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

FEB 16 2021

BY Alma Villalva Garcia
ALMA VALLERU GARCIA, DEPUTY

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 FOR THE COUNTY OF SAN BERNARDINO

18 MARIO CRUZ and BENITO MAYO
19 JIJON, as aggrieved employees pursuant to
20 the Private Attorneys General Act
21 ("PAGA"), on behalf of the State of
22 California and other aggrieved employees,

23 Plaintiffs,

24 vs.

25 BEMUS LANDSCAPE, INC., a California
26 corporation; and DOES 1 through 10,
27 inclusive,

28 Defendants.

Case No.:

CIV SB 2105787

**COMPLAINT – PAGA ENFORCEMENT
ACTION**

(1) Claim for Civil Penalties for Violations
of California Labor Code, Pursuant to
PAGA, §§ 2698, *et seq.*

Jury Trial Demanded

BY FAX

1 Plaintiffs Mario Cruz and Benito Mayo Jijon, as aggrieved employees and on behalf of
2 the State of California and all other aggrieved employees, allege as follows:

3 JURISDICTION AND VENUE

4 1. This is an enforcement action under the Labor Code Private Attorneys General
5 Act of 2004, California Labor Code sections 2698 *et seq.* (“PAGA”) to recover civil penalties
6 and any other available relief on behalf of Plaintiffs, the State of California, and other current
7 and former employees who worked for Defendants in California as a non-exempt, hourly paid
8 employee and received at least one wage statement and against whom one or more violations of
9 any provision in Division 2 Part 2 Chapter 1 of the Labor Code or any provision regulating
10 hours and days of work in the applicable Industrial Welfare Commission (“IWC”) Wage Order
11 were committed, as set forth in this complaint, at any time between one year prior to the filing
12 of the pre-filing written notices to the Labor and Workforce Development Agency (“LWDA”) in
13 this case on December 11, 2020, until judgment (“non-party Aggrieved Employees”).
14 Plaintiffs’ respective individual share of civil penalties sought in this action does not exceed
15 \$75,000.

16 2. This Court has jurisdiction over this action pursuant to the California
17 Constitution, Article VI, section 10. The statute under which this action is brought does not
18 specify any other basis for jurisdiction.

19 3. This Court has jurisdiction over all Defendants because, on information and
20 belief, Defendants are either citizens of California, have sufficient minimum contacts in
21 California, or otherwise intentionally avail themselves of the California market so as to render
22 the exercise of jurisdiction over them by the California courts consistent with traditional notions
23 of fair play and substantial justice. There is no basis for federal diversity jurisdiction in this
24 action given that the State of California, as the real party in interest in this action, is not a
25 “citizen” for purposes of satisfying diversity jurisdiction. *Urbino v. Orkin Servs. of Cal.*, 726
26 F.3d 1118, 1123 (9th Cir. Cal. 2013). *Urbino* also holds that civil penalties cannot be aggregated
27 to satisfy the amount in controversy requirement for federal diversity jurisdiction in this action,
28 and that diversity jurisdiction cannot be established when Plaintiffs’ share of the civil penalties

1 attributable to violations personally suffered are less than \$75,000. *Id.* at 1122.

2 4. Venue is proper in this Court, because Defendants employ persons within the
3 County of San Bernardino and have violated the requirements of the California Labor Code and
4 applicable Wage Order in this county which give rise to the penalties sought in this action. Cal.
5 Code Civ. P. § 393. Specifically, Defendants have violated the requirements of the California
6 Labor Code and applicable Wage Order in at least one location within the County of San
7 Bernardino, including Defendants' location in Chino (8005 Pine Ave., Chino, CA 91708).
8 Pursuant to California Civil Code of Procedure section 393, venue is proper for the recovery of
9 a penalty imposed by statute in the county in which the cause, or some part of the cause, arose.
10 Because Defendants have employees in San Bernardino County and Plaintiffs could bring this
11 action to recover penalties in San Bernardino County, venue is proper. *Id.*

12 5. California Labor Code sections 2698, *et seq.*, the "Labor Code Private Attorneys
13 General Act of 2004" ("PAGA"), authorize aggrieved employees to sue as private attorneys
14 general their current or former employers for various civil penalties for violations of various
15 provisions in the California Labor Code.

16 THE PARTIES

17 6. Plaintiff MARIO CRUZ is a resident of Garden Grove, in Orange County,
18 California. Defendants employed Plaintiff Cruz as an hourly paid, non-exempt Gardener from
19 approximately September 2019 to February 2020. Plaintiff Cruz worked for Defendants out of
20 their facilities in Santa Ana, California. During his employment, Plaintiff Cruz typically worked
21 eight (8) hours or more per day and five (5) days per week. At the time Plaintiff Cruz's
22 employment with Defendants ended, he earned approximately \$13.50 per hour. His job duties
23 included, without limitation, installing piping and irrigation systems, operating landscaping
24 equipment, planting and removing trees, and applying pesticides and herbicides.

25 7. Plaintiff BENITO MAYO JIJON is a resident of Santa Ana, in Orange County,
26 California. Defendants employed Plaintiff Mayo Jijon as an hourly paid, non-exempt Gardener
27 from approximately December 2019 to May 2020. Plaintiff Mayo Jijon worked for Defendants
28 out of their facilities in Santa Ana, California. During his employment, Plaintiff Mayo Jijon

1 typically worked eight (8) hours or more per day and five (5) days per week. At the time
2 Plaintiff Mayo Jijon's employment with Defendants ended, he earned approximately \$14.00 per
3 hour. His job duties included, without limitation, operating landscaping equipment, planting
4 and removing trees, and applying pesticides and herbicides.

5 8. On information and belief, Defendants required some employees, including
6 Plaintiffs, to execute a dispute resolution policy and/or arbitration agreement at the time of their
7 hire or during their employment. On further information and belief, Defendants' dispute
8 resolution policy and/or arbitration agreement was and is both procedurally and substantively
9 unconscionable. Specifically, Defendants presented new hires with an "Acuerdo de Arbitraje"
10 ("Arbitration Agreement") during the onboarding process, which had to be reviewed and signed
11 immediately. In fact, upon information and belief, the Arbitration Agreement was one of several
12 documents presented to new employees for signature during the orientation process, including
13 an Confidential Information Agreement ("Acuerdo de Información Confidencial"), Employee
14 Acknowledgments form (Reconocimientos Del Empleado), Second Meal Period Waiver, and
15 Mobile Time Adjustment Notice, among other documents. Also, employees did not have a
16 meaningful opportunity to negotiate the terms of the Arbitration Agreement. Rather, it was
17 provided to Defendants' employees for them to sign on a take-it or leave-it basis at the time
18 they were hired, along with other on-boarding documents. Further, Defendants did not set forth
19 in the agreement or otherwise provide employees with the rules which will govern the
20 arbitration, instead forcing employees to seek this information out on their own.

21 9. BEMUS LANDSCAPE, INC. was and is, upon information and belief, a
22 California corporation, and at all times hereinafter mentioned, an employer whose employees
23 are engaged throughout this county and the State of California.

24 10. Plaintiffs are unaware of the true names or capacities of the Defendants sued
25 herein under the fictitious names DOES 1 through 10, but will seek leave of this Court to amend
26 the complaint and serve such fictitiously named Defendants once their names and capacities
27 become known.

28 11. Plaintiffs are informed and believe, and thereon allege, that DOES 1 through 10

1 were the partners, agents, owners, or managers of BEMUS LANDSCAPE, INC. at all relevant
2 times.

3 12. Plaintiffs are informed and believe, and thereon allege, that each and all of the
4 acts and omissions alleged herein was performed by, or is attributable to, BEMUS
5 LANDSCAPE, INC.; and/or DOES 1 through 10 (collectively, “Defendants” or “BEMUS”),
6 each acting as the agent, employee, alter ego, and/or joint venturer of, or working in concert
7 with, each of the other co-Defendants and was acting within the course and scope of such
8 agency, employment, joint venture, or concerted activity with legal authority to act on the
9 others’ behalf. The acts of any and all Defendants were in accordance with, and represent, the
10 official policy of Defendants.

11 13. At all relevant times, Defendants, and each of them, ratified each and every act
12 or omission complained of herein. At all relevant times, Defendants, and each of them, aided
13 and abetted the acts and omissions of each and all the other Defendants in proximately causing
14 the damages herein alleged.

