Defendants without being compensated for each and every
19 hour worked at the appropriate rate in violation of Labor Code §§ 201, 202, and 203.

20 49. Separate and independent of the foregoing, Defendant engaged in a common
21 pattern and practice of failing to pay Plaintiff and the aggrieved employees any wages whatsoever
22 upon their separation from the company and/or within the time constraints proscribed in Labor
23 Code §§ 201-202. For instance, although Defendant contends Plaintiff was terminated on August
24 31, 2020—Defendants failed to pay her any of her final wages on that day. When Plaintiff
25 complained in writing to Brenda Martinez about the missing wages that Ms. Martinez had
26 referenced in her correspondence that day and represented had already been paid—Ms. Martinez
27 refused to respond. Such wages were obviously not paid “immediately” as required by Labor
28 Code § 201. Moreover, based upon information and belief, Defendants have a policy and

1 procedure of terminating employees and failing to advise them of that decision until after a
2 second payroll can be run in an effort to conceal its non-compliance with California Labor Code
3 §§ 201-203. For instance, Plaintiff believes that she was actually terminated on August 28,
4 2020—but that Defendants attempted to cover-up their non-compliance with Labor Code §§ 201-
5 203 by failing to pay her all wages owed until well after the time of her separation. Plaintiff
6 alleges that Defendants in the same conduct with respect to all aggrieved employees.

7 50. Plaintiff fully and completely exhausted her administrative remedies under PAGA
8 prior to proceeding with this action. Plaintiff filed her PAGA Notice online with the Labor
9 Workforce Development Agency (“LWDA”) and sent a letter by certified mail to Defendants
10 setting forth the facts and theories of the violations alleged against Defendants, as prescribed by
11 Labor Code § 2698 *et seq.* **Exh. A.** As required by PAGA, Plaintiff submitted the \$75.00 filing
12 fee with the LWDA by regular mail. Pursuant to Labor Code § 2699.3(a)(2)(A), no notice was
13 received and/or will have been received by Plaintiff from the LWDA evidencing its intention to
14 investigate within sixty-five (65) calendar days of the postmark date of the PAGA notice. Plaintiff
15 is therefore, entitled to commence and proceed with a civil action pursuant to Labor Code § 2699.

16 III.

17 JURISDICTION AND VENUE

18 51. This Court has subject matter jurisdiction over any and all causes of action
19 asserted herein pursuant to Article VI, § 10 of the California Constitution and California Code of
20 Civil Procedure § 410.10 by virtue of the fact that this is a civil action in which the matter in
21 controversy, exclusive of interest, exceeds \$25,000, and because each cause of action asserted
22 arises under the laws of the State of California or is subject to adjudication in the courts of the
23 State of California.

24 52. This Court has personal jurisdiction over Defendants because Defendants have
25 caused injuries in the County of San Bernardino including at its location in Redlands California
26 through their acts, and by their violation of the California Labor Code and California state
27 common law.
28

53. Venue as to each Defendants is proper in this judicial district, pursuant to Code of Civil Procedure § 395. Defendants operates within California and does business within San Bernardino County, California. The unlawful acts alleged herein have a direct effect on Plaintiff and all “employees” within the State of California and San Bernardino County.

IV.

PARTIES

A. PLAINTIFF

54. Plaintiff ASHLEY FLORES is a resident of California and at all times pertinent hereto worked for Defendants and was harmed by activities in San Bernardino County.

55. Plaintiff and all aggrieved employees are, and at all times pertinent hereto, have been classified as employees by Defendants. Defendants hires employees to work in California.

56. Upon information and belief, Plaintiff and all aggrieved employees are covered by California Industrial Welfare Commission Occupational Wage Orders Nos. 7-2001 and 9-2001.

57. Plaintiff represents the state of California in prosecuting claims against Defendants on behalf of several groups of employees defined as:

- (1) all individuals who were employed by AVDC, Inc. as a non-exempt hourly employee for one or more pay periods from September 9, 2019 and continuing into the present. (“AVDC Minimum Wage Aggrieved Employees”);
- (2) all individuals who were employed by AVDC, Inc. or its predecessor or merged entities in California as a non-exempt, hourly employee or other similar position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from September 9, 2019 and continuing into the present. (“AVDC Overtime Aggrieved Employees”);
- (3) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from September 9, 2019 and continuing into the present. (“AVDC Meal Period Aggrieved Employees”);
- (4) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position and who underwent a security and/or bag check and/or who left the premises during a meal period from

September 9, 2019 and continuing into the present. (“AVDC Security Check Meal Period Aggrieved Employees”);

(5) all individuals who were employed by AVDC, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from September 9, 2019 and continuing into the present. (“AVDC Rest Period Aggrieved Employee”);

(6) all individuals who were employed by AVDC, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a rest period from September 9, 2019 and continuing into the present. (“AVDC Security Check Rest Period Aggrieved Employee”);

(7) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities for one or more pay periods in California and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into the present; (“AVDC Late Payment Aggrieved Employee”);

58. The groups referenced in paragraph 57 may also all collectively be referred to herein as aggrieved employees, other aggrieved employees, and/or all aggrieved employees where appropriate.

