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8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

10 ELISABETH BAUTISTA, as a private
attorney general,

11 Plaintiffs,

12 vs.
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14 FM RESTAURANTS HQ, LLC, a
Delaware limited liability company; and
15 DOES 1 through 20, inclusive,

16 Defendants.
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Case No. 21STCV09500

REPRESENTATIVE ACTION COMPLAINT

(1) Claim for Civil Penalties for Violation of
California's Private Attorneys General Act of
2004 (Labor Code § 2698, *et seq.*)

DEMAND FOR JURY TRIAL

1 Plaintiff Elisabeth Bautista, as a private attorney general and proxy for the State of California,
2 alleges on information and belief as follows:

3 **INTRODUCTION**

4 1. This is a representative action under the Labor Code Private Attorneys General Act
5 of 2004, Labor Code Section 2698, *et seq.* (“PAGA”) that challenges systemic employment practices
6 resulting in violations of the California Labor Code against non-exempt and exempt employees who
7 worked for Defendants in California.

8 2. The Labor Code is broadly remedial in nature. Its laws serve an important public
9 interest in establishing minimum working conditions and requirements in California. These labor
10 standards protect employees from onerous terms and conditions of employment or exploitation by
11 employers who have superior economic and bargaining power. PAGA was enacted to improve the
12 enforcement of California’s Labor Code by empowering an aggrieved employee to bring an
13 enforcement action as a private attorney general and proxy for the State of California for an
14 employer’s violations of California labor law.

15 3. By this action, Plaintiff seeks civil penalties and any other available relief under the
16 PAGA on behalf of herself, the State of California and other current and former employees who
17 worked for Defendants as non-exempt, hourly-paid and exempt employees in California at their
18 Acapulco Restaurant y Cantina, Chevy’s Fresh Mex, El Torito Mexican Restaurant, El Torito Grill,
19 Las Brisas, SOL Mexican Cocina, and Solita Tacos and Margaritas restaurants.

20 4. This Complaint seeks civil penalties and other relief pursuant to the PAGA for
21 Defendants’ violations of Labor Code Sections 201, 202, 203, 204, 226(a), 226.7, 510, 1174(d),
22 1182.12, 1194, 1197, 1197.5, 1198, and 2802.

23 **THE PARTIES**

24 5. Plaintiff Elisabeth Bautista (“Plaintiff”) is and at all times relevant to this Complaint
25 was an individual residing in Los Angeles County, California.

26 6. Defendant FM Restaurants HQ, LLC (“FM Restaurants”) is and at all times relevant
27 to this Complaint was a Delaware limited liability company that does business in Los Angeles
28 County, California.

14. Venue is proper in this Court pursuant to Code of Civil Procedure Sections 395 and 395.5 because, Plaintiff resides in Los Angeles County, Defendant FM Restaurants conducts business in Los Angeles County, and the liability for the alleged wrongs described herein arose in Los Angeles County. Venue is also proper in this Court because “venue is proper in any county in which an aggrieved employee worked and Labor Code violations allegedly occurred.” *Crestwood Behavioral Health, Inc. v. Superior Court of Alameda County* (Cal. Ct. App., Feb. 17, 2021) No. A160523, 2021 WL 613700, at *2.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

15. On December 11, 2020, Plaintiff provided written notice by online filing to the Labor and Workforce Development Agency (“LWDA”) and by certified mail to Defendant FM Restaurants HQ, LLC of the specific provisions of the Labor Code alleged to have been violated, including facts and theories to support the alleged violations, in accordance with Labor Code Section 2699.3. A true and correct copy of Plaintiff’s PAGA Notice is attached hereto as Exhibit 1.

16. As of the filing date of this Complaint, over 65 days have passed since Plaintiff sent the December 11, 2020 LWDA Notice, and the LWDA has not responded that it intends to investigate Plaintiff’s claims, and Defendants have not cured the violations. Plaintiff has thus satisfied the administrative prerequisites under Labor Code Sections 2699.3(a) and 2699.3(c) to recover civil penalties against Defendants, in addition to other remedies, for violations of Labor Code Sections 201, 202, 203, 204, 226(a), 226.7, 510, 1174(d), 1182.12, 1194, 1197, 1197.5, 1198, and 2802

GENERAL ALLEGATIONS

17. Defendants employed Plaintiff as an hourly-paid, non-exempt food server in California, beginning in June 2020 and continuing through the present.

18. Plaintiff and all other current and former non-exempt and exempt employees who worked in California (the “Aggrieved Employees”) are aggrieved employees within the meaning of Labor Code § 2699, *et seq.* See Labor Code § 2699(c).

19. On information and belief, Defendants subjected Plaintiff and the other Aggrieved Employees to the same policies, practices and procedures governing the control and payment of wages and hours worked, and the reimbursement of business expenses and uniformly denied Plaintiff

1 and other Aggrieved Employees rights afforded to them under the Labor Code, IWC Wage Order
2 No. 5–2001 and the California Business and Professions Code.

3 20. Plaintiff worked four (4) or five (5) shifts per week, until approximately September
4 2020, when her shifts decreased to two (2) or three (3) shift per week. Plaintiff worked between six
5 (6) and eight (8) hours per shift. On occasion, Plaintiff worked shifts in excess of eight (8) hours.

6 21. On information and belief, other Aggrieved Employees also worked, and continue to
7 work, shifts of between six (6) and eight (8) hours, and on occasion, shifts in excess of eight (8)
8 hours.

9 **A. Defendants’ Failure to Pay Minimum Wage For All Hours Worked**

10 22. Compensable work time is defined by the applicable IWC Wage Order No. 5 as “the
11 time during which an employee is subject to the control of an employer and includes all the time the
12 employee is suffered or permitted to work, whether or not required to do so.” Cal. Code. Regs. tit. 8,
13 § 11050(2)(G) (defining “Hours Worked”).

14 23. In 2018, the California Supreme Court held that “The relevant statutes and wage order
15 do not allow employers to require employees to routinely work for minutes off-the-clock without
16 compensation.” *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 848.

17 24. Defendants knew or should have known that Plaintiff and other non-exempt
18 Aggrieved Employees were entitled to receive at least minimum wages for all hours worked, and that
19 they were not receiving at least minimum wages for work that Defendants required Plaintiff and other
20 non-exempt Aggrieved Employees to perform off-the-clock.

21 25. Within the one-year period prior to the date Plaintiff provided notice of these PAGA
22 claims to the LWDA and continuing through the present, Defendants’ compensation practices and
23 policies systematically failed to pay Plaintiff and other non-exempt Aggrieved Employees the
24 applicable minimum wage for all hours worked because all hours worked were not recorded.

25 26. First, Defendants required Plaintiff and other non-exempt Aggrieved Employees to
26 download the “HotSchedules” application (“HotSchedules” or “HotSchedules App”) onto their
27 personal cell phones and to access it frequently while off-the-clock for scheduling purposes.