15 14. Plaintiffs are informed and believe, and thereon allege, that each of said
16 Defendants is in some manner intentionally, negligently, or otherwise responsible for the acts,
17 omissions, occurrences, and transactions alleged herein.

18 **PAGA REPRESENTATIVE ALLEGATIONS**

19 15. Defendants are a commercial landscape company providing landscape
20 management, tree care, brush management, and erosion control services throughout Southern
21 California. Upon information and belief, Defendants maintain a single, centralized Human
22 Resources (“HR”) department at their corporate headquarters in San Clemente, California,
23 which is responsible for the recruiting and hiring of new employees, and communicating and
24 implementing Defendants’ company-wide policies, including timekeeping policies and meal
25 and rest period policies, to employees throughout California.

26 16. In particular, Plaintiffs and other non-party Aggrieved Employees, on
27 information and belief, received the same standardized documents and/or written policies.
28 Upon information and belief, the usage of standardized documents and/or written policies,

1 including new-hire documents, indicate that Defendants dictated policies at the corporate level
2 and implemented them company-wide, regardless of their employees' assigned locations or
3 positions. Upon information and belief, Defendants set forth uniform policies and procedures
4 in several documents provided at an employee's time of hire.

5 17. Upon information and belief, Defendants maintain a centralized Payroll
6 department at their corporate headquarters in San Clemente, California, which processes payroll
7 for all non-exempt, hourly paid employees working for Defendants at their various locations
8 and jobsites in California, including Plaintiffs and other non-party Aggrieved Employees.
9 Based upon information and belief, Defendants issue the same formatted wage statements to all
10 non-exempt, hourly paid employees in California, irrespective of their work locations. Upon
11 information and belief, Defendants process payroll for departing employees in the same manner
12 throughout the State of California, regardless of the manner in which each employee's
13 employment ends.

14 18. Defendants continue to employ non-exempt or hourly paid employees in
15 California.

16 19. Plaintiffs are informed and believe, and thereon allege, that at all times herein
17 mentioned, Defendants were advised by skilled lawyers and other professionals, employees and
18 advisors knowledgeable about California labor and wage law, employment and personnel
19 practices, and about the requirements of California law.

20 20. Plaintiffs are informed and believe, and thereon allege, that Plaintiffs and other
21 non-party Aggrieved Employees were not paid for all hours worked because all hours worked
22 were not recorded.

23 21. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
24 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
25 receive certain wages for overtime compensation and that they were not receiving certain wages
26 for overtime compensation.

27 22. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
28 should have known that other non-party Aggrieved Employees were entitled to be paid at a

1 regular rate of pay, and corresponding overtime rates of pay, that included as eligible income
2 all income derived from incentive pay, nondiscretionary bonuses, and/or other forms of
3 remuneration.

4 23. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
5 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
6 receive at least minimum wages for compensation and that they were not receiving at least
7 minimum wages for work that was required to be done off-the-clock. In violation of the
8 California Labor Code, Plaintiffs and other non-party Aggrieved Employees were not paid at
9 least minimum wages for work done off-the-clock.

10 24. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
11 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
12 meal periods in accordance with the Labor Code or payment of one (1) additional hour of pay
13 at their regular rates of pay when they were not provided with timely, uninterrupted, thirty (30)
14 minute meal periods and that Plaintiffs and other non-party Aggrieved Employees were not
15 provided with all meal periods or payment of one (1) additional hour of pay at their regular rates
16 of pay when they did not receive a timely, uninterrupted, thirty (30) minute meal period.

17 25. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
18 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
19 rest periods in accordance with the Labor Code and applicable IWC Wage Order or payment of
20 one (1) additional hour of pay at their regular rates of pay when they were not authorized and
21 permitted to take a compliant rest period. In violation of the California Labor Code, Plaintiffs
22 and other non-party Aggrieved Employees were not authorized and permitted to take compliant
23 rest periods, nor did Defendants provide Plaintiffs and other non-party Aggrieved Employees
24 with payment of one (1) additional hour of pay at their regular rates of pay when they were not
25 authorized and permitted to take a compliant rest period.

26 26. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
27 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
28 recovery periods in accordance with the Labor Code and applicable General Industry Safety

1 Order or payment of one (1) additional hour of pay at their regular rates of pay when they were
2 not provided a compliant recovery period. In violation of the California Labor Code, Plaintiffs
3 and other non-party Aggrieved Employees were not provided compliant recovery periods, nor
4 did Defendants provide Plaintiffs and other non-party Aggrieved Employees members with
5 payment of one (1) additional hour of pay at their regular rates of pay when they were not
6 provided a compliant recovery period.

7 27. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
8 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
9 receive complete and accurate wage statements in accordance with California law. In violation
10 of the California Labor Code, Plaintiffs and other non-party Aggrieved Employees were not
11 provided complete and accurate wage statements.

12 28. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
13 should have known that they had a duty to maintain accurate and complete payroll records in
14 accordance with the Labor Code and applicable IWC Wage Order, but willfully, knowingly,
15 and intentionally failed to do so.

16 29. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
17 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
18 timely payment of all wages earned upon termination of employment. In violation of the
19 California Labor Code, Plaintiffs and other non-party Aggrieved Employees did not receive
20 payment of all wages due, including, but not limited to, overtime wages, minimum wages,
21 and/or meal, rest, and recovery period premiums, within permissible time periods.

22 30. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
23 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
24 timely payment of wages during their employment. In violation of the California Labor Code,
25 Plaintiffs and other non-party Aggrieved Employees did not receive payment of all wages,
26 including, but not limited to, overtime wages, minimum wages, and/or meal, rest, and recovery
27 period premiums, within permissible time periods.

28 31. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or

1 should have known that they were prohibited from issuing instruments for the payment of wages
2 that were not payable in cash on demand, without discount and with authorization, but did so,
3 in violation of the California Labor Code.

4 32. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
5 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
6 the portion of wages previously paid and subsequently unlawfully deducted by Defendants.

7 33. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
8 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
9 payment of wages as designated by statute. In violation of the California Labor Code,
10 Defendants secretly paid Plaintiffs and other non-party Aggrieved Employees lower wages than
11 required by statute while purporting to pay them proper wages.

12 34. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
13 should have known that they had a duty to cover the costs and expenses Plaintiff Mayo Jijon
14 and other non-party Aggrieved Employees incurred obtaining mandatory examinations and/or
15 drug tests, but willfully, knowingly, and intentionally failed to do so.

16 35. Plaintiffs are informed and believe, and thereon allege, that Defendants knew or
17 should have known that Plaintiffs and other non-party Aggrieved Employees were entitled to
18 receive reimbursement for all business-related expenses and costs they incurred during the
19 course and scope of their employment and that they did not receive reimbursement of applicable
20 business-related expenses and costs incurred.

21 36. Plaintiffs are informed and believe, and thereon allege, that at all times herein
22 mentioned, Defendants knew or should have known that Defendants had a duty to provide
23 Plaintiffs and other non-party Aggrieved Employees with written notice of the material terms
24 of their employment with Defendants as required by the California Wage Theft Prevention Act,
25 but willfully, knowingly, and intentionally failed to do so.

26 37. Plaintiffs are informed and believe, and thereon allege, that at all times herein
27 mentioned, Defendants knew or should have known that they had a duty to compensate
28 Plaintiffs and other non-party Aggrieved Employees for all hours worked, and that Defendants

1 had the financial ability to pay such compensation, but willfully, knowingly, and intentionally
2 failed to do so, and falsely represented to Plaintiffs and other non-party Aggrieved Employees
3 that they were properly denied wages, all in order to increase Defendants' profits.

4 38. At all times herein set forth, PAGA provides that any provision of law under the
5 Labor Code and applicable IWC Wage Order that provides for a civil penalty to be assessed and
6 collected by the LWDA for violations of the California Labor Code and applicable IWC Wage
7 Order may, as an alternative, be recovered by aggrieved employees in a civil action brought on
8 behalf of themselves and other current or former employees pursuant to procedures outlined in
9 California Labor Code section 2699.3.

10 39. PAGA defines an "aggrieved employee" in Labor Code section 2699(c) as "any
11 person who was employed by the alleged violator and against whom one or more of the alleged
12 violations was committed."