B. DEFENDANTS

59. Defendant AVDC, INC. is believed to be an Ohio Corporation operating within the State of California including within San Bernardino County. Defendant’s principal place of business is believed to be 4900 E Dublin Granville Rd, Columbus OH 43081. Based upon information and belief, Defendant only does business in San Bernardino County in California and its name stands for Apple Valley Distribution Center, which is abbreviated as AVDC. The AVDC is located at 18880 Navajo Rd, Apple Valley, CA 92307.

60. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants

1 designated herein as a DOE is legally responsible in some manner for the unlawful acts referred
2 to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and
3 capacities of the Defendants designated hereinafter as DOES when such identities become
4 known. Plaintiff further alleges that the Doe Defendants include California residents including
5 individuals who could be brought into the action under Labor Code § 558.1.

6 61. Plaintiff is informed and believes, and based thereon alleges, that each Defendants
7 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
8 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
9 legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the
10 employer and/or joint employer of Plaintiff and the other aggrieved employees.

11 **V.**

12 **FIRST CAUSE OF ACTION**

13 **PLAINTIFF AND ALL AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS**
14 **FOR PENALTIES PURSUANT TO LABOR CODE § 2698, ET SEQ. FOR VIOLATIONS**
15 **OF LABOR CODE §§ 201, 202, 203, 204, 210, 226(a), 226.3, 226.7, 510, 512, 558, 1194, 1197,**
16 **1197.1 and 1198 as well as IWC Wage Order Nos. 7-2001 and 9-2001**

17 62. Plaintiff, on behalf of the State of California, realleges and incorporates by
18 reference all previous paragraphs.

19 63. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code
20 § 2698, *et seq.* because of Defendants' violations of Labor Code §§ 201, 202, 203, 204, 210,
21 226(a), 226.3, 226.7, 510, 512, 558, 1194, 1197, 1197.1 and 1198 as well as IWC Wage Order
22 Nos. 7-2001 and 9-2001

23 64. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiff and
24 all other aggrieved employees are entitled to penalties in an amount to be shown at the time of
25 trial subject to the following formula unless a civil penalty is already proscribed under the Labor
26 Code:

27 \$100 for the initial violation per employee per pay period; and

28 \$200 for each subsequent violation per employee per pay period.

65. These penalties will be allocated 75% to the Labor Workforce Development
Agency and 25% to the affected employees. These penalties may be stacked separately for each

1 of Defendants violations of the California Labor Code. *See e.g. Kaanaana v. Barrett Business*
2 *Services, Inc.*, 29 Cal.App.5th 778, 808 (2018) (acknowledging that the employees could get
3 separate PAGA penalties for interrupted meal periods because interrupted meal periods violated
4 Labor Code sections 1194 and 512 and remanding to the trial court to determine the amount of
5 PAGA penalties to award); *Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017)
6 (“hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section
7 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section
8 226(e)(1) and acknowledging that a Plaintiff could recover separately under PAGA for violations
9 of Labor Code §§ 226(a) and 226(e)); *Magadia vs. Wal-Mart*, No. 17-CV-00062-LHK, 2019 U.S.
10 Dist. LEXIS 91792 (N.D. Cal. May 31, 2019) (awarding three sets of PAGA penalties including
11 several during the same pay period); *Hernandez v. Towne Park, Ltd.*, No. CV 12-02972 MMM
12 (JCGx) 2012 U.S.Dist. LEXIS 86975, at *59, fn. 77 (C.D.Cal. June 22, 2012) (holding that
13 although the plaintiff did not seek stacked PAGA penalties, that “PAGA penalties can be
14 ‘stacked,’ *i.e.*, multiple PAGA penalties can be assessed for the same pay period for different
15 Labor Code violations.”); *accord Schiller v. David’s Bridal, Inc.*, No. 1:10-cv-00616 AWI SKO)
16 2010 U.S. Dist. LEXIS 81128, at *17 (E.D. Cal. July 14, 2010); *Pulera v. F & B, Inc.*, No. 2:08-
17 cv-00275-MCE-DAD, 2008 U.S. Dist. LEXIS 72659, 2008 WL 3863489, at * 2-3 (E.D. Cal.
18 Aug. 19, 2008); *Smith v. Brinker Intern, Inc.*, No. C 10-0213 VRW, 2010 U.S. Dist. LEXIS
19 54110, 2010 WL 1838726, at * 2-6 (N.D. Cal. May 5, 2010).

20 66. In addition, Plaintiff and the aggrieved employees seek the default penalty
21 provided by Labor Code § 226.3. Labor Code § 226.3 provides that “[a]ny employer who violates
22 subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred
23 fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars
24 (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to
25 provide the employee a wage deduction statement or fails to keep the required in subdivision (a)
26 of Section 226.”

27 67. Labor Code § 210 provides that “in addition to, an entirely independent and apart
28 from, any other penalty provided in this article, every person who fails to pay the wages of each

1 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
2 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
3 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
4 each failure to pay each employee, plus 25% of the amount unlawfully withheld.” Pursuant to
5 Labor Code § 210, “[t]welve and one-half percent of the penalty recovered shall be paid into a
6 fund within the Labor and Workforce Development Agency dedicated to educating employers
7 about state labor laws, and the remainder shall be paid into the State Treasury to the credit of the
8 General Fund.” As a result of the faulty compensation policies and practices described in detail
9 above, the State of California is entitled to recover penalties under Labor Code § 210 through
10 PAGA.