28 27. Second, Defendants also required Plaintiff and other non-exempt Aggrieved

1 Employees to review, analyze and respond to messages on HotSchedules while they were off-the-
2 clock. Defendants prohibited Plaintiff and other Aggrieved Employees from accessing their personal
3 cell phones during working hours. As a result, Plaintiff and other Aggrieved Employees could not
4 read, review and respond to Defendants' work-related messages during working hours. Instead,
5 Plaintiff and other Aggrieved Employees accessed the HotSchedules App and responded to
6 Defendants' work-related emails while they were off-the-clock.

7 28. Second, Defendants required Plaintiff and other Aggrieved Employees to wait at the
8 beginning of a scheduled shift for up to 15 minutes before clocking in because the point-of-sale
9 system used by FM Restaurants for clocking in and out required a manager's approval. Because
10 managers and/or other staff that could permit an employee to clock in were not always available,
11 Plaintiff and other Aggrieved Employees routinely had to wait up to 15 minutes after the start of their
12 scheduled shift before they could clock in. As a result, Plaintiff and other Aggrieved Employees
13 routinely were subject to the control of FM Restaurants, while off the clock.

14 **B. Defendants' Failure to Pay Overtime Compensation**

15 29. Defendants knew or should have known that Plaintiff and other non-exempt
16 Aggrieved Employees were entitled to receive overtime compensation for hours worked in excess of
17 eight (8) hours in a day and forty (40) hours in a week, and that they were not receiving required
18 overtime compensation.

19 30. As detailed above, within the one-year period prior to the date Plaintiff provided
20 notice of this claim to the LWDA and continuing through the present, Defendants knowingly
21 required, suffered and permitted Plaintiff and other non-exempt Aggrieved Employees to perform
22 duties off-the-clock and failed to compensate them for all hours worked.

23 31. Because Plaintiff and other non-exempt Aggrieved Employees occasionally worked
24 close to eight (8) hours in a single day, in excess of eight (8) hours in a single day, and/or in excess
25 of forty (40) hours in week, some of the off-the-clock work performed by Plaintiff and other non-
26 exempt Aggrieved Employees qualified as overtime and should have been paid at the applicable
27 overtime rate.

28 //

1 **C. Defendants' Failure to Provide Off-Duty Rest Periods**

2 32. Defendants knew or should have known that Plaintiff and other non-exempt
3 Aggrieved Employees were entitled to receive all 10-minute rest periods in accordance with the
4 Labor Code and applicable IWC Wage Order or payment of one (1) additional hour of pay at
5 Plaintiff's and other non-exempt Aggrieved Employees' regular rates of pay when a compliant rest
6 period was missed, and that Plaintiff and other non-exempt Aggrieved Employees did not receive all
7 rest periods or payment of one (1) additional hour of pay at Plaintiff's and other non-exempt
8 Aggrieved Employees' regular rates of pay when a compliant rest period was missed.

9 33. Within the one-year period prior to the date Plaintiff provided notice of these PAGA
10 claims to the LWDA and continuing through the present, and notwithstanding any formal written
11 policy to the contrary, Defendants' actual custom and business practice was to undermine any formal
12 policy of providing legally required rest periods by pressuring employees to perform their duties in
13 ways that omitted breaks, including, but not limited to, scheduling a heavy workload that made taking
14 rest periods extremely difficult, maintaining an informal anti-rest-period policy enforced through
15 pressure, failing to schedule rest periods, failing to provide rest-period coverage, and otherwise
16 discouraging employees from taking legally protected rest periods. Plaintiff and other non-exempt
17 Aggrieved Employees routinely worked through their shifts without being able to take a legally
18 complaint rest period.

19 34. Additionally, Defendants systematically failed to provide Plaintiff and other non-
20 exempt Aggrieved Employees one additional hour of compensation at Plaintiff's regular rate of pay
21 for each work day that an off-duty, uninterrupted 10-minute rest period was not provided.

22 35. On information and belief, Defendants failed to implement any practice or procedure
23 to pay rest period premiums when Plaintiff and other non-exempt Aggrieved Employees missed a
24 required rest period.

25 36. Defendants also failed to compensate Plaintiff and other non-exempt Aggrieved
26 Employees for the time they spent working instead of taking legally compliant rest periods.

27 **D. Defendants' Failure To Reimburse Necessary Business Expenses**

28 37. Defendants knew or should have known that Plaintiff and other exempt and non-

1 exempt Aggrieved Employees were entitled to receive full reimbursement for all business-related
2 expenses and costs they incurred during the course and scope of their employment, and that they did
3 not receive full reimbursement of applicable business-related expenses and costs incurred.

4 38. Within the one-year period prior to the date Plaintiff provided notice of these PAGA
5 claims to the LWDA and continuing through the present, Defendants systematically failed to
6 reimburse Plaintiff and other exempt and non-exempt Aggrieved Employees for necessary business
7 expenses incurred at the direction of Defendants. in at least two respects.

8 39. Within the one-year period prior to the date Plaintiff provided notice of these PAGA
9 claims to the LWDA and continuing through the present, Defendants had a uniform policy and/or
10 practice that required Plaintiff and other exempt and non-exempt Aggrieved Employees to use their
11 own personal cell phone and cell phone data plan to carry out their job duties. For example, Plaintiff
12 and other Aggrieved Employees were required to download the HotSchedules mobile application
13 onto their personal cell phones and to access it frequently for scheduling purposes. As detailed above,
14 Plaintiff and Aggrieved Employees were also required to respond to Defendants' work-related
15 messages; and Plaintiff and other Aggrieved Employees used their personal cell phones to respond
16 to such messages. Although Defendants required Plaintiff and other Aggrieved Employees to
17 regularly use their personal cell phones and cell phone data to carry out work-related responsibilities,
18 Defendants failed to reimburse Plaintiff and other exempt and non-exempt Aggrieved Employees for
19 this cost.

20 **E. Inaccurate Wage Statements and Failure To Maintain Accurate Payroll Records**

21 40. Upon information and belief, Defendants knew or should have known that Plaintiff
22 and other Aggrieved Employees were entitled to receive complete and accurate wage statements in
23 accordance with California law, and that Defendants were not providing Plaintiff and other
24 Aggrieved Employees with complete and accurate wage statements.

25 41. Within the one-year period prior to the date to the date Plaintiff provided notice of
26 these PAGA claims to the LWDA and continuing through the present, Defendants had a consistent
27 policy and/or practice of not providing accurate wage statements to Plaintiff and other Aggrieved
28 Employees. The wage statement deficiencies include the following:

1 a. failing to include the accurate amount of “gross wages,” “net wages” and “total hours
2 worked by the employee” because Defendants failed to record all hours worked off-
3 the-clock; and

4 b. failing to include rest period penalty wages when Defendants failed to provide lawful
5 rest periods.