13 40. Plaintiffs and other current and former employees of Defendants are "aggrieved
14 employees" as defined by Labor Code section 2699(c) in that they are all Defendants' current
15 or former employees and one or more of the alleged violations were committed against them.

16 41. Pursuant to California Labor Code sections 2699.3 and 2699.5, an aggrieved
17 employee, including Plaintiffs, may pursue a civil action arising under PAGA after the
18 following requirements have been met:

19 (a) The aggrieved employee shall give written notice by online filing
20 (hereinafter "Employee's Notice") to the LWDA and by certified mail to
21 the employer of the specific provisions of the California Labor Code
22 alleged to have been violated, including the facts and theories to support
23 the alleged violations.

24 (b) An aggrieved employee's notice filed with the LWDA pursuant to
25 2699.3(a) and any employer response to that notice shall be accompanied
26 by a filing fee of seventy-five dollars (\$75).

27 (c) The LWDA shall provide notice (hereinafter "LWDA Notice") to the
28 employer and the aggrieved employee by certified mail that it does not

1 intend to investigate the alleged violation within sixty (60) calendar days
2 of the postmark date of the Employee's Notice. Upon receipt of the
3 LWDA Notice, or if the LWDA Notice is not provided within sixty-five
4 (65) calendar days of the postmark date of the Employee's Notice, the
5 aggrieved employee may commence a civil action pursuant to California
6 Labor Code section 2699 to recover civil penalties in addition to any other
7 penalties to which the employee may be entitled.

8 42. Pursuant to California Labor Code sections 2699.3(c), aggrieved employees,
9 through Plaintiffs, may pursue a civil action arising under PAGA for violations of any provision
10 other than those listed in Section 2699.5 after the following requirements have been met:

- 11 (a) The aggrieved employee or representative shall give written notice by
12 online filing to the LWDA and by certified mail to the employer of the
13 specific provisions of the California Labor Code alleged to have been
14 violated (other than those listed in Section 2699.5), including the facts
15 and theories to support the alleged violation.
- 16 (b) An aggrieved employee's notice filed with the LWDA pursuant to
17 2699.3(c) and any employer response to that notice shall be accompanied
18 by a filing fee of seventy-five dollars (\$75).
- 19 (c) The employer may cure the alleged violation within thirty-three (33)
20 calendar days of the postmark date of the notice. The employer shall give
21 written notice by certified mail within that period of time to the aggrieved
22 employee or representative and the agency if the alleged violation is
23 cured, including a description of actions taken, and no civil action
24 pursuant to Section 2699 may commence. If the alleged violation is not
25 cured within the 33-day period, the employee may commence a civil
26 action pursuant to Section 2699.

27 43. On December 11, 2020, Plaintiff Cruz provided written notice by online filing to
28 the LWDA and by certified mail to Defendants of the specific provisions of the California Labor

Code alleged to have been violated, including facts and theories to support the alleged violations, in accordance with California Labor Code section 2699.3. Plaintiff Cruz’s written notice was accompanied with the applicable filing fee of seventy-five dollars (\$75). The LWDA PAGA Administrator has confirmed receipt of Plaintiff Cruz’s written notice and assigned Plaintiff Cruz PAGA Case Number LWDA-CM-815075-20. A true and correct copy of Plaintiff Cruz’s written notice to the LWDA and Defendants dated December 11, 2020, is attached hereto as “Exhibit 1.”

44. On December 11, 2020, Plaintiff Mayo Jijon provided written notice by online filing to the LWDA and by certified mail to Defendants of the specific provisions of the California Labor Code alleged to have been violated, including facts and theories to support the alleged violations, in accordance with California Labor Code section 2699.3. Plaintiff Mayo Jijon’s written notice was accompanied with the applicable filing fee of seventy-five dollars (\$75). The LWDA PAGA Administrator has confirmed receipt of Plaintiff Mayo Jijon’s written notice and assigned Plaintiff Mayo Jijon PAGA Case Number LWDA-CM-815078-20. A true and correct copy of Plaintiff Mayo Jijon’s written notice to the LWDA and Defendants dated December 11, 2020, is attached hereto as “Exhibit 2.”

45. As of the filing date of this complaint, over 65 days have passed since Plaintiffs sent the initial LWDA Notices described above, and the LWDA has not responded that it intends to investigate Plaintiffs’ claims, and Defendants have not cured the violations.

46. Thus, Plaintiffs have satisfied the administrative prerequisites under California Labor Code sections 2699.3(a) and 2699.3(c) to recover civil penalties against Defendants for violations of California Labor Code sections 201, 202, 203, 204, 212, 213, 221, 222.5, 223, 224, 226(a), 226.7, 510, 512(a), 516, 1174(d), 1182.12, 1194, 1197, 1198, 2802, and 2810.5.

47. Labor Code section 558(a) provides “[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. . . . (2)

1 For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for
2 each pay period for which the employee was underpaid. . . .” Labor Code section 558(c)
3 provides “[t]he civil penalties provided for in this section are in addition to any other civil or
4 criminal penalty provided by law.” Plaintiffs, acting in the public interest as private attorneys
5 general, seek assessment and collection of civil penalties under Labor Code section 558 for
6 themselves, all other non-party Aggrieved Employees, and the State of California against
7 Defendants for violations of Labor Code sections 510, 512(a), 516, 1198, and the applicable
8 IWC wage order. Plaintiffs, acting in the public interest as private attorneys general, do not
9 seek the recovery of unpaid wages under Labor Code section 558 from Defendants for violations
10 of Labor Code sections 510, 512(a), 516, 1198, and the applicable IWC wage order.

11 48. Defendants, at all times relevant to this complaint, were employers or persons
12 acting on behalf of an employer(s) who violated Plaintiffs’ and other non-party Aggrieved
13 Employees’ rights by violating various sections of the California Labor Code as set forth above.

14 49. As set forth below, Defendants have violated numerous provisions of both the
15 Labor Code sections regulating hours and days of work as well as the applicable IWC Wage
16 Order.

17 50. Pursuant to PAGA, and in particular, California Labor Code sections 2699(a),
18 2699.3(a), 2699.3(c), 2699.5, and section 558, Plaintiffs, acting in the public interest as private
19 attorneys general, seek assessment and collection of civil penalties for themselves, all other
20 non-party Aggrieved Employees, and the State of California against Defendants for violations
21 of California Labor Code sections 201, 202, 203, 204, 212, 213, 221, 222.5, 223, 224, 226(a),
22 226.7, 510, 512(a), 516, 1174(d), 1182.12, 1194, 1197, 1198, 2802, and 2810.5.

23 **FIRST CAUSE OF ACTION**

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

25 **(Against all Defendants)**

26 51. Plaintiffs incorporate by reference and re-allege as if fully stated herein each and
27 every allegation set forth above.

28 ///

1 52. California Labor Code §§ 2698, *et seq.* (“PAGA”) permits Plaintiffs to recover
2 civil penalties for the violation(s) of the Labor Code sections enumerated in Labor Code section
3 2699.5. Section 2699.5 enumerates Labor Code sections 201, 202, 203, 204, 212, 213, 221,
4 222.5, 223, 224, 226(a), 226.7, 510, 512(a), 1174(d), 1194, 1197, 1198, and 2802. Labor Code
5 section 2699.3(c) permits aggrieved employees, including Plaintiffs, to recover civil penalties
6 for violations of those Labor Code sections not found in section 2699.5, including sections 516,
7 1182.12, and 2810.5.