11 68. In addition, Labor Code § 256 provides that the Labor Commissioner “shall
12 impose a civil penalty in an amount not exceeding 30 days pay as waiting time under the terms of
13 Section 203. The California Supreme Court and California Court of Appeal have both specifically
14 recognized the ability of an aggrieved employee to recover civil penalties under Labor Code §
15 256 for a defendant’s willful violation of Labor Code § 201 and 202 under PAGA. In *Iskanian v.*
16 *CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014), the California Supreme Court
17 acknowledged that PAGA penalties for the untimely payment of wages included the 30 days of
18 pay as waiting time pursuant to Labor Code § 256. *See also Esparza v. KS Industries, L.P.* 13
19 Cal.App.5th 1228, 1242 (2017) (explaining that the Labor Code § 256 penalties under PAGA
20 only exist if the employer’s failure to timely pay wages upon separation was willful and is a “civil
21 penalty” “recovered or imposed by the Labor Commissioner.”). As such, for Defendants’ willful
22 violations of Labor Code §§ 201 and 202, the State of California is entitled to recover civil
23 penalties pursuant to Labor Code § 256.

24 69. Further, Labor Code § 558 imposes a penalty upon employers “who violates, or
25 causes to be violated...any provision regulating hours and days of work in any order of the
26 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
27 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
28 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For

1 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
2 period for which the employee was underpaid..." Based upon the above factual allegations
3 related to rest period violations, Plaintiff and the aggrieved employees are entitled to recover civil
4 penalties under Labor Code § 558 and not any underpaid wages. *ZB, N.A. v. Sup. Ct.* 8 Cal.5th
5 175 (2019).

6 **RELIEF REQUESTED**

7 **WHEREFORE**, Plaintiff prays for the following relief:

- 8 1. For penalties under Labor Code § 2698, *et seq.* for Plaintiff and all aggrieved
9 employees because of Defendants' violation of Labor Code §§ 201, 202, 203, 204, 210, 226(a),
10 226.3, 226.7, 510, 512, 558, 1194, 1197, 1197.1 and 1198 as well as IWC Wage Order Nos. 7-
11 2001 and 9-2001.
- 12 2. An award providing for payment of costs of suit;
- 13 3. An award of attorneys' fees; and
- 14 4. Such other and further relief as this Court may deem proper and just.

15 Dated: November 15, 2020

WINSTON LAW GROUP, P.C.

16
17
18 By: David Winston
19 DAVID S. WINSTON
20 Attorney for Plaintiff and the aggrieved employees
21
22
23
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25
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27
28

Exhibit A

WINSTON LAW GROUP, P.C.

1180 S BEVERLY DR., SUITE 320 • LOS ANGELES, CA 90035 • (424) 288-4568

September 9, 2020

Via Online Filing with the LWDA & by Certified Mail to Defendants

AVDC, Inc.
4900 E Dublin Granville Rd
Columbus, OH 43081

Big Lots Stores, Inc.
4900 E Dublin Granville Rd
Columbus, OH 43081

Re: *ASHLEY FLORES VS. AVDC, INC. and BIG LOTS STORES, INC.- California Labor Code § 2699 Penalties*

Gentlepersons:

This firm represents Plaintiff Ashely Flores (“Plaintiff” or “Ms. Flores”) and a proposed group of current and former employees working for AVDC, Inc. and Big Lots Stores, Inc. (“Defendants” or “AVDC”) in California for violations of California Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226.3, 226.7, 510, 512, 558, 1194, 1197, 1197.1 and 1198 as well as IWC Wage Order Nos. 7-2001 and 9-2001.¹

Ms. Flores wishes to bring a representative action on behalf of the State of California based upon alleged improper acts committed against her and several groups of aggrieved employees defined as:

- (1) all individuals who were employed by AVDC, Inc. as a non-exempt hourly employee for one or more pay periods from one (1) year prior to the date of this letter and continuing into the present. (“AVDC Minimum Wage Aggrieved Employees”);
- (2) all individuals who were employed by Big Lots Stores, Inc. as a non-exempt hourly employee for one or more pay periods from one (1) year prior to the date of this letter and continuing into the present. (“Big Lots Minimum Wage Aggrieved Employees”);

Collectively, aggrieved employee groups one (1) and two (2) may be referred to as the “Minimum

¹ All references to AVDC, Inc. are also intended to refer to any businesses or entities doing business as AVDC, Inc. with respect to all aggrieved employee groups. This PAGA Notice is only intended to apply to distribution and warehouse workers and does not apply to retail workers or asset protection officers.

Wage Aggrieved Employees.”

- (3) all individuals who were employed by AVDC, Inc. or its predecessor or merged entities in California as a non-exempt, hourly employee or other similar position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from one (1) year prior to the date of this letter and continuing into the present. (“AVDC Overtime Aggrieved Employees”);
- (4) all individuals who were employed by Big Lots Stores, Inc. or its predecessor or merged entities in California as a non-exempt, hourly employee or other similar position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from one (1) year prior to the date of this letter and continuing into the present. (“Big Lots Overtime Aggrieved Employees”);

Collectively, aggrieved employee groups three (3) and four (4) may be referred to as the “Overtime Aggrieved Employees.”