6 42. Because Defendants failed to provide Plaintiff and other Aggrieved Employees with
7 accurate, itemized wage statements, Plaintiff and other Aggrieved Employees were never aware of
8 what their true wages should have been, and how they should have been calculated.

9 43. Defendants also knew or should have known that they had a duty to maintain accurate
10 and complete payroll records in accordance with the Labor Code and applicable IWC Wage Order,
11 but willfully, knowingly, and intentionally failed to do so.

12 44. Throughout the relevant time period, Defendants also failed to maintain accurate
13 payroll records showing the total hours worked daily by, and the wages paid to, Plaintiff and other
14 Aggrieved Employees. None of the Defendants’ payroll records pertaining to Plaintiff and other
15 Aggrieved Employees accurately reflect all regular hours worked, overtime hours worked, actual
16 gross wages and net wages earned, and premium wages owed for denied lawful rest periods. As a
17 result of Defendants’ failure to maintain accurate payroll records, Defendants prohibited Plaintiff
18 and other Aggrieved Employees from monitoring whether Defendants compensated them correctly
19 and lawfully.

20 **F. Failure To Timely Pay Wages During Employment And At Separation**

21 45. Defendants knew or should have known that Plaintiff and other Aggrieved Employees
22 were entitled to timely payment of wages during their employment. Nevertheless, in violation of the
23 Labor Code, Defendants failed to timely pay Plaintiff and other Aggrieved Employees all earned
24 wages during their employment, including but not limited to minimum wages, overtime wages, and
25 rest period premium wages.

26 46. Defendants knew or should have known that the Aggrieved Employees were entitled
27 to timely payment of all wages earned when they resigned or were terminated from employment.
28 Nevertheless, in violation of the Labor Code, Defendants failed to timely pay the Aggrieved

Employees all their earned wages when they resigned or were terminated from employment, including, but not limited to, minimum wages, overtime wages, and rest period premium wages.

FIRST CAUSE OF ACTION

For Civil Penalties, Pursuant to Labor Code § 2698, *et seq.*

(By Plaintiff on Behalf of the State of California and Aggrieved Employees

Against all Defendants)

47. Plaintiff incorporates all preceding allegations as if fully set forth herein.

48. Labor Code Section 2698, *et seq.* permits Plaintiff to recover civil penalties for the violation(s) of the Labor Code Sections enumerated in Labor Code Section 2699.5. Section 2699.5 enumerates Labor Code Sections 201, 202, 203, 204, 226(a), 226.7, 510, 1174(d), 1194, 1197, 1197.1, 1197.5, 1198, and 2802. Labor Code Section 2699.3(c) permits aggrieved employees, including Plaintiff, to recover civil penalties for violations of those Labor Code Sections not found in Section 2699.5, including Sections 1182.12.

49. Pursuant to Labor Code Sections 2699(a) and (f), Plaintiff may recover civil penalties on behalf of herself, the State of California and other aggrieved current and former employees in the following amounts:

a. For violations of Labor Code Sections 201, 202, 203, 226.7, 1182.82, 1194, 1198 and 2802, one hundred dollars (\$100.00) for each aggrieved employee per pay period for each initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay period for each subsequent violation (penalty amounts established by Labor Code Sections 2699(f)(2));

b. For violations of Labor Code Section 1197, one hundred dollars (\$100.00) for each aggrieved employee for each initial and intentional violation and two hundred fifty dollars (\$250.00) for each aggrieved employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalty amounts established by Labor Code § 1197.1).

c. For violations of Labor Code Section 204, one hundred dollars (\$100.00) for each aggrieved employee for each initial violation, and two hundred dollars (\$200.00) for

each aggrieved employee plus twenty-five percent (25%) of the amount unlawfully withheld from each aggrieved employee for each subsequent, willful or intentional violation (penalty amounts established by Labor Code § 210);

d. For violations of Labor Code Sections 226(a), two hundred fifty dollars (\$250.00) for each aggrieved employee for each initial violation and one thousand dollars (\$1,000.00) for each aggrieved employee for each subsequent violation (penalty amounts established by Labor Code § 226.3);

e. For violations of Labor Code Sections 510 and 512, fifty dollars (\$50.00) for each aggrieved employee for initial violation and one hundred dollars (\$100.00) for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalty amounts established by Labor Code § 558); and

f. For violations of Labor Code Section 1174, a civil penalty of \$500 per employee (penalties set by Labor Code § 1174.5).

50. As detailed below, Defendants violated Labor Code Sections 201, 202, 203, 204, 226(a), 226.7, 510, 1174(d), 1182.12, 1194, 1197, 1197.1, 1197.5, 1198, and 2802.

51. These violations were willful, knowing, and intentional.

FAILURE TO PAY MINIMUM WAGE

(Labor Code §§ 1182.12, 1194, 1197 and 1198)

52. Labor Code Sections 1182.12, 1194, 1197 and 1198 provide that the minimum wage for employees fixed by the IWC is the minimum wage to be paid to employees, and the payment of a wage less than the minimum so fixed is unlawful.

53. Compensable work time is defined by the applicable wage order as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” Cal. Code. Regs. tit. 8, § 11050(2)(K) (defining “Hours Worked”).

54. Labor Code Section 1194(a) provides that “Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage . . . is entitled to recover

1 in a civil action the unpaid balance of the full amount of this minimum wage . . . , including interest
2 thereon, reasonable attorney's fees, and costs of suit."

3 55. Defendants employed Plaintiff and other non-exempt Aggrieved Employees as non-
4 exempt employees who were entitled to the protections of Labor Code Sections 1182.12, 1194, 1197
5 and 1198 and IWC Wage Order 5-2001.

6 56. As set forth above, in violation of Labor Code Sections 1182.12, 1194, 1197 and 1198
7 and IWC Wage Order 5-2001, Defendants failed to pay Plaintiff and other non-exempt Aggrieved
8 Employees the applicable minimum wages for all hours worked by requiring, permitting or suffering
9 Plaintiff to work off-the-clock in at least three respects: (a) accessing the HotSchedules App while
10 working off-the-clock; (b) reviewing, analyzing and responding to business related messages while
11 working off-the-clock; and (c) requiring Plaintiff and other non-exempt Aggrieved Employees to
12 wait at the beginning of a scheduled shift for up to 15 minutes before clocking in. As a result, Plaintiff
13 and other non-exempt Aggrieved Employees routinely were subject to the control of FM Restaurants,
14 while off the clock.

15 57. Defendants' failure to pay Plaintiff and other non-exempt Aggrieved Employees
16 minimum wages violates Labor Code Sections 1182.12, 1194, 1197 and 1198. Plaintiff and other
17 non-exempt Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor
18 Code Sections 1197.1 and/or 2699(a), (f), and (g).