8 53. Defendants’ conduct, as alleged herein, violates numerous sections of the
9 California Labor Code, including, but not limited to, the following:

- 10 (a) Violation of Labor Code sections 510, 1198, and the applicable IWC
11 wage order for Defendants’ failure to compensate Plaintiffs and other
12 non-party Aggrieved Employees with all required overtime pay and
13 failure to properly calculate the overtime rates paid to Plaintiffs and other
14 non-party Aggrieved Employees, as set forth below;
- 15 (b) Violation of Labor Code sections 1182.12, 1194, 1197, 1198, and the
16 applicable IWC wage order for Defendants’ failure to compensate
17 Plaintiffs and other non-party Aggrieved Employees with at least
18 minimum wages for all hours worked, as set forth below;
- 19 (c) Violation of Labor Code sections 226.7, 512(a), 516, 1198, and the
20 applicable IWC wage order for Defendants’ failure to provide Plaintiffs
21 and other non-party Aggrieved Employees with meal periods, as set forth
22 below;
- 23 (d) Violation of Labor Code sections 226.7, 516, 1198, and the applicable
24 IWC wage order for Defendants’ failure to authorize and permit Plaintiffs
25 and other non-party Aggrieved Employees to take rest periods, as set forth
26 below;
- 27 (e) Violation of Labor Code sections 226.7, 516, 1198, and the applicable
28 General Industry Safety Order for Defendants’ failure to provide

1 Plaintiffs and other non-party Aggrieved Employees with recovery
2 periods, as set forth below;

3 (f) Violation of Labor Code sections 226(a), 1198, and the applicable IWC
4 wage order for failure to provide accurate and complete wage statements
5 to Plaintiffs and other non-party Aggrieved Employees, as set forth
6 below;

7 (g) Violation of Labor Code sections 1174(d), 1198, and the applicable IWC
8 wage order for failure to maintain payroll records, as set forth below;

9 (h) Violation of Labor Code section 204 for failure to pay all earned wages
10 during employment, as set forth below;

11 (i) Violation of Labor Code sections 201, 202, and 203 for failure to pay all
12 earned wages upon termination, as set forth below;

13 (j) Violation of Labor Code sections 212 and 213 for issuing instruments for
14 the payment of wages that were not payable in cash on demand, without
15 discount, and with prior authorization, as set forth below;

16 (k) Violation of Labor Code sections 221 and 224 for unlawfully deducting
17 a portion of wages previously paid to Plaintiffs and other non-party
18 Aggrieved Employees, as set forth below;

19 (l) Violation of Labor Code section 223 for secretly paying Plaintiffs and
20 other non-party Aggrieved Employees lower wages than required by
21 statute, while purporting to pay the proper wages, as set forth below;

22 (m) Violation of Labor Code section 222.5 for failure to compensate Plaintiff
23 Mayo Jijon and other non-party Aggrieved Employees for mandatory
24 physical examinations and/or drug testing, as set forth below;

25 (n) Violation of Labor Code section 2802 for failure to reimburse Plaintiffs
26 and other non-party Aggrieved Employees for all business expenses
27 necessarily incurred, as set forth below; and

28 ///

(o) Violation of Labor Code section 2810.5(a)(1)(A)-(C) for failure to provide written notice of information material to Plaintiffs' and other non-party Aggrieved Employees' employment with Defendants, as set forth below.

FAILURE TO PAY OVERTIME

VIOLATION OF LABOR CODE SECTIONS 510 AND 1198

54. Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that "... the standard conditions of labor fixed by the commission shall be the ... standard conditions of labor for employees. The employment of any employee ... under conditions of labor prohibited by the order is unlawful."

55. California Labor Code section 1198 and the applicable IWC Wage Order provide that it is unlawful to employ persons without compensating them at a rate of pay either time-and-one-half or two-times that person's regular rate of pay, depending on the number of hours worked by the person on a daily or weekly basis.

56. Specifically, the applicable IWC Wage Order provides that Defendants are and were required to pay Plaintiffs and other non-party Aggrieved 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 (1½) for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek.

57. The applicable IWC Wage Order further provides that Defendants are and were required to pay Plaintiffs and other non-party Aggrieved Employees working more than twelve (12) hours in a day, overtime compensation at a rate of two (2) times their regular rate of pay. An employee's regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee, including nondiscretionary bonuses and incentive pay.

58. California Labor Code section 510 codifies the right to overtime compensation at one and one-half (1½) times the regular rate of pay for hours worked in excess of eight (8) hours in a day or forty (40) hours in a week or for the first eight (8) hours worked on the seventh (7th) day of work, and to overtime compensation at twice the employee's regular rate of pay for

1 hours worked in excess of twelve (12) hours in a day or in excess of eight (8) hours in a day on
2 the seventh (7th) day of work.

3 59. During the relevant time period, Defendants willfully failed to pay all overtime
4 wages owed to Plaintiffs and other non-party Aggrieved Employees. During the relevant time
5 period, Plaintiffs and other non-party Aggrieved Employees were not paid overtime premiums
6 for all of the hours they worked in excess of eight (8) hours in a day, in excess of twelve (12)
7 hours in a day, and/or in excess of forty (40) hours in a week, because all hours worked were
8 not recorded.

9 60. First, during the relevant time period, Defendants have had a company-wide
10 policy and/or practice of failing to accurately record hours worked by their employees and thus
11 restricted overtime accrual. Defendants did not provide employees with any mechanism, such
12 as a handwritten timesheet, time clock, or electronic timekeeping system, to track and record
13 their hours worked. Instead, Defendants had their supervisors input all employee time through
14 the Aspire Crew Mobile App, which was only accessible to Defendants' supervisors, and thus
15 maintained exclusive control and discretion over employee punch-in and punch-out times.
16 Thus, Plaintiffs and other non-party Aggrieved Employees could only be clocked in and clocked
17 out when they physically located their supervisor, but would not be compensated for the time
18 they remained under control of Defendants before their supervisors clocked them in or after
19 their supervisors clocked them out.

20 61. For example, Defendants required Plaintiffs and other non-party Aggrieved
21 Employees to report to Defendants' main yard before their scheduled shifts for "sign-in," which
22 included the loading of gardening equipment onto Defendants' gardening trucks and waiting for
23 the coordination of carpools to job sites, all before their supervisors clocked them in. Similarly,
24 Defendants' supervisors clocked out Plaintiffs and other non-party Aggrieved Employees upon
25 their return from job sites to Defendants' main yard, even though Plaintiffs and other non-party
26 Aggrieved Employees continued to unload their gardening trucks. As result, Defendants did
27 not compensate Plaintiffs and other non-party Aggrieved Employees for this time worked before
28 and after their scheduled shifts. Because Defendants failed to provide Plaintiffs and other non-

1 party Aggrieved Employees with any mechanism to record their actual hours worked themselves
2 and, instead, granted Defendants' supervisors exclusive control and discretion over employee
3 time records, Plaintiffs and other non-party Aggrieved Employees were not paid for all hours
4 worked.

5 62. Second, Defendants' company-wide timekeeping practices and/or policies did
6 not permit employees, including Plaintiffs and other non-party Aggrieved Employees, to
7 accurately track the start and stop times of their meal periods or allow them to report a short,
8 missed, or interrupted meal period. As stated, because Defendants' supervisors logged the start
9 and stop times of meal periods through the Aspire Crew Mobile App, which Plaintiffs and other
10 non-party Aggrieved Employees did not have access to, Defendants, upon information and
11 belief, would record that compliant meal periods were taken, even if that was not the case. For
12 example, Plaintiff Cruz had his meal periods interrupted and/or cut short by 15 minutes four (4)
13 days per week, in order to complete his work duties, but was unable to record his meal periods
14 were shortened. As a result, Defendants' supervisors recorded 30-minute meal periods were
15 taken, even when they were not, and Plaintiff Cruz and other non-party Aggrieved Employees
16 were not paid for all hours worked.

17 63. Third, Defendants have systematically, and on a company-wide basis,
18 understaffed their job sites, pursuant to their labor budget practices, while assigning heavy
19 workloads, thereby failing to provide adequate meal period coverage to permit employees to
20 take compliant meal periods. Further, Defendants' customer/client management practices led
21 to the creation of "punch lists" wherein Defendants' management would create lists of
22 additional tasks that gardening crews were required to complete based on customer/client
23 feedback. Because Defendants understaffed their job sites, there was no one available to relieve
24 employees needing meal period coverage, and Plaintiff Cruz and other non-party Aggrieved
25 Employees were not always afforded uninterrupted 30-minute meal periods during shifts when
26 they were entitled to receive a meal period. For example, Plaintiff Cruz and other non-party
27 Aggrieved Employees were required to work through and/or return early from meal periods, in
28 order to complete their assigned tasks. Consequently, Plaintiff Cruz and other non-party

1 Aggrieved Employees performed work during meal periods for which they were not paid.

2 64. Additionally, due to the lack of meal period coverage, Defendants required
3 Plaintiffs and other non-party Aggrieved Employees to remain on or near the job site premises
4 for their meal periods. Because Plaintiffs and other non-party Aggrieved Employees were
5 restricted from leaving the premises during meal periods, they were denied the ability to use
6 their meal periods freely for their own purposes. Thus, Defendants effectively maintained
7 control over Plaintiffs and other non-party Aggrieved Employees during meal periods.
8 Defendants also had a company-wide practice and/or policy of failing to schedule meal periods,
9 which further caused Plaintiffs and other non-party Aggrieved Employees to not be relieved of
10 their duties for compliant meal periods.