- (5) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from one (1) year prior to the date of this letter and continuing into the present. (“AVDC Meal Period Aggrieved Employees”);
- (6) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position and who underwent a security and/or bag check and/or who left the premises during a meal period from one (1) year prior to the date of this letter and continuing into the present. (“AVDC Security Check Meal Period Aggrieved Employees”);
- (7) all individuals who were employed by Big Lots Stores, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from one (1) year prior to the date of this letter and continuing into the present. (“Big Lots Meal Period Aggrieved Employees”);
- (8) all individuals who were employed by Big Lots Stores, Inc. or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position and who underwent a

security and/or bag check and/or who left the premises during a meal period from one (1) year prior to the date of this letter and continuing into the present. (“Big Lots Security Check Meal Period Aggrieved Employees”);

Collectively, aggrieved employee groups five (5), six (6), seven (7), and eight (8) may be referred to as the “Meal Period Aggrieved Employees.”

(9) all individuals who were employed by AVDC, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. (“AVDC Rest Period Aggrieved Employee”);

(10) all individuals who were employed by AVDC, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a rest period from one year prior to the date of this letter and continuing into the present. (“AVDC Security Check Rest Period Aggrieved Employee”);

(11) all individuals who were employed by Big Lots Stores, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. (“Big Lots Rest Period Aggrieved Employee”);

(12) all individuals who were employed by Big Lots Stores, Inc., or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a rest period from one year prior to the date of this letter and continuing into the present. (“Big Lots Security Check Rest Period Aggrieved Employee”);

Collectively, aggrieved employee groups nine (9), ten (10), eleven (11) and twelve (12) may be referred to as the “Rest Period Aggrieved Employees.”

(13) all individuals who were employed by AVDC, Inc. or its predecessor, merged or related entities for one or more pay periods in California and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into

the present; (“AVDC Late Payment Aggrieved Employee”);

(14) all individuals who were employed by Big Lots Stores, Inc or its predecessor, merged or related entities for one or more pay periods in California and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into the present; (“Late Payment Aggrieved Employee”);

Collectively, aggrieved employee groups thirteen (13) and fourteen (14) may be referred to as the “Late Payment Aggrieved Employees.”

These groups may all collectively be referred to herein as aggrieved employees and/or all aggrieved employees where appropriate. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698 *et seq.* We herein set forth some of the facts and theories of California Labor Code violations which we allege Defendants engaged in with respect to our client and all aggrieved employees.²

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 221, 224, 225.5, 1194, 1194.2, 1197, 1197.1, 1199, 1199.5 and IWC WAGE ORDER Nos. 7-2001 and 9-2001

Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles “any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage.” IWC Wage Order No. 7-2001 obligates employers to pay each employee minimum wages for all hours worked.

These minimum wage standards apply to each hour employees worked for which they were not paid. Therefore, an employer’s failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee’s total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta*, 135 Cal.App.4th at 324.

Defendants required Plaintiff and all aggrieved employees to regularly perform work-off-the-clock for which they did not receive any compensation. As part of their employment, Defendants required Plaintiff and all aggrieved employees to go through security checks when

² See *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. Jul. 8, 2011) 796 F. Supp. 2d 1246, 1261; *Moua v. Int’l Bus. Machines Corp.* (N.D. Cal. Jan. 31, 2012) No. 5:10-CV-01070 EJD, 2012 WL 370570, at *5; *York v. Starbucks Corp.*, (C.D. Cal. Nov. 1, 2012) No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *4.

entering and leaving the premises at the start of their shift, if they attempted to go outside during a meal/rest period, and at the conclusion of their shift. Although Defendants maintained a common policy and practice of requiring Plaintiff and the all aggrieved employees to stand/wait in line for security checks in lines and searched their bags and subjected them to other security measures regardless of whether or not they brought a bag, Defendants failed to compensate Plaintiff and the other aggrieved employees for such time, which Plaintiff estimates took approximately 5-10 minutes per day.

Nor could Plaintiff and the other Minimum Wage Aggrieved Employees report such time to the Company's due to Defendants policy and practice of making employees record their time by swiping their badge on a time clock/machine that was not physically available until either after an employee had undergone a security check or prior to undergoing a bag check (when entering the premises) or had to be used prior to undergoing a security or bag check (when leaving the premises). Instead of paying Plaintiff and the minimum wage aggrieved employees for all hours worked and/or the time they were subject to Defendants' control during meal/rest periods, Defendants routinely required Plaintiff and the aggrieved employees to perform off-the-clock work.

Recently, in *Frlekin v. Apple Inc.*, 8 Cal.5th 1038, 1051 (2020), the California Supreme Court found that employees—as here—that were required to undergo a security and/or bag check in the workplace to deter thefts were required to be compensated for such time. *Id.* at 1058 (“We conclude that plaintiffs’ time spent on Apple’s premises waiting for, and undergoing, mandatory exit searches of bags or packages or personal Apple technology devices, such as iPhones, voluntary brought to work purely for personal convenience is compensable as ‘hours worked’ within the meaning of Wage Order 7.”). In reaching its decision, the Court explained that employees subject to the defendant’s bag check policy were “confined to the premises until they submitted to the search procedure.” *Id.* The Court distinguished *Morillion* and its progeny on the basis that the nature of the controlled activity did not “involve optional services that benefit the employee.” *Id.* at 1052 (explaining that “the Ninth Circuit recently described *Morillion* as holding that compensation was not required ‘if employers offered a *benefit* or *service* that employees could chose, but were not required to take advantage of.’”) (emphasis in original).