19 **FAILURE TO PAY OVERTIME WAGES**

20 **(Labor Code §§ 510, 1198)**

21 58. Labor Code Section 510 provides that "Any work in excess of eight hours in one
22 workday and any work in excess of 40 hours in any one workweek . . . shall be compensated at the
23 rate of no less than one and one-half times the regular rate of pay for an employee."

24 59. An employee's regular rate of pay includes all remuneration for employment paid to,
25 or on behalf of, the employee, including non-discretionary bonuses and incentive pay.

26 60. Labor Code Section 1198 provides that it is unlawful to employ persons for longer
27 than the hours set by the Industrial Welfare Commission or under conditions prohibited by the
28 applicable IWC Wage Order.

1 61. Section 3 of IWC Wage Order No. 5-2001 provides in pertinent part that:

2 [E]mployees shall not be employed more than eight (8) hours in any
3 workday or more than 40 hours in any workweek unless the employee
4 receives one and one-half (1½) times such employee's regular rate of
5 pay for all hours worked over 40 hours in the workweek. Eight (8)
6 hours of labor constitutes a day's work. Employment beyond eight (8)
7 hours in any workday or more than six (6) days in any workweek is
8 permissible provided the employee is compensated for such overtime
9 at not less than:

10 (a) One and one-half (1½) times the employee's regular rate of pay for
11 all hours worked in excess of eight (8) hours up to and including 12
12 hours in any workday, and for the first eight (8) hours worked on the
13 seventh (7th) consecutive day of work in a workweek; and

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

18 62. Labor Code Section 1194(a) provides that "Notwithstanding any agreement to work
19 for a lesser wage, an employee receiving less than the legal minimum wage or the legal overtime
20 compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of
21 the full amount of this minimum wage or overtime compensation, including interest thereon,
22 reasonable attorney's fees, and costs of suit."

23 63. Defendants employed Plaintiff and other non-exempt Aggrieved Employees who
24 were entitled to the protections of Labor Code Sections 510, 1194, 1198 and IWC Wage Order 5-
25 2001.

26 64. As noted above, Defendants failed to compensate Plaintiff and other non-exempt
27 Aggrieved Employees for all overtime hours worked pursuant to Labor Code Sections 510, 1194,
28 1198 and IWC Wage Order 5-2001 by requiring, permitting or suffering Plaintiff and other non-
 exempt Aggrieved Employees to work off-the-clock in at least three respects: (a) accessing the
 HotSchedules App while working off-the-clock; (b) reviewing, analyzing and responding to business
 related messages while working off-the-clock; and (c) requiring Plaintiff and other non-exempt
 Aggrieved Employees to wait at the beginning of a scheduled shift for up to 15 minutes before
 clocking in. As a result, Plaintiff and other non-exempt Aggrieved Employees routinely were subject

1 to the control of FM Restaurants, while off the clock.

2 65. When Plaintiff and other non-exempt Aggrieved Employees worked eight or more
3 hours on-the-clock, the off-clock work clearly constituted work in excess of eight hours in workday
4 and should have been paid at the applicable overtime rate. When Plaintiff's and other non-exempt
5 Aggrieved Employees' time records indicate that they worked close to eight hours in a workday on
6 the clock—e.g., when their time cards reflect that they worked 7.9 or 7.93 total hours—the off-the-
7 clock work also caused Plaintiff's and other non-exempt Aggrieved Employees' total hours worked
8 to exceed eight (8) hours on such a workday and, likewise, should have been paid at the applicable
9 overtime rate.

10 66. Defendants' failure to pay Plaintiff and other non-exempt Aggrieved Employees all
11 earned overtime compensation, as required by California law, violates the provisions of Labor Code
12 Sections 510 and 1198. Plaintiff and other non-exempt Aggrieved Employees are therefore entitled
13 to recover civil penalties pursuant to Labor Code Sections 558 and/or 2699(a), (f)-(g).

14 **FAILURE TO PROVIDE REQUIRED REST PERIODS**

15 **(Labor Code §§ 226.7, 1198 and IWC Wage Order No. 5-2001, § 12)**

16 67. Labor Code Section 226.7 provides that no employer shall require an employee to
17 work during any rest period mandated by an applicable order of the California IWC.

18 68. IWC Order No. 5-2001(12)(A) provides, in pertinent part:

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

28 69. Labor Code Section 226.7 further provides that, "If an employer fails to provide an
employee a meal or rest or recovery period in accordance with a state law, including, but not limited
to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare
Commission . . . , the employer shall pay the employee one additional hour of pay at the employee's

1 regular rate of compensation for each workday that the meal or rest or recovery period is not
2 provided.”

3 70. During the relevant time period, Defendants failed to provide rest periods to Plaintiff
4 and other non-exempt Aggrieved Employees as required under Labor Code Section 226.7 and IWC
5 Wage Order No. 5-2001, Section 12. To the contrary, Defendants actively discouraged and prohibited
6 Plaintiff and other non-exempt Aggrieved Employees from taking rest periods when rest periods
7 were required.

8 71. During the relevant time period, Defendants required Plaintiff and other non-exempt
9 Aggrieved Employees to work four (4) or more hours without authorizing or permitting a ten (10)
10 minute rest period per each four (4) hour period worked. Defendants failed to authorize and permit
11 Plaintiff and other non-exempt Aggrieved Employees to take all required rest periods on a duty free
12 basis and permit them to leave the premises, failed to provide the rest periods as close as is feasible
13 to the middle of each four hour work period, failed to provide a second rest break to Plaintiff and
14 other non-exempt Aggrieved Employees when they worked shifts of seven hours or greater, failed to
15 schedule rest breaks and to provide rest break coverage, and failed properly to compensate Plaintiff
16 and other non-exempt Aggrieved Employees for all late, shortened, and missed rest periods.

17 72. Defendants as a matter of practice and/or policy also failed to pay Plaintiff and other
18 non-exempt Aggrieved Employees an additional one hour of compensation at their regular rate of
19 pay for each day that they were not provided with an off-duty, uninterrupted 10-minute rest period
20 as required by Labor Code Sections 226.7 and Section 12 of IWC Wage Order No. 5-2001.

21 73. Defendants’ conduct violates Labor Code Sections 226.7 1198 and the applicable
22 IWC Wage Order. Plaintiff and other non-exempt Aggrieved Employees are therefore entitled to
23 recover civil penalties pursuant to Labor Code Section 2699(a), (f)-(g).

24 **FAILURE TO REIMBURSE BUSINESS EXPENDITURES**

25 **(Labor Code § 2802)**

26 74. Labor Code Section 2802(a) provides that an employer “shall indemnify his or her
27 employee for all necessary expenditures or losses incurred by the employee in direct consequence of
28 the discharge of his or her duties, or of his or her obedience to the directions of the employer.”

1 75. Section 9(B) of IWC Wage Order No. 5 provides in pertinent part that, “When tools
2 or equipment are required by the employer or are necessary to the performance of a job, such tools
3 and equipment shall be provided and maintained by the employer.”