11 65. Defendants knew or should have known that as a result of these company-wide
12 practices and/or policies, Plaintiffs and other non-party Aggrieved Employees were working
13 before and after their shifts and/or during their meal periods, and were suffered or permitted to
14 perform work for which they were not paid. Defendants also knew, or should have known, that
15 they did not compensate Plaintiffs and other non-party Aggrieved Employees applicable
16 overtime rates of pay for overtime hours that they worked.

17 66. Because Plaintiffs and other non-party Aggrieved Employees sometimes worked
18 shifts of eight (8) hours a day or more or forty (40) hours a week or more, some of this off-the-
19 clock work qualified for overtime premium pay. Therefore, Plaintiffs and other non-party
20 Aggrieved Employees were not paid overtime wages for all of the overtime hours they actually
21 worked.

22 67. Furthermore, on information and belief, Defendants did not pay other non-party
23 Aggrieved Employees the correct overtime rate for the recorded overtime hours that they
24 generated. In addition to an hourly wage, Defendants paid other non-party Aggrieved
25 Employees incentive pay, nondiscretionary bonuses, and/or other forms of remuneration.
26 However, in violation of the California Labor Code, Defendants failed to incorporate all
27 remunerations, including incentive pay and/or nondiscretionary bonuses, into the calculation of
28 the regular rate of pay for purposes of calculating the overtime wage rates. Therefore, during

1 times when other non-party Aggrieved Employees worked overtime and received these other
2 forms of pay, Defendants failed to pay all overtime wages by paying a lower overtime rate than
3 required.

4 68. For example, Defendants paid other non-party Aggrieved Employees
5 nondiscretionary bonuses or incentive pay. On information and belief, these nondiscretionary
6 bonuses and/or incentive pay were listed on other non-party Aggrieved Employees' wage
7 statements as "Ref. Incentive." During pay periods that other non-party Aggrieved Employees
8 were paid overtime wages, Defendants failed to incorporate the nondiscretionary bonuses and/or
9 incentive pay into other non-party Aggrieved Employees' regular rate of pay and, as a result,
10 paid them at incorrect and lower rates of pay for overtime hours worked. Specifically,
11 Defendants paid other non-party Aggrieved Employees 1.5 times their hourly rate of pay instead
12 of 1.5 times their regular rate of pay. Defendants' failure to properly calculate the overtime
13 rates of pay based on all remuneration paid has resulted in an underpayment of overtime wages
14 to other non-party Aggrieved Employees on a company-wide basis.

15 69. Defendants' failure to pay Plaintiffs and other non-party Aggrieved Employees
16 the balance of overtime compensation as required by California law, violates the provisions of
17 California Labor Code sections 510 and 1198. Plaintiffs and other non-party Aggrieved
18 Employees are entitled to recover civil penalties pursuant to Labor Code sections 558 and/or
19 2699(a), (f), and (g).

20 **FAILURE TO PAY MINIMUM WAGES**

21 **VIOLATION OF LABOR CODE SECTIONS 1182.12, 1194, 1197, AND 1198**

22 70. At all relevant times, California Labor Code sections 1182.12, 1194, 1197, and
23 1198 provide that the minimum wage for employees fixed by the IWC is the minimum wage to
24 be paid to employees, and the payment of a wage less than the minimum so fixed is unlawful.
25 Compensable work time is defined by the applicable wage order as "the time during which an
26 employee is subject to the control of an employer, and includes all the time the employee is
27 suffered or permitted to work, whether or not required to do so." Cal. Code. Regs. tit. 8,
28 § 11050(2)(K) (defining "Hours Worked").

1 71. As set forth above, Defendants' company-wide policies and/or practices of not
2 permitting employees to record all their hours worked and limiting overtime accrual, Defendants
3 failed to record all hours worked outside scheduled shifts or during meal periods. Also, as stated
4 above, Defendants maintained a policy and/or practice requiring Plaintiffs to other non-party
5 Aggrieved Employees to perform work off-the-clock prior to clocking in at the start of their
6 shifts and after the end of their shifts. Furthermore, due to Defendants' policies and/or practices
7 of understaffing while assigning heavy workloads of completing daily crew punch lists,
8 requiring employees to stay on or near the job site premises during meal periods, and failure to
9 schedule meal periods, Plaintiffs and other non-party Aggrieved Employees were forced to
10 forego meal periods, have their meal periods interrupted, and/or were otherwise not relieved of
11 all duties during meal periods.

12 72. Moreover, Defendants implemented, on a company-wide basis, an employer-
13 imposed requirement that employees undergo a mandatory drug test and/or physical
14 examination upon hiring. At all times, Defendants were in control of scheduling the date and
15 time for the testing and/or examinations, selecting the provider/facility where the testing and/or
16 examinations were to take place, and determining the scope of the testing and/or examinations.
17 For example, Defendants gave Plaintiff Mayo Jijon strict instructions to obtain drug testing, and
18 Plaintiff Mayo Jijon underwent the testing for the sole benefit of Defendants. Plaintiff Mayo
19 Jijon was required to travel for approximately 30-40 minutes roundtrip from Defendants' office
20 to Pacific Medical Clinic, located at 1534 E. Warner Avenue, Suite A, Santa Ana, and spend
21 two (2) hours waiting for and undergoing Defendants' mandatory drug test. However,
22 Defendants did not compensate Plaintiff Mayo Jijon and other non-party Aggrieved Employees
23 for the time they spent traveling to and from the medical facilities and for the time they spent
24 undergoing the drug testing and/or physical examinations.

25 73. Defendants did not pay at least minimum wages for off-the-clock hours that
26 Plaintiffs and other non-party Aggrieved Employees worked through that qualified for overtime
27 premium payment. To the extent that these off-the-clock hours did not qualify for overtime
28 premium payment, Defendants did not pay at least minimum wages for those hours worked off-

1 the-clock in violation of California Labor Code sections 1182.12, 1194, 1197, and 1198.

2 74. Defendants' failure to pay Plaintiffs and other non-party Aggrieved Employees
3 minimum wages violates California Labor Code sections 1182.12, 1194, 1197, and 1198.
4 Plaintiffs and other non-party Aggrieved Employees are therefore entitled to recover civil
5 penalties pursuant to Labor Code sections 2699(a), (f), and (g).

6 **FAILURE TO PROVIDE AND RECORD MEAL PERIODS**
7 **VIOLATION OF LABOR CODE SECTIONS 226.7, 512(a), 516, AND 1198**

8 75. At all relevant times herein set forth, the applicable IWC Wage Order(s) and
9 California Labor Code sections 226.7, 512(a), 516, and 1198 were applicable to Plaintiffs' and
10 other non-party Aggrieved Employees' employment by Defendants.

11 76. At all relevant times herein set forth, California Labor Code section 512(a)
12 provides that an employer may not require, cause, or permit an employee to work for a period
13 of more than five (5) hours per day without providing the employee with a meal period of not
14 less than thirty (30) minutes, except that if the total work period per day of the employee is not
15 more than six (6) hours, the meal period may be waived by mutual consent of both the employer
16 and the employee. Under California law, first meal periods must start after no more than five
17 hours. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1041-1042 (Cal. 2012).

18 77. At all relevant times herein set forth, California Labor Code section 226.7,
19 512(a), 516, and 1198 provide that no employer shall require an employee to work during any
20 meal period mandated by an applicable order of the IWC.

21 78. At all relevant times herein set forth, Labor Code sections 226.7, 512(a), 1198
22 and the applicable IWC Wage Order also require employers to provide a second meal period of
23 not less than thirty (30) minutes if an employee works over ten (10) hours per day or to pay an
24 employee one (1) additional hour of pay at the employee's regular rate, except that if the total
25 hours worked is no more than twelve (12) hours, the second meal period may be waived by
26 mutual consent of the employer and the employee only if the first meal period was not waived.