Similarly, in *Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018), the California Supreme Court analyzed an employer’s responsibility with respect to the payment of wages to employees for small or *de minimis* amounts of time under California law. Specifically, the California Supreme Court held “that the relevant California statutes and wage order have not incorporated the *de minimis* doctrine found in the FLSA.” *Id.* at 848. The California Supreme Court further explained that California law does “not allow employers to require employees to routinely work for minutes off the clock without compensation.” In reaching its decision, the California Supreme Court noted

that “technological advances may help with tracking small amounts of time,” that an employer should be expected to explore and/or customize or develop time tracking tools, and that it also “may be possible to reasonable estimate worktime.” *Id.* In other words, following *Troester* employers in California are expected to either find and/or develop their own timekeeping system that captures all hours worked and/or to estimate and compensate employees for otherwise difficult to capture amounts of time.

In addition, the California Court of Appeal unequivocally held in a published decision³ that employees must be paid a meal/rest period premium for not receiving a proper meal/rest period as well as wages for the time that they were required to work during breaks. *Kaanaana v. Barrett Business Services, Inc.*, 29 Cal.App.5th 778, 808 (2018) (holding that an employee whose meal period is interrupted is entitled to receive both a meal period premium and to recover minimum wages for the time worked). Despite the fact that Defendants regularly and consistently required Plaintiff and the other aggrieved employees to undergo security and bag checks during meal and rest periods (including, but not limited to, searching employees bags containing food during the meal periods if they tried to reenter the premises), Defendants failed to pay Plaintiff minimum wages and overtime wages for this time.

Here, Plaintiff and the other aggrieved employees are subject to Defendants control because they are confined to the employer’s premises as they wait to undergo a security check and/or bag check. This includes during meal/rest periods where it is not possible for Plaintiff and the other aggrieved employees to leave the premises without first complying with Defendants security and bag check policy and practice. As part of Defendants security check policies and procedures, Defendants required employees to pass through a metal detector, have any bags searched, and to lift up their pant legs. Plaintiff and the other aggrieved employees were required by Defendants to submit to these security checks and bag searches on a regular and consistent basis not because of an optional service for their benefit, but for the company’s own inventory control, theft deterrence and/or liability mitigation purposes among other reasons. Based upon information and belief, Defendants specifically employ “Asset Protection Officers” whose job duties specifically include maintaining “physical security of a distribution center in protecting company assets, property and associates” and who must “carry[] out shortage control disciplines and programs.” The shortage/shrinkage control programs in effect at the Apple Valley Distribution Center and other AVDC, Inc. distribution centers include conducting security and bag checks for the benefit of Defendants. Accordingly, Plaintiff and the other aggrieved employees should have received compensation for this time under both the control and suffer and permitted to work clauses of the

³ The California Supreme Court only agreed to rehear a limited issue regarding the classification of workers for prevailing wages and declined to depublish the decision.

Labor Code and Wage Orders.⁴

Through its policy and practice of requiring Plaintiff and the aggrieved employees to undergo security and bag checks, Defendants clearly violated Labor Code § 1194. As a result of Defendants' policy and practices described above, Defendants regularly failed to pay Plaintiff and all aggrieved employees for all hours worked in violation of Labor Code §§ 1194 and 1197. Accordingly, Plaintiff is an aggrieved employee within the meaning PAGA and Defendants have violated Labor Code §§ 1194 and 1197 with respect to Plaintiff and the aggrieved employees.

Labor Code § 1197.1 authorizes employees who are paid less than the minimum fixed by an applicable state or local law, or by an order of the commission a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. As set forth above, Defendants failed to compensate Plaintiff and all aggrieved employees for all hours worked. Accordingly, through PAGA and to the extent permitted by law Plaintiff and all aggrieved employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1. Based upon these same factual allegations, Plaintiff and the other aggrieved employees are entitled to penalties under Labor Code § 1199.

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE § 510, 1194.2, 1197, and 1198 AND WAGE ORDER NOS. 7-2001 and 9-2001

Labor Code § 510 requires an employer to compensate an employee who works more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight (8) hours worked on the seventh consecutive day no less than one and one-half times the regular rate of pay for an employee. Further, Labor Code § 510 obligates employers to compensate employees at no less than twice the regular rate of pay when an employee works more than twelve (12) hours in a day or more than eight (8) hours on the seventh consecutive day of work. In accordance with Labor Code § 1194, Plaintiff and the other aggrieved employees could not agree to work for a lesser wage.

In addition, Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful.

⁴ Plaintiff hereby incorporates these factual allegations as it relates to all claims and Labor Code sections identified herein.

Similarly, Labor Code § 1198 provides that “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 discussed in detail above, Defendants failed to pay Plaintiff and the other aggrieved employees for all hours worked based upon its unlawful security check and bag check policies and failure to pay wages during interrupted meal/rest periods. Since many of the hours Plaintiff and the other aggrieved employees did not receive compensation for whatsoever were hours worked in excess of eight (8) hours in a day and/or forty (40) hours in a week, Plaintiff and the aggrieved employees were not paid for all hours worked. In addition, as Defendants failed to include all hours worked when determining whether or not Plaintiff and the aggrieved employees worked more than eight (8) hours in a day and/or forty (40) hours in a week, Defendants regularly and consistently misclassified overtime hours as regular hours.