4 76. Defendants had and, on information and belief, continue to have, a company-wide
5 policy and/or practice of not reimbursing non-exempt and exempt Aggrieved Employees for
6 expenses necessarily incurred.

7 77. As detailed above, Defendants as a matter of practice and/or policy violated Labor
8 Code Section 2802 by denying Plaintiff and non-exempt and exempt Aggrieved Employees
9 reimbursement for necessary expenditures that they incurred as a result of discharging their duties
10 and/or obeying the directions of Defendants. Plaintiff and non-exempt and exempt Aggrieved
11 Employees were required to incur out-of-pocket expenses, including, expenses to obtain and
12 maintain a personal cell phone and the data usage that was used at Defendants’ direction for work
13 purposes.

14 78. Defendants could have provided Plaintiff and non-exempt and exempt Aggrieved
15 Employees with the actual tools required for use on the job, including company phones. Defendants
16 also could have reimbursed Plaintiff and other Aggrieved Employees for the costs they incurred in
17 obtaining and maintaining a personal cell phone and cell data plan. Instead, Defendants passed those
18 operating costs off onto Plaintiff and other Aggrieved Employees in violation Labor Code Section
19 2802.

20 79. Plaintiff and other non-exempt and exempt Aggrieved Employees are therefore
21 entitled to recover civil penalties pursuant to Labor Code Section 2699(a), (f)-(g).

22 **FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS**

23 **(Labor Code § 226(a))**

24 80. Labor Code Section 226(a) provides in pertinent part:

25 An employer, semimonthly or at the time of each payment of wages,
26 shall furnish to his or her employee, either as a detachable part of the
27 check, draft, or voucher paying the employee’s wages, or separately if
28 wages are paid by personal check or cash, an accurate itemized
 statement in writing showing (1) gross wages earned, (2) total hours
 worked by the employee . . . , (3) the number of piece-rate units earned

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

81. During the relevant time period, Defendants knowingly and intentionally violated Labor Code Section 226(a) by providing Plaintiff and other non-exempt Aggrieved Employees with uniform incomplete and inaccurate wage statements as follows:

- a. Defendants violated Labor Code Sections 226(a)(1), 2267(a)(2) and 226(a)(5) and 226(a)(9) by failing to include the accurate amount of “gross wages,” “net wages” and “total hours worked” because Defendants failed to record and compensate Plaintiff and other non-exempt Aggrieved Employees for all off-the-clock work; and
- b. Defendants also violated Labor Code Sections 226(a)(1) and 226(a)(5) by failing to include the accurate amount of “gross wages” and “net wages” because Defendants failed to provide Plaintiff and other non-exempt Aggrieved Employees with required meal and rest period premium wages.

82. Plaintiff and other non-exempt Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor Code Sections 226.3, and/or 2699(a), (f), and (g).

FAILURE TO MAINTAIN ACCURATE PAYROLL RECORDS

(Labor Code § 1174(d))

83. Labor Code Section 1174(d) provides that “[e]very person employing labor in this state shall . . . [k]eep a record showing the names and addresses of all employees employed and the ages of all minors” and “[k]eep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments”

84. During the relevant time period, and in violation of Labor Code Section 1174(d),

1 Defendants willfully failed to maintain accurate payroll records for Plaintiff and other non-exempt
2 Aggrieved Employees showing the daily hours they worked, and the wages paid thereto as a result
3 of failing to record the off-the-clock hours that they worked.

4 85. Plaintiff and other non-exempt Aggrieved Employees are therefore entitled to recover
5 civil penalties pursuant to Labor Code Sections 1174.5 and/or 2699(a), (f), and (g).

6 **FAILURE TO PAY WAGES TIMELY**

7 **(Violation of Labor Code § 204)**

8 86. Labor Code Section 204 requires that all wages earned by any person in any
9 employment between the 1st and the 15th days inclusive of any calendar month other than those
10 wages due upon termination of an employee are due and payable between the 16th and the 26th day
11 of the month during which the labor was performed Labor Code section 204 further provides that all
12 wages earned by any person in any employment between the 16th and the last day inclusive of any
13 calendar month other than those wages due upon termination of an employee are due and payable
14 between the 1st and the 10th day of the following month.

15 87. Labor Code section 204 also requires that all wages earned for labor in excess of the
16 normal work period shall be paid no later than the payday for the next regular payroll period
17 Alternatively at all relevant times herein.

18 88. Labor Code Section 204 further provides that the requirements of this section are
19 deemed satisfied by the payment of wages for weekly biweekly or semimonthly payroll if the wages
20 are paid not more than seven 7 calendar days following the close of the payroll period.

21 89. During the relevant time period Defendants willfully failed to pay Plaintiff and other
22 non-exempt Aggrieved Employees all wages due to them within any time period specified by Labor
23 Code section 204 including but not limited to overtime wages minimum wages and meal and rest
24 period premium wages.

25 90. Plaintiff and other non-exempt Aggrieved Employees are therefore entitled to recover
26 civil penalties pursuant to Labor Code Sections 210 and/or 2699(a), (f), and (g).

27 //

28 //

FAILURE TO PAY WAGES TIMELY AT SEPARATION

(Labor Code §§ 201, 202, 203)

91. Labor Code Section 201 provides that, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

92. Labor Code Section 202 provides that if an employee voluntarily leaves his or her employment, the employee's wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to resign, in which case the employee is entitled to his or her wages at the time of resignation.

93. Labor Code Section 203 provides that if an employer willfully fails to pay compensation as required by Sections 201 and 202, then the employer is liable for waiting time penalties in the form of continued compensation of up to thirty work days.

94. As detailed above, Defendants willfully failed to pay non-exempt Aggrieved Employees who separated from their employment with Defendants all their earned wages, including, but not limited to minimum wages, overtime wages and meal and rest period premium wages, either at the time of their discharge, or within seventy-two (72) hours after their resignation.

95. Defendants' failure to pay non-exempt Aggrieved Employees who separated from their employment their earned and unpaid wages at the time of discharge, or within seventy-two (72) hours after their resignation, violates Labor Code Sections 201 and 202.

96. Plaintiff and non-exempt Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor Code Sections 2699(a), (f)-(g).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment for herself and all others on whose behalf this suit is brought against Defendants, jointly and severally, as follows:

1. For civil penalties pursuant to Labor Code Sections 210, 226.3, 558, 1174.5, 1197.1, 2699(a), (f) and (g), for Plaintiff, the State of California and all Aggrieved Employees for Defendants' violations of Labor Code Sections 201, 202, 203, 204, 226(a), 226.7, 510, 1174(d), 1182.12, 1194, 1197, 1197.5, 1198, and 2802;

2. For attorneys' fees and costs pursuant to Labor Code Section 2699(g)(1), and all other relevant statutes, for Defendants' violations of Labor Code Sections 201, 202, 203, 204, 226(a), 226.7, 510, 1174(d), 1182.12, 1194, 1197, 1197.5, 1198, and 2802;

3. For pre-judgment and post-judgment interest as provided by law; and

4. For such other and further relief as the Court may deem equitable and appropriate.

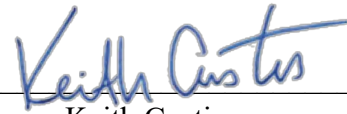
DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial with respect to all issues triable by jury.