27 79. First, as described above, Defendants did not have a mechanism in place for
28 employees to track and record the start and stop times of their meal periods. Instead, Defendants

1 gave their supervisors exclusive control and discretion over employee punch-in and punch-out
2 times, including meal period start and stop times, through the Aspire Crew Mobile App.
3 Because Plaintiffs and other Aggrieved Employees did not have access to the timekeeping
4 system, they were unable to record when their meal periods were missed, late, interrupted, or
5 cut short.

6 80. Second, as stated, Defendants had, and continue to have, company-wide policies
7 and/or practices of utilizing labor budgets, understaffing while assigning heavy workloads, and
8 failing to schedule meal periods, which prevented Plaintiff Cruz and other non-party Aggrieved
9 Employees from taking timely, uninterrupted 30-minute meal periods to which they were
10 entitled. As a result, Plaintiff Cruz and other non-party Aggrieved Employees were forced to
11 work in excess of five (5) hours before taking a meal period and, at times, had their meal periods
12 interrupted. For example, Plaintiff Cruz was required to take his meal periods late after having
13 worked in excess of five (5) hours or more into his shift, and, at times, would have his meal
14 periods interrupted to complete work duties or to discuss work assignments.

15 81. Furthermore, as stated above, in conjunction with these policies and/or practices,
16 Defendants required Plaintiffs and other non-party Aggrieved Employees to remain on the
17 premises for their meal periods. Because Plaintiffs and other non-party Aggrieved Employees
18 were restricted from leaving the premises during meal periods, they were denied the ability to
19 use their meal periods freely for their own purposes. Thus, Defendants effectively maintained
20 control over Plaintiffs and other non-party Aggrieved Employees during meal periods.

21 82. Third, Defendants did not provide other non-party Aggrieved Employees with
22 second 30-minute meal periods on days that they worked in excess of ten (10) hours in one day.
23 Upon information and belief, other non-party Aggrieved Employees worked in excess of 10
24 hours per day but were not provided with second 30-minute meal periods. Plaintiffs and other
25 non-party Aggrieved Employees did not sign valid meal period waivers on days that they were
26 entitled to meal periods and were not relieved of all duties.

27 83. Moreover, Defendants had a company-wide policy of requiring all newly hired
28 employees to sign blanket meal period waivers at or near their time of hire. Defendants took

1 the position that non-exempt, hourly paid employees had waived their rights to second meal
2 periods for the entirety of their employment and, on that basis, did not provide them with all
3 meal periods to which they were entitled. Defendants' presumption that second meal periods
4 would not be provided for shifts in excess of ten (10) hours but less than twelve (12) hours due
5 to the use of blanket second meal period waivers, and imposition of the burden on employees
6 to revoke the meal period waiver in writing, discouraged and impeded other non-party
7 Aggrieved Employees from taking second meal periods.

8 84. Furthermore, an employer's obligation to provide a meal period is only
9 "triggered" when the employer "employs an employee for a work period of more than five hours
10 per day." *Brinker*, 53 Cal. 4th at 1039 ("If an employer engages, suffers, or permits anyone to
11 work for a full five hours, its meal break obligation is triggered.").

12 [A]fter the meal break obligation is triggered . . . an employer is put to a
13 choice: it must (1) afford an off-duty meal period; (2) consent to a
14 mutually agreed-upon waiver if one hour or less will end the shift; or (3)
15 obtain written agreement to an on-duty meal period if circumstances
16 permit. Failure to do one of these will render the employer liable for

17 premium pay.

18 *Id.* (citing Cal. Labor Code § 226.7; Wage Order No. 5 subd. 11(A), (B)). Further, under Labor
19 Code section 512(a) and the applicable IWC Wage Order, employees may waive their second
20 meal periods only if they took their first meal period. That Defendants require other non-party
21 Aggrieved Employees to sign meal period waivers simultaneously at or near their time of hire
22 (as opposed to on a specific work day) renders them invalid and unenforceable, because
23 Defendants' obligation to provide other non-party Aggrieved Employees with meal periods did
24 not arise until they had employed them for a full five (5) hours.

25 85. Defendants knew or should have known that as a result of their company-wide
26 policies and/or practices, that Plaintiffs and other non-party Aggrieved Employees were not
27 actually relieved of all duties and required to perform some of their assigned duties during meal
28 periods. Defendants further knew or should have known that they did not pay Plaintiffs and
other non-party Aggrieved Employees meal period premium wages when meal periods were
missed, late, short, and/or interrupted.

1 86. Furthermore, Defendants engaged in a company-wide practice and/or policy of
2 not paying all meal period premiums owed when compliant meal periods are not provided.
3 Because of this practice and/or policy, Plaintiffs and other non-party Aggrieved Employees
4 have not received premium pay for missed, interrupted, or late meal periods. Alternatively, to
5 the extent that Defendants did pay other non-party Aggrieved Employees for missed, late, and
6 interrupted meal periods, Defendants did not pay other non-party Aggrieved Employees at the
7 correct rate of pay for premium wages because Defendants systematically failed to include all
8 forms of compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms of
9 remuneration, in the regular rate of pay.

10 87. Thus, Defendants failed to provide Plaintiffs and other non-party Aggrieved
11 Employees compliant meal periods and failed to pay the full meal period premiums due.
12 Defendants' conduct violates the applicable IWC Wage Order, and California Labor Code
13 sections 226.7, 512(a), 516, and 1198. Plaintiffs and other non-party Aggrieved Employees are
14 entitled to recover civil penalties pursuant to Labor Code sections 558 and/or 2699(a), (f), and
15 (g).

16 **FAILURE TO AUTHORIZE AND PERMIT REST PERIODS**

17 **VIOLATION OF LABOR CODE SECTIONS 226.7, 516, AND 1198**

18 88. At all relevant times herein set forth, the applicable IWC Wage Order and
19 California Labor Code sections 226.7, 516, and 1198 were applicable to Plaintiffs' and other
20 non-party Aggrieved Employees' employment by Defendants.

21 89. At all relevant times, the applicable IWC Wage Order provides that "[e]very
22 employer shall authorize and permit all employees to take rest periods, which insofar as
23 practicable shall be in the middle of each work period" and that the "rest period time shall be
24 based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4)
25 hours or major fraction thereof" unless the total daily work time is less than three and one-half
26 (3½) hours.

27 90. At all relevant times, California Labor Code section 226.7 provides that no
28 employer shall require an employee to work during any rest period mandated by an applicable

1 order of the California IWC. To comply with its obligation to authorize and permit rest periods
2 under California Labor Code section 226.7 and the applicable IWC Wage Order, an employer
3 must “relinquish any control over how employees spend their break time, and relieve their
4 employees of all duties—including the obligation that an employee remain on call. A rest
5 period, in short, must be a period of rest.” *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th
6 257, 269-270 (2016).

7 91. Pursuant to the applicable IWC Wage Order and California Labor Code section
8 226.7(c), Plaintiffs and other non-party Aggrieved Employees are entitled to recover from
9 Defendants one (1) additional hour of pay at their regular rates of pay for each work day that a
10 required rest period was not authorized and permitted.

11 92. During the relevant time period, Defendants regularly failed to authorize and
12 permit Plaintiffs and other non-party Aggrieved Employees to take a ten (10) minute rest period
13 per each four (4) hour period worked or major fraction thereof. As with meal periods,
14 Defendants’ company-wide policies and/or practices of understaffing and assigning heavy
15 workloads prevented Plaintiffs and other non-party Aggrieved Employees from being relieved
16 of all duty in order to take compliant rest periods. For example, Plaintiffs frequently missed
17 their rest periods due to their heavy workloads of completing daily punch lists. Additionally,
18 Defendants also failed to schedule rest periods, which, coupled with Defendants’ failure to
19 provide adequate rest period coverage, further led to Plaintiffs and other non-party Aggrieved
20 Employees not being authorized and permitted to take rest periods.

21 93. Furthermore, Defendants maintained and implemented a company-wide practice
22 and/or policy requiring that Plaintiffs and other non-party Aggrieved Employees remain on the
23 work premises during their rest periods. Because Plaintiffs and other non-party Aggrieved
24 Employees were restricted from leaving the work premises during rest periods, they were denied
25 the ability to use their rest periods freely for their own purposes. Thus, Defendants effectively
26 maintained control over Plaintiffs and other non-party Aggrieved Employees during rest
27 periods, and, as a result of this rest period policy, Defendants did not relinquish control over
28 Plaintiffs and other non-party Aggrieved Employees during rest periods.