Labor Code § 558 imposes a penalty upon employers “who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee.” For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

Labor Code § 1197.1 authorizes employees who are paid less than the minimum fixed by an applicable state or local law, or by an order of the commission a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. As set forth above, Defendants failed to compensate Plaintiff and all aggrieved employees for all overtime wages at the proper rates. Accordingly, through PAGA and to the extent permitted by law Plaintiff and all aggrieved employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1.

As a result of the unlawful policies and practices detailed herein, Defendants failed to pay Plaintiff and all aggrieved employees' wages at the rate of one-and-one half their regular rate of pay in violation of Labor Code §§ 510, 558, 1197, and 1198.

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 226.7, 512, 558, and 1198 AS WELL AS IWC WAGE ORDER NOS. 7-2001 and 9-2001

Labor Code § 512 requires employers to provide employees with thirty (30) minute uninterrupted and duty-free meal period ***within*** the first five (5) hours of work. Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty-free meal period. Pursuant to Labor Code § 512, an employer may not employ an employee for a work period of more than ten (10) hours, without providing the employee with a second meal period of not less than thirty (30) minutes. Moreover, the second meal period may not be waived if the total hours worked is more than twelve (12) hours.

Under Labor Code § 512, if an employer maintains a uniform policy that does not authorize and permit the amount of meal time called for under the law (as specified in the applicable Wage Order), "it has violated the wage order and is liable." The *Brinker* Court explained in the context of rest breaks that employer liability attaches from adopting an unlawful policy:

An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—***it has violated the wage order and is liable.***

Brinker Rest. Corp. v. Sup. Ct., 53 Cal.4th 1004, 1033 (2012) [emphasis added].

Following *Brinker*, the Courts of Appeal have confirmed that liability for meal period violations arise when an employer adopts a uniform policy that fails to provide off-duty breaks. For example, in *Faulkinbury vs. Boyd & Associates, Inc.*, the California Court of Appeal explained: "the employer's liability arises by adopting a uniform policy that violates the wage and hour laws. Whether or not the employee was able to take the required break goes to damages" *Ibid.* (citations omitted); see also *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 728 (2013).

In addition, the California Court of Appeal unequivocally held in a published decision that employees must be paid a meal/rest period premium for not receiving a proper meal/rest period as well as wages for the time that they were required to work during breaks. *Kaanaana v. Barrett Business Services, Inc.*, 29 Cal.App.5th 778, 808 (2018) (holding that an employee whose meal

period is interrupted is entitled to receive both a meal period premium and to recover minimum wages for the time worked).

As explained in detail above, Defendants required Plaintiff and all aggrieved employees to go through security checks when entering and leaving the premises at the start of their shift, if they attempted to go outside during a meal/rest period, and at the conclusion of their shift. Although Defendants maintained a common policy and practice of requiring Plaintiff and the all aggrieved employees to stand/wait in line for security checks in lines and searched their bags and subjected them to other security measures regardless of whether or not they brought a bag, Defendants failed to relieve employees of all control during meal periods and disincentivized and discouraged Plaintiff and the aggrieved employees from taking and/or receiving lawful thirty (30) minute, duty-free meal periods and/or allowing Plaintiffs to use the entirety of their meal period for their own purposes. Since Plaintiff and the other aggrieved employees could not leave the premises without undergoing a security and/or bag check, Defendants never relinquished control over Plaintiff and the other aggrieved employees. Such conduct is unlawful and requires an employer to provide both a meal period premium and to pay the employee for the wages associated with unlawful search. Through Defendants' policy and practice of conducting security and bag searches on employees who were on breaks, Defendants violated Labor Code §§ 226.7, 512 and 1198.⁵

Defendants also actively interfered with and discouraged employees from receiving lawful meal periods through its unlawful security check and bag check policies and practices. Requiring employees to go through security and bag checks while attempting to leave the premises to eat, make phone calls, smoke and/or perform other activities was intended and had the effect of discouraging employees from taking off-premises and duty-free meal periods. Plaintiff and the other aggrieved employees ability to take meal/rest periods was impeded and discouraged because they were required to forgo parts of their meal periods in order to go outside. *See Hamilton v. Wal-Mart Stores, Inc.*, No. 5:17-cv-01415-AB (KKx)), 2019 U.S. Dist. LEXIS 77699, at *12 (C.D.Cal. Mar. 4, 2019) ("Walmart's security check arguably 'impedes or discourages' associates from taking an "uninterrupted 30-minute break" because employees have only two options: leave the premises and go through the security check even though the security check may eat up some part of their meal break or stay inside the facility."). In order to prevail on her meal period claims, Plaintiff and the State of California need not "show the security check 'actually prevent[s]' associates from taking meal breaks or 'off-site meal breaks...Plaintiffs need only present evidence...that the security check 'imped[s] or discourages them from doing so.'" *Id.* (citing

⁵ Similarly, Labor Code § 1198 provides that "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."

Brinker, 53 Cal. 4th at 1038-40).