Dated: March 10, 2021

CUSTIS LAW, P.C.

By: _____


Keith Custis

Attorneys for Plaintiff

ELIZABETH BAUTISTA

Exhibit 1



December 11, 2020

Keith A. Custis
kcustis@custislawpc.com

SUBMITTED VIA ONLINE CLAIM NOTICE

(<https://dir.tfaforms.net/198>)
California Labor and Workforce
Development Agency
Attn. PAGA Administrator
1515 Clay Street, Ste 801
Oakland, CA 94612

SENT VIA CERTIFIED MAIL

President
FM Restaurants HQ, LLC
11065 Knott Avenue, Suite A
Cypress, CA 90630
Certified Mail No. 9414811899564210301079

SENT VIA CERTIFIED MAIL

Agent for Service of Process
CT Corporation System
818 West Seventh Street, Suite 930
Los Angeles, CA 90017
Certified Mail No. 9414811899564210219824

Re: *Elisabeth Bautista v. FM Restaurants HQ, LLC*: Written Notice of Intent to File Civil
Action Pursuant to Labor Code § 2699.3

Dear PAGA Administrator and FM Restaurants HQ, LLC,

This office represents Elisabeth Bautista with respect to claims arising from her employment by FM Restaurants HQ, LLC (“FM Restaurants” or “Employer”). Ms. Bautista was employed by FM Restaurants from approximately July 2020 until approximately December 2020, when she was furloughed.

Ms. Bautista intends to file a civil action against FM Restaurants, seeking, *inter alia*, civil penalties, attorneys’ fees, costs and other available relief that is recoverable under the Private Attorneys General Act of 2004, Labor Code Section 2698, *et al.* (“PAGA”), for violations of the Labor Code. Ms. Bautista shall seek relief on behalf of herself, the State of California, and other persons who are or were employed by FM Restaurants as non-exempt and exempt employees in

California (“Aggrieved Employees”).

Pursuant to Labor Code Section 2699.3, this letter serves as Ms. Bautista’s written notice to the Labor and Workforce Development Agency (“LWDA”) and FM Restaurants regarding the following alleged violations of the Labor Code, and the facts and legal theories that support those violations.¹ This letter is being submitted to the LWDA online pursuant to the process described on the California Department of Industrial Relations’ website.² The \$75.00 filing fee required by Labor Code Section 2699.3 is being sent concurrently to the LWDA by separate letter.

As detailed below, FM Restaurants has violated the Labor Code within the last year and beyond as to Ms. Bautista and/or other Aggrieved Employees in the following respects:

A. Failure to Pay Minimum Wages in Violation of Labor Code Sections 1182.12, 1194, 1197, 1197.1 and 1198

Labor Code Sections 1182.12, 1194, 1197, 1197.1 and 1198 require an employer to pay employees no less than the established minimum wage. These Labor Code Sections provide that payment of a wage less than the established minimum wage is unlawful. The applicable Industrial Welfare Commission (“IWC”) Wage Order defines compensable work time, or “hours worked,” as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” Cal. Code. Regs. tit. 8, § 11050(2)(K) (defining “Hours Worked”). An employee is entitled to be paid no less than the established minimum wage for all hours worked.

Within the previous twelve months and beyond, FM Restaurants maintained a policy and practice of failing to pay Ms. Bautista and other Aggrieved Employees the correct minimum wage for all hours worked because FM Restaurants required Ms. Bautista and other Aggrieved Employees to work off-the-clock without compensation.

First, FM Restaurants, on a company-wide basis, required that all Aggrieved Employees utilize their own personal cell phones and/or cell phone data to carry out their job duties. For example, Ms. Bautista and other Aggrieved Employees were required to download the “HotSchedules” mobile application onto their personal cell phones and to access it frequently. FM Restaurants would convey scheduling information through the application and also used it to directly message Ms. Bautista and other Aggrieved Employees. FM Restaurants required Ms.

¹ The Labor Code violations, facts and legal theories detailed herein are based on the Plaintiff’s experience and her counsel’s review of the records currently available relating to the Plaintiff’s employment. Discovery conducted in litigation of wage and hour claims such as these often reveals that the employer violated additional Labor Code Sections and additional facts and legal theories supporting all Labor Code violations. Thus, Plaintiff reserves the right to supplement this letter with additional facts, theories, and claims if they become aware of them subsequent to the submission of this letter.

² See <http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>.

Bautista and other Aggrieved Employees to work off-the-clock to review and respond to business-related messages that FM Restaurants sent to them on the HotSchedules app while they were off-the-clock.

Second, FM Restaurants also required Ms. Bautista and other Aggrieved Employees to wait at the beginning of a scheduled shift for up to 15 minutes before clocking in because the point-of-sale system used by FM Restaurants for clocking in and out required a manager's approval. Because managers and/or other staff that could permit an employee to clock in were not always available, Ms. Bautista and other Aggrieved Employees routinely had to wait up to 15 minutes after the start of their scheduled shift before they could clock in. As a result, Ms. Bautista and other Aggrieved Employees routinely were subject to the control of FM Restaurants, while off the clock.

Because FM Restaurants required Ms. Bautista and other Aggrieved Employees to work off-the-clock, FM Restaurants failed to compensate Ms. Bautista and other Aggrieved Employees for all hours worked, including minimum wage and overtime hours.

FM Restaurants has thus violated Labor Code Sections 1182.12, 1194, 1197, 1197.1 and 1198. As a result, Ms. Bautista and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 1197.1 and/or 2699(a), (f) and (g).

B. Failure to Pay Overtime in Violation of Labor Code Sections 510 & 1198

Labor Code Sections 510 and 1198 and the applicable IWC Wage Order require employers to pay employees working more than eight (8) hours in a day or more than forty (40) hours in a workweek at the rate of time-and-one-half (1.5) times the regular rate of pay for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek. The applicable IWC Wage Order further provides that employers are required to pay employees working more than twelve (12) hours in a day overtime compensation at a rate of two (2) times their regular rate of pay.

FM Restaurants failed to pay the requisite overtime wages to Aggrieved Employees. When Aggrieved Employees worked eight or more hours on-the-clock, the off-the-clock work detailed above constituted work in excess of eight hours in workday and should have been paid at the applicable overtime rate. When Aggrieved Employees' time records indicate that they worked close to eight hours in a workday on the clock—e.g., when their time cards reflect that they worked 7.8 or more total hours—the off-the-clock work detailed above also caused Ms. Bautista's and other Aggrieved Employees' total hours worked to exceed eight (8) hours on such a workday and, likewise, should have been paid at the applicable overtime rate. Thus, because FM Restaurants required Ms. Bautista and other Aggrieved Employees to work off-the-clock, FM Restaurants failed to pay all required overtime wages in violation of Labor Code Sections 510 and 1198 and the applicable IWC Wage Order.