1 94. As a result, Plaintiffs and other non-party Aggrieved Employees would work
2 shifts in excess of 3.5 hours, in excess of 6 hours, and/or in excess of 10 hours without being
3 permitted and authorized to take all ten (10) minute rest periods to which they were entitled.
4 For example, throughout his employment, Plaintiff Mayo Jijon missed all of his rest periods in
5 order to complete his work-related duties Defendants assigned to him. As a further example,
6 Plaintiff Cruz would miss rest periods at least nine (9) times per week for the same reasons.

7 95. Defendants also have engaged in a company-wide practice and/or policy of not
8 paying all rest period premiums owed when compliant rest periods are not authorized and
9 permitted. Because of this practice and/or policy, Plaintiffs and other non-party Aggrieved
10 Employees have not received premium pay for all missed rest periods. Alternatively, to the
11 extent that Defendants did pay other non-party Aggrieved Employees one (1) additional hour
12 of premium pay for missed rest periods, Defendants did not pay other non-party Aggrieved
13 Employees at the correct rate of pay for premium wages because Defendants failed to include
14 all forms of compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms
15 of remuneration, in the regular rate of pay.

16 96. Defendants' conduct violates the applicable IWC Wage Order and California
17 Labor Code sections 226.7, 516, and 1198. Plaintiffs and other non-party Aggrieved Employees
18 are therefore entitled to recover civil penalties pursuant to Labor Code sections 558 and/or
19 2699(a), (f), and (g).

20 **FAILURE TO PROVIDE HEAT RECOVERY PERIODS**
21 **VIOLATION OF LABOR CODE SECTIONS 226.7, 516, AND 1198, AND CODE OF**
22 **REGULATIONS TITLE 8, SECTION 3395**

23 97. At all relevant times herein set forth, the applicable General Industry Safety
24 Order and California Labor Code sections 226.7, 516, and 1198 were applicable to Plaintiffs'
25 and other non-party Aggrieved Employees' employment by Defendants

26 98. At all relevant times, California Labor Code section 226.7(a) defines "recovery
27 period" to mean a cooldown period afforded an employee to prevent heat illness. California
28 Labor Code section 226.7 provides that no employer shall require an employee to work during

1 any recovery period mandated by an applicable order of the California IWC, the Occupational
2 Safety and Health Standards Board, or the Division of Occupational Safety and Health. The
3 applicable General Industry Safety Order provides that “[w]hen the outdoor temperature in the
4 work area exceeds 80 degrees Fahrenheit, the employer shall have and maintain one or more
5 areas with shade at all times while employees are present that are either open to the air or
6 provided with ventilation or cooling.” Cal. Code of Reg., Title 8, § 3395(d)(1). Furthermore,
7 “[t]he amount of shade present shall be at least enough to accommodate the number of
8 employees on recovery or rest periods, so that they can sit in a normal posture fully in the shade
9 without having to be in physical contact with each other.” *Id.* “Employees shall be allowed
10 and encouraged to take a preventative cool-down rest in the shade when they feel the need to
11 do so to protect themselves from overheating. Such access to shade shall be permitted at all
12 times.” *Id.* Pursuant to California Labor Code section 226.7(c), Plaintiffs and other non-party
13 Aggrieved Employees are entitled to recover from Defendants one (1) additional hour of pay at
14 their regular rates of pay for each work day that a recovery period was not provided.

15 99. During the relevant time period, Defendants violated California Labor Code
16 section 226.7 and California Code of Regulations, Title 8, section 3395(d), because Defendants
17 failed to provide Plaintiffs and other non-party Aggrieved Employees with recovery periods.
18 For example, Plaintiffs were not provided a shaded area for recovery and were not permitted to
19 take recovery periods in a shaded area while working at various job sites.

20 100. Defendants also have engaged in a company-wide practice and/or policy of not
21 paying all recovery period premiums owed when compliant recovery periods are not provided.
22 Because of this practice and/or policy, Plaintiffs and other non-party Aggrieved Employees
23 have not received premium pay for all missed recovery periods. Alternatively, to the extent that
24 Defendants did pay other non-party Aggrieved Employees for missed recovery periods,
25 Defendants did not pay other non-party Aggrieved employees at the correct rate of pay, because
26 Defendants systematically failed to include all compensation, such as incentive pay,
27 nondiscretionary bonuses, and/or other forms of remuneration in the regular rate of pay.

28 ///

101. Defendants' conduct violates the applicable IWC Wage Order and California Labor Code sections 226.7, 516, and 1198. Plaintiffs and other non-party Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor Code sections 558 and/or 2699(a), (f), and (g).

FAILURE TO PROVIDE AND MAINTAIN COMPLIANT WAGE STATEMENTS
VIOLATION OF LABOR CODE SECTIONS 226(a), 1174(d), AND 1198

102. At all relevant times herein, California Labor Code section 226(a) provides that every employer shall furnish each of his or her employees an accurate and complete itemized wage statement in writing, including, but not limited to, the name and address of the legal entity that is the employer, the inclusive dates of the pay period, total hours worked, and all applicable rates of pay.

103. During the relevant time period, Defendants have knowingly and intentionally provided Plaintiffs and other non-party Aggrieved Employees with uniform, incomplete, and inaccurate wage statements. For example, Defendants issued uniform wage statements to Plaintiffs and other non-party Aggrieved Employees that fail to correctly list: gross wages earned; total hours worked; net wages earned; and all applicable hourly rates in effect during the pay period, including overtime rates of pay, and the corresponding number of hours worked at each hourly rate. Specifically, Defendants violated sections 226(a)(1), 226(a)(2), 226(a)(5), and 226(a)(9).

104. Because Defendants did not record the time Plaintiffs and other non-party Aggrieved Employees spent working off-the-clock, Defendants did not list the correct amount of gross wages and net wages earned by Plaintiffs and other non-party Aggrieved Employees in compliance with section 226(a)(1) and section 226(a)(5), respectively. For the same reason, Defendants failed to accurately list the total number of hours worked by Plaintiffs and other non-party Aggrieved Employees, in violation of section 226(a)(2), and failed to list the applicable hourly rates of pay in effect during the pay period and the corresponding accurate number of hours worked at each hourly rate, in violation of section 226(a)(9).

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1 105. In addition, because Defendants did not calculate other non-party Aggrieved
2 Employees' regular rate of pay correctly for purposes of paying overtime wages, Defendants
3 did not list the correct amount of gross wages in compliance with section 226(a)(1) and did not
4 list the correct amount of net wages in violation of section 226(a)(5). Defendants also failed
5 to correctly list all applicable hourly rates in effect during the pay period, namely, correct
6 overtime rates of pay and correct rates of pay for premium wages, in violation of section
7 226(a)(9).

8 106. The wage statement deficiencies also include, among other things, failing to list
9 the number of piece-rate units earned and any applicable piece rate if the employee is paid on a
10 piece-rate basis; failing to list all deductions; failing to list the name of the employee and only
11 the last four digits of his or her social security number or an employee identification number
12 other than a social security number; failing to list the name and address of the legal entity that
13 is the employer; failing to list the inclusive dates of the period for which aggrieved employees
14 were paid; and/or failing to state all hours worked as a result of not recording or stating the
15 hours they worked off-the-clock.

16 107. California Labor Code section 1198 provides that the maximum hours of work
17 and the standard conditions of labor shall be those fixed by the Labor Commissioner and as set
18 forth in the applicable IWC Wage Orders. Section 1198 further provides that "[t]he employment
19 of any employees for longer hours than those fixed by the order or under conditions of labor
20 prohibited by the order is unlawful." Pursuant to the applicable IWC Wage Order, employers
21 are required to keep accurate time records showing when the employee begins and ends each
22 work period and meal period. During the relevant time period, Defendants failed, on a
23 company-wide basis, to keep accurate records of work period and meal period start and stop
24 times for Plaintiffs and other non-party Aggrieved Employees, in violation of section 1198.
25 Furthermore, in light of Defendants' failure to provide other non-party Aggrieved Employees
26 with second 30-minute meal periods to which they were entitled, Defendants kept no records of
27 meal start and end times for second meal periods.