Defendants also failed to pay Plaintiff and the other meal period premiums for each workday that the employees did not receive a compliant meal period. Labor Code § 226.7 provides “an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Similarly, IWC Wage Order Nos. 7-2001 and 9-2001 prohibit an employer from “employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order Nos. 7-2001 and 9-2001 further obligate employers to provide an employee to “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. Accordingly, for each day that Plaintiff and all aggrieved employees did not receive compliant—including but not limited to uninterrupted meal periods and meal periods within the first five (5) hours of their shift. Labor Code § 226.7 and IWC Wage Order Nos. 7-2001 and 9-2001. Unfortunately, Plaintiff and the aggrieved employees were not compensated with one (1) hours’ worth of pay at their regular rate of compensation when they were not provided with a compliant meal period in violation of Labor Code § 226.7 and IWC Wage Order Nos. 7-2001 and 9-2001.

Further, even when Defendants paid Plaintiff and the other aggrieved employees meal period premiums, Defendants still violated Labor Code §§ 226.7, 512, and 1198 by failing to comply with California’s meal period laws. *See e.g. Kim v. Reins International California, Inc.*, 9 Cal.5th 73, 84 (2020) (“employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy ‘does not excuse a section 226.7 violation.’”) (*quoting Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244, 1256 (2012)). Thus, Defendants are still liable for PAGA penalties even if it paid them a meal or rest period premium because Plaintiff and the aggrieved employees were regularly not authorized and permitted to take a timely first meal period, an uninterrupted meal period, discouraged and/or impeded duty-free meal periods by continuing to exercise control over employees through their security and bag check policies and/or provide lawful second meal periods. For instance, although Plaintiff only worked for Defendants for an approximate 3 month period in the summer of 2020, the wage statements issued by Defendants to Plaintiff indicate that even without taking into account the security/bag check related meal period issues, she did not receive proper lawful meal periods on at least six (6) occasions. Defendants engaged in the same policies and practices with respect to all aggrieved employees and denoted some—but not necessarily all—of such instances by providing meal period premiums under the pay code “Adj Meal Period Penalty.”

Labor Code § 558 imposes a penalty upon employers “who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee.” For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE § 226.7 AND IWC WAGE ORDER Nos. 7-2001 and 9-2001

Labor Code § 226.7 provides “an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Under IWC Wage Order Nos. 7-2001 and 9-2001, an employer must authorize and permit all employees to take ten (10) minute duty free rest periods for every major fraction of four hours worked. *See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269 (concluding that “during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time.”).

The *Brinker* Court explained in the context of rest breaks that employer liability attaches from adopting an unlawful policy:

An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—***it has violated the wage order and is liable.***

Brinker Rest. Corp. v. Sup. Ct., 53 Cal.4th 1004, 1033 (2012).

Pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 7-2001 and 9-2001, Defendants failed to provide Plaintiff and all Rest Period Aggrieved Employees with duty-free rest periods of not less than ten (10) minutes for every major fraction of four (4) hours worked. Instead, Defendants regularly and consistently required Plaintiff and the other Rest Period Aggrieved Employees to undergo security and bag checks during meal and rest periods (including, but not limited to, searching employees bags containing food during the meal periods if they tried to reenter

the premises).

As part of their employment, Defendants required Plaintiff and all aggrieved employees to go through security checks when entering and leaving the premises at the start of their shift, if they attempted to go outside during a meal/rest period, and at the conclusion of their shift. Although Defendants maintained a common policy and practice of requiring Plaintiff and the all aggrieved employees to stand/wait in line for security checks in lines and searched their bags and subjected them to other security measures regardless of whether or not they brought a bag, Defendants failed to relieve employees of all control during rest periods and disincentivized and discouraged Plaintiff and the aggrieved employees from taking and/or receiving lawful duty-free rest periods and/or from using all ten (10) minutes for their own purposes.

When Plaintiff and the aggrieved employees attempted to go outside, they were required to go through security and bag checks while leaving the premises and reentering such that they were never relieved of their job duties. For instance, Defendants searched Plaintiff when she attempted to reenter the premises among other unlawful conduct. Such conduct is unlawful and requires an employer to provide both a rest period premium and to pay the employee for the wages associated with unlawful search. Through Defendants' policy and practice of conducting security and bag searches on employees who were on breaks, Defendants violated Labor Code §§ 226.7 and 1198.

Defendants also actively interfered with and discouraged employees from receiving lawful rest periods through its unlawful security check and bag check policies and practices. Requiring employees to go through security and bag checks while attempting to leave the premises to eat, make phone calls, smoke and/or perform other activities was intended and had the effect of discouraging employees from taking off-premises and duty-free rest periods. Plaintiff and the other aggrieved employees' ability to take meal/rest periods was impeded and discouraged because they were required to forgo parts of their meal and rest periods in order to go outside. *See e.g. Hamilton v. Wal-Mart Stores, Inc.*, No. 5:17-cv-01415-AB (KKx)), 2019 U.S.Dist.LEXIS 77699, at *12 (C.D.Cal. Mar. 4, 2019) ("Walmart's security check arguably 'impedes or discourages' associates from taking an "uninterrupted 30-minute break" because employees have only two options: leave the premises and go through the security check even though the security check may eat up some part of their meal break or stay inside the facility."). In order to prevail on her meal period claims, Plaintiff and the State of California need not "show the security check 'actually prevent[s]' associates from taking meal breaks or 'off-site meal breaks...Plaintiffs need only present evidence...that the security check 'imped[s] or discourages them from doing so.'" *Id.* (citing *Brinker*, 53 Cal. 4th at 1038-40). Based upon the foregoing, Defendants violated Labor Code §§ 226.7, and 1198.