FM Restaurants has thus violated Labor Code Sections 510 and 1198. As a result, Ms. Bautista and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 558, 1194, and/or 2699(a), (f)-(g).

C. Failure to Provide Meal Periods In Violation of Labor Code §§ 226.7, 512(a) & 1198

Labor Code Sections 226.7, 512(a), 1198 and the applicable IWC Wage Order require employers to provide meal breaks and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal break is not provided. Pursuant to Labor Code Sections 226.7 and 512(a) and the applicable IWC Wage Order, an employer may not require, cause or permit an employee to work for a period of more than five (5) hours per day without providing the employee with an uninterrupted meal period of not less than thirty (30) minutes, except that if the total work period per day of the employee is not more than six (6) hours, the meal period may be waived by mutual consent of both the employer and the employee. Under California law, first meal periods must start after no more than five hours. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1041-1042 (Cal. 2012). Labor Code Sections 226.7 and 512(a) and the applicable IWC Wage Order also require employers to provide a second meal break of not less than thirty (30) minutes if an employee works over ten (10) hours per day or to pay an employee one (1) additional hour of pay at the employee's regular rate, except that if the total hours worked is no more than twelve (12) hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Within the last twelve months and beyond, FM Restaurants' scheduling and staffing policies and practices, or lack thereof, prevented Ms. Bautista and other Aggrieved Employees from being relieved of all duty in order to take compliant meal periods. Due to the workload demands at FM Restaurants and FM Restaurants' failure to staff the workplace adequately, Ms. Bautista and other Aggrieved Employees regularly were forced to forego meal periods and/or had their meal periods interrupted or delayed by work, and were not relieved of all duties for unpaid meal periods.

FM Restaurants also has a company-wide practice and/or policy of not paying meal period premiums owed when compliant meal periods are not provided. Because of this practice and/or policy, Ms. Bautista and other Aggrieved Employees have not received premium pay for all missed meal periods. Labor Code § 226.7(c) ("If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law . . . , the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.").

FM Restaurants thus failed to provide all meal periods in violation of Labor Code Sections 226.7, 512(a), and 1198. As a result, Ms. Bautista and other Aggrieved Employees are entitled to meal period premium wages, civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 558 and/or 2699(a), (f)-(g).

D. Failure to Provide Rest Periods in Violation of Labor Code Sections 226.7 and 1198

Labor Code Section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the California IWC. The applicable IWC Wage Order provides that “[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period” and that the “rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof” unless the total daily work time is less than three and one-half (3.5) hours. Labor Code Section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the California IWC. To comply with its obligation to provide rest periods under Labor Code Section 226.7 and the applicable IWC Wage Order, an employer must “relinquish any control over how employees spend their break time, and relieve their employees of all duties — including the obligation that an employee remain on call. A rest period, in short, must be a period of rest.” *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269-270.

Within the last twelve months and beyond, FM Restaurants’ scheduling and staffing policies and practices, or lack thereof, prevented Ms. Bautista and other Aggrieved Employees from being relieved of all duty in order to take compliant rest periods. Additionally, FM Restaurants failed to schedule rest periods and had no policy for permitting Ms. Bautista and other Aggrieved Employees to take rest periods. As a result, Ms. Bautista and other Aggrieved Employees would work shifts in excess of 3.5 hours and/or 6 hours without receiving all ten (10) minute rest periods to which they were entitled. Within the last twelve months and beyond, Ms. Bautista and other Aggrieved Employees worked straight through their shifts without taking any off-duty, uninterrupted ten (10) minute rest periods.

FM Restaurants also engaged in a systematic, firm-wide practice and/or policy of not paying rest period premiums owed when rest periods were not provided. Thus, FM Restaurants denied Ms. Bautista and other Aggrieved Employees rest periods and failed to pay them rest period premium wages due in violation of Labor Code Section 226.7 and the applicable IWC Wage Order.

Because FM Restaurants failed to provide all rest periods in violation of Labor Code Sections 226.7 and 1198, Ms. Bautista and other Aggrieved Employees are entitled to penalties, attorneys’ fees, costs, and interest thereon, pursuant to Labor Code Sections 558 and/or 2699(a), (f)-(g).

E. Failure to Reimburse Necessary Business Expenses in Violation of Labor Code Section 2802

Labor Code Section 2802 requires employers to pay for all necessary expenditures and losses incurred by the employee in the performance of his or her job. The purpose of Labor Code Section 2802 is to prevent employers from passing off their cost of doing business and operating

expenses on to their employees. *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1144 (2014). The applicable wage order provides that: “[w]hen tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.”

During the relevant time period, FM Restaurants, on a company-wide basis, required that Ms. Bautista and other Aggrieved Employees utilize their own personal cell phones and/or cell phone data to carry out their job duties, but FM Restaurants failed to reimburse them for the costs of their cell phone plans and/or data plans. For example, FM Restaurants required Ms. Bautista and other Aggrieved Employees to download the “HotSchedules” mobile application onto their personal cell phones and to access it frequently. FM Restaurants would convey scheduling information through the application and also used it to directly message Ms. Bautista. Although FM Restaurants required Ms. Bautista and other Aggrieved Employees to regularly utilize their personal cellular phones and/or data to carry out work-related responsibilities, FM Restaurants failed to reimburse them for this cost. FM Restaurants also required Ms. Bautista and other Aggrieved Employees to incur a cost to acquire and download the HotSchedules app.

FM Restaurants could have provided Ms. Bautista and other Aggrieved Employees with the actual tools required for use on the job, including company phones, or reimbursed employees for their cell phone cell phone usage, but instead, FM Restaurants passed these operating costs off onto Ms. Bautista and other Aggrieved Employees. Thus, FM Restaurants violated Section 2802 by uniformly failing to reimburse any portion of Ms. Bautista’s and other Aggrieved Employees’ cell phone and data plan expenses. *See, e.g., Cochran*, 228 Cal. App. 4th at 1144 (“We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.”); *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D. Cal. Dec. 9, 2014) (certifying class of cell phone reimbursement claim and adopting the logic of *Cochran*).

FM Restaurants’ policy and/or practice of passing its operating costs on to Ms. Bautista and other Aggrieved Employees by requiring that they use their personal cellular phones violates Labor Code Section 2802. As a result, Ms. Bautista and other Aggrieved Employees are entitled to recover civil penalties, attorneys’ fees, costs, and interest thereon, pursuant to Labor Code Section 2699(f)-(g).