Further, even when Defendants paid Plaintiff and the other aggrieved employees rest period premiums, Defendants still violated Labor Code §§ 226.7, 512, and 1198 by failing to comply with California's meal period laws. *See e.g. Kim v. Reins International California, Inc.*, 9 Cal.5th 73, 84 (2020) ("employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy 'does not excuse a section 226.7 violation.'") (*quoting Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244, 1256 (2012)). Thus, Defendants are still liable for PAGA penalties even if it paid them a rest period premium because Plaintiff and the aggrieved employees were regularly not authorized and permitted to take lawful duty-free rest periods.

Moreover, Labor Code § 558 imposes a penalty upon employers "who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee." For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

DEFENDANTS VIOLATED AND CONTINUES TO VIOLATE LABOR CODE § 226 and 226.3

As to Plaintiff and all aggrieved employees, Defendants also failed to provide accurate itemized wage statements in accordance with Labor Code § 226(a)(1, 2, 5, and 9). Labor Code § 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (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 other than a social security number;
- (8) the name and address of the legal entity that is the employer...;

(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...

Similarly, Labor Code § 226(e) provides:

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

(2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

Due to Defendants' failure to pay Plaintiff and all aggrieved employees all minimum wages, overtime wages, meal period premiums, and rest period premiums, the wage statements issued by Defendants do not indicate the correct amount of gross wages earned, the total hours worked, the net wages earned, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Thus, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendants have violated Labor Code §226(a)(1), (2), (5), and (9) with respect to Plaintiff and all aggrieved employees.

Plaintiff and the aggrieved employees will prevail on their claim for PAGA penalties under Labor Code § 226(a). *See Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017)

(“hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1).”); *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 679 (2018) (finding that the “requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a).”).

Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” As explained in detail above, Defendants failed to provide Plaintiff and the other aggrieved employees with accurate itemized wage statements. Accordingly, Plaintiff and the other aggrieved employees may also recover Labor Code § 226.3 penalties for Defendants’ violations of Labor Code § 226(a).

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 204 AND 210

Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.” Defendants pay Plaintiff and all aggrieved employees on a weekly basis.

Due to Defendants’ failure to pay Plaintiff and all aggrieved employees all minimum wages, overtime wages, meal period premiums, and rest period premiums, Defendants failed to timely pay Plaintiff and all aggrieved employees all wages owed within seven (7) days of the close of the payroll period in accordance with Labor Code § 204(d) on a regular and consistent basis.

Labor Code § 210 provides that “in addition to, an entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld.” As a result of the faulty compensation policies and practices described in detail above and Defendants’ failure to pay Plaintiff all aggrieved employees within seven (7) days of the close of the payroll period, the State of California is entitled to recover penalties under Labor Code § 210 through PAGA. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of Labor Code section 210 penalties under PAGA due to the employer’s failure to timely pay wages at the proper rate in

accordance with a local wage ordinance).

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 201-203

Under Labor Code §§ 201-202, an employer must provide an employee wages at the time or discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

As described in detail above, Defendants failed to pay Plaintiff and other aggrieved employees whose employment concluded all wages owed, including but not limited to minimum wages, overtime wages, meal period premiums, and rest period premiums within the time constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation. Thus, as result of Defendants’ faulty policies described above, Plaintiff and all aggrieved employees left their employment with Defendants without being compensated for each and every hour worked at the appropriate rate in violation of Labor Code §§ 201, 202, and 203.

Separate and independent of the foregoing, Defendant engaged in a common pattern and practice of failing to pay Plaintiff and the Late Payment Aggrieved Employees any wages whatsoever upon their separation from the company and/or within the time constraints proscribed in Labor Code §§ 201-202. For instance, although Defendant contends Plaintiff was terminated on August 31, 2020—Defendants failed to pay her any of her final wages on that day. When Plaintiff complained in writing to Brenda Martinez about the missing wages that Ms. Martinez had referenced in her correspondence that day and represented had already been paid—Ms. Martinez refused to respond. Such wages were obviously not paid “immediately” as required by Labor Code § 201. Moreover, based upon information and belief, Defendants have a policy and procedure of terminating employees and failing to advise them of that decision until after a second payroll can be run in an effort to conceal its non-compliance with California Labor Code §§ 201-203. For instance, Plaintiff believes that she was actually terminated on August 28, 2020—but that Defendants attempted to cover-up their non-compliance with Labor Code §§ 201-203 by failing to pay her all wages owed until well after the time of her separation. Plaintiff alleges that Defendants in the same conduct with respect to all Late Payment Aggrieved Employees.

CONCLUSION

Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of the alleged Labor Code violations. If Defendant is interested in attempting to resolve this matter on a class-wide basis, including the PAGA claims, please contact

September 9, 2020
Page 18 of 18

me or have a lawyer you choose to retain contact me so that we can discuss the possibility of early mediation on or before **October 8, 2020**.

Very truly yours,

WINSTON LAW GROUP, P.C.

By: 
DAVID S. WINSTON

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