F. Failure to Provide Complaint Wage Statements in Violation of Labor Code Sections 226(a), 1174(d) and 1198

Labor Code Section 226(a) requires an employer to provide its employees with “an accurate itemized statement in writing showing: (1) gross wages earned, (2) total hours worked

by the employee . . . , (4) all deductions . . . , (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 . . . , (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.” The itemized wage statement must be provided semimonthly or otherwise when wages are paid.

FM Restaurants has not provided Ms. Bautista and other Aggrieved Employees with properly itemized wage statements. Labor Code Section 226(e) provides that if an employer fails to provide an employee with properly itemized wages statements as set forth in Section 226(a), then the employee is entitled to recover the greater of all actual damages or \$50.00 for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period, not to exceed \$4,000. Further, Labor Code Section 226.3 provides that any employer who violates Section 226(a) shall be subject to a civil penalty in the amount of \$250 per employee per violation in an initial citation and \$1,000 per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage statement or fails to keep the required records pursuant to Section 226(a).

During the relevant time period, FM Restaurants knowingly and intentionally failed to provide accurate and complete itemized wage statements to Ms. Bautista and other Aggrieved Employees in violation of Labor Code Section 226(a) in several ways:

- FM Restaurants violated Labor Code Sections 226(a)(1), 226(a)(2), 226(a)(5) by failing to include the accurate amount of “gross wages,” “total hours worked by the employee,” and “net wages” because FM Restaurants did not record all off-the-clock work, as detailed above.
- FM Restaurants violated Labor Code Sections 226(a)(1), 226(a)(5) and 226(a)(9) by failing to include the accurate amount of “gross wages” and “net wages” for each pay period when Ms. Chamberlain and other Aggrieved Employees should have received meal and rest period premium wages pursuant to Labor Code Section 226.7.
- Upon information and belief, Labor Code Section 246(i) provides that “An employer shall provide an employee with written notice that sets forth the amount of paid sick leave available . . . for use on either the employee’s itemized wage statement described in Section 226 or in a separate writing provided on the designated pay date with the employee’s payment of wages.” Upon information and belief, within the previous twelve months and beyond, FM Restaurants’ wage statements failed to comply with Labor Code Section 246(i)’s disclosure requirements and FM Restaurants otherwise failed to comply with Labor Code Section 246(i).

Ms. Bautista and other Aggrieved Employees are entitled to recover penalties, attorneys' fees, costs, and interest thereon pursuant to Labor Code Sections 226(e), 226.3, 1174.5, and/or 2699(a), (f)-(g).

G. Failure to Pay Wages Timely Upon Termination in Violation of Labor Code Sections 201, 202 & 203

Labor Code Section 201 provides that if an employer discharges an employee, the employee's earned and unpaid wages at the time of discharge are due and payable immediately. Labor Code Section 202 provides that, if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Failure to pay all wages in compliance with Labor Code Sections 201 and 202 subjects the employer to the penalties outlined in Labor Code Section 203. Section 203, in turn, requires the employer to pay the employee a full day of wages (8 hours) at the employee's last hourly rate for each day that all earned but unpaid wages remain unpaid up to a total of 30 days.

Within the previous twelve months and beyond, and in violation of Labor Code Sections 201 and 202, FM Restaurants willfully failed to pay Aggrieved Employees all their earned and unpaid wages either at the time of discharge, or within seventy-two (72) hours of their separation from employment with FM Restaurants for several reasons:

- FM Restaurants failed to pay the Ms. Bautista and other Aggrieved Employees for all off-the-clock hours worked, as detailed above.
- FM Restaurants failed to provide Ms. Bautista and other Aggrieved Employees with statutory meal and rest breaks and to pay meal and rest period premium wages for missed meal and rest breaks, as detailed above.

Ms. Bautista and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 203 and/or 2699(f)-(g).

H. Failure to Timely Pay Wages During Employment in Violation of Labor Code Section 204

Labor Code Section 204 provides that all wages earned by any person in any employment between the 1st and the 15th days of any calendar month (other than those wages due upon termination of an employee) are due and payable between the 16th and the 26th day of the month during which the labor was performed. Labor Code Section 204 further provides that all wages earned by any person in any employment between the 16th and the last day of any calendar month (other than those wages due upon termination of an employee) are due and payable

between the 1st and the 10th day of the following month. Labor Code Section 204 also requires that all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period. Alternatively, Labor Code Section 204 provides that the requirements of this section are deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven (7) calendar days following the close of the payroll period.

During the relevant time period, FM Restaurants failed to pay Ms. Bautista and other Aggrieved Employees all wages due to them, including, but not limited to, overtime wages, minimum wages, and meal and rest period premium wages, within the time period specified by Labor Code Section 204.

As a result, Ms. Bautista and other Aggrieved Employees are entitled to recover penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Sections 210 and/or 2699(a), (f)-(g).

I. Failure To Maintain Accurate Records In Violation Of Labor Code § 1174(d)

Labor Code Section 1174(d) requires employers to keep payroll records showing the hours worked daily by and the wages paid to employees. Likewise, the relevant Wage Orders require employers to keep accurate records for each employee with respect to total wages paid each payroll period, total hours worked in the payroll period and applicable rates of pay, as well as time records showing when employees begin and end each work period, including meal periods, split shift intervals, and total daily hours.

FM Restaurants violated Labor Code Section 1174(d) by knowingly, intentionally, and willfully failing to keep required accurate payroll records for Ms. Bautista and other Aggrieved Employees. FM Restaurants did not accurately record all hours worked by Ms. Bautista and other Aggrieved Employees including the off-the-clock work detailed above, which caused the payroll records of Aggrieved Employees to be inaccurate.

J. Penalties Pursuant to Labor Code Section 558(a)

Labor Code Section 558(a) provides that “[a]ny employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or 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.” Labor Code Section 558(c) provides that “[t]he civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.”

At all relevant times, FM Restaurants was an employer who violated Ms. Bautista's and other Aggrieved Employees' rights by violating the various sections of the Labor Code detailed herein. Accordingly, Ms. Bautista shall seek all applicable remedies available under Labor Code Section 558 for themselves, the State of California, and all other Aggrieved Employees.

* * *

If the LWDA does not provide notice that it will investigate these violations within 65 days of the date of this notice, Ms. Bautista, acting in the public interest as a private attorney general, shall file a civil action—and seek assessment and collection of civil penalties and all other available relief for himself, all other Aggrieved Employees, and the State of California—against FM Restaurants for violations of Labor Code Sections 98.6, 201, 202, 203, 204, 226, 226.7, 246, 510, 512, 558, 1102.5 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2802 and 6310, as detailed herein. Ms. Bautista shall seek all applicable and available penalties and remedies related to these violations of the Labor Code pursuant to PAGA, including an award of reasonable attorneys' fees and costs pursuant to Labor Code § 2699(g).

Sincerely,

CUSTIS LAW, P.C.



Keith A. Custis