28 ///

1 108. California Labor Code section 1174(d) provides that “[e]very person employing
2 labor in this state shall . . . [k]eep a record showing the names and addresses of all employees
3 employed and the ages of all minors” and “[k]eep, at a central location in the state or at the
4 plants or establishments at which employees are employed, payroll records showing the hours
5 worked daily by and the wages paid to, and the number of piece-rate units earned by and any
6 applicable piece rate paid to, employees employed at the respective plants or establishments. . .
7 .” Labor Code section 1174.5 provides that employers are subject to a \$500 civil penalty if they
8 fail to maintain accurate and complete records as required by section 1174(d). During the
9 relevant time period, and in violation of Labor Code section 1174(d), Defendants willfully failed
10 to maintain accurate payroll records for Plaintiffs and other non-party Aggrieved Employees
11 showing the daily hours they worked and the wages paid thereto as a result of failing to record
12 the off-the-clock hours that they worked.

13 109. Because Defendants’ violations of 226(a) and 1174(d) were committed against
14 Plaintiffs and other non-party Aggrieved Employees, Plaintiffs and other non-party Aggrieved
15 Employees are entitled to recover civil penalties pursuant to Labor Code sections 226.3, 1174.5,
16 and/or 2699(a), (f), and (g).

17 **FAILURE TO PAY WAGES DURING EMPLOYMENT**
18 **VIOLATION OF LABOR CODE SECTION 204**

19 110. At all relevant times herein set forth, California Labor Code section 204 requires
20 that all wages earned by any person in any employment between the 1st and the 15th days,
21 inclusive, of any calendar month, other than those wages due upon termination of an employee,
22 are due and payable between the 16th and the 26th day of the month during which the labor was
23 performed. Labor Code section 204 further provides that all wages earned by any person in any
24 employment between the 16th and the last day, inclusive, of any calendar month, other than
25 those wages due upon termination of an employee, are due and payable between the 1st and the
26 10th day of the following month.

27 111. At all relevant times herein, California Labor Code section 204 also requires that
28 all wages earned for labor in excess of the normal work period shall be paid no later than the

1 payday for the next regular payroll period. Alternatively, at all relevant times herein, Labor
2 Code section 204 provides that the requirements of this section are deemed satisfied by the
3 payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more
4 than seven (7) calendar days following the close of the payroll period.

5 112. During the relevant time period, Defendants failed to pay Plaintiffs and other
6 non-party Aggrieved Employees all wages due to them, including, but not limited to, overtime
7 wages, minimum wages, and/or meal, rest, and recovery period premium wages, within any
8 time period specified by California Labor Code section 204.

9 113. Plaintiffs and other non-party Aggrieved Employees are therefore entitled to
10 recover civil penalties pursuant to Labor Code sections 210 and/or 2699(a), (f), and (g).

11 **FAILURE TO PAY WAGES UPON TERMINATION**

12 **VIOLATION OF LABOR CODE SECTIONS 201, 202, and 203**

13 114. At all times relevant herein set forth, Labor Code sections 201, 202, and 203
14 provide that if an employer discharges an employee, the wages earned and unpaid at the time of
15 discharge are due and payable immediately, and that if an employee voluntarily leaves his or
16 her employment, his or her wages shall become due and payable not later than seventy-two (72)
17 hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his
18 or her intention to quit, in which case the employee is entitled to his or her wages at the time of
19 quitting.

20 115. Defendants willfully failed to pay Plaintiffs and other non-party Aggrieved
21 Employees who are no longer employed by Defendants all their earned wages, including, but
22 not limited to, overtime wages, minimum wages, and/or meal, rest, and recovery period
23 premium wages either at the time of discharge, or within seventy-two (72) hours of their leaving
24 Defendants' employ in violation of California Labor Code sections 201, 202, and 203.

25 116. Defendants' failure to pay Plaintiffs and those non-party Aggrieved Employees
26 who are no longer employed by Defendants their wages earned and unpaid at the time of
27 discharge, or within seventy-two (72) hours of their leaving Defendant's employ, violates Labor
28 Code sections 201, 202, and 203. Plaintiffs and other non-party Aggrieved Employees are

1 therefore entitled to recover civil penalties pursuant to Labor Code sections 256 and/or 2699(a),
2 (f), and (g).

3 **UNLAWFUL DIRECT DEPOSIT AND DISCOUNT OF WAGES**

4 **VIOLATION OF LABOR CODE SECTIONS 212 AND 213**

5 117. California Labor Code section 212 prohibits employers from issuing any
6 instruments for the payment of wages unless such instruments are negotiable and payable in
7 cash on demand and without discount, at some established place of business in the state, the
8 name and address of which must appear on the instrument. California Labor Code section 212
9 further prohibits employers from issuing payment of wages due in the form of any scrip, coupon,
10 cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable
11 otherwise than in money.

12 118. California Labor Code section 213 permits employers to pay employees via
13 direct deposit so long as the employee authorizes payment via direct deposit.

14 119. Under California law, employers are permitted to fulfill their wage payment
15 obligations to employees by using payroll debit cards, but only so long as the employee is given
16 the choice as to whether to accept a payroll debit card as a form of payment. *Johnson v. Sunrise*
17 *Senior Living Management, Inc.*, No. 16 CV 00443 BRO RAOx, 2016 WL 8929249, *9 (C.D.
18 Cal. May 5, 2016). In *Johnson*, the court stated that the Division of Labor Standards
19 Enforcement (“DLSE”) decision deeming payroll debit card program permissible relied heavily
20 on:

21 . . . [T]he fact that the pay programs were optional, thereby
22 allowing an employee to either participate in the program or
23 receive his or her pay in some other way, such as direct deposit.
24 Specifically, the DLSE opined that “[t]he success of the described
25 procedure, in practice, will of course require that . . . it is
26 presented as an *alternative* method for wage payment for which
27 [the employees’] participation is optional.” The DLSE also stated,
28 “[i]t is significant that the program does not mandate employee
participation in the Money Network Service and that it is designed
to provide an alternative for employees receiving their wage
payment. Employees are also given the option of having their pay
direct deposited into an account of their choosing. . . .” (internal
citations omitted)

120. In addition, California law only permits employers to utilize payroll debit card

1 programs if they provide employees with effective access to their wages without discount. The
2 DLSE has interpreted Labor Code sections 212 and 213 as permitting employer use of payroll
3 debit cards where the following requirements are satisfied:

4 . . . (1) [T]he “wages [are] payable at some established place of
5 business in the state and there be at least 30 days of sufficient
6 funds for payment,”; (2) the employees are “fully informed of the
7 service and procedures and that it is represented as an alternative
8 method for wage payment for which their participation is
9 optional,”; (3) the employees receive “an itemized wage
10 statement,”; and (4) “at least one transaction per pay period [is]
11 without fee.”

12 *Ortiz v. Randstad North America, L.P.*, No. C-13-5050 MMC, 2015 WL 6202298 at 3.

13 121. Further, the DLSE notes that the Labor Code manifests:

14 . . . [A] strong public policy that prohibits an employer (or its
15 agent) from imposing conditions or obstacles which interfere with
16 or prevent an employee’s (*sic*) from promptly receiving their due
17 wages *in full*. The imposition of a fee in order to readily *access*
18 one’s earned and paid wage under a payroll card program which
19 is designed to discharge the employer’s wage payment obligations
20 could impermissibly interfere with an employee’s receipt of page
21 wages by creating a financial condition which would have the
22 *effect* of reducing or discounting wages because such fee would
23 be charged against the same account in which wages are
24 deposited.” (Emphases in original.)

25 *DLSE opinion letter* 2008.07.07. The DLSE has also acknowledged that payroll service
26 providers “effectively act as *agents* of the client employers in discharging the employer’s wage
27 payment obligations.” *Id.* In a second opinion letter, the DLSE stated that “[w]hile the Labor
28 Code does not purport to regulate the specific arrangements between employers and payroll
service providers, both an employer and, under the express language in Labor Code § 212- their
agent, must comply with its requirements.” *DLSE opinion letter* 2008.07.07.2.

122. During the relevant time period, Defendants had an agreement with a payroll
service provider for the issuance of payroll cards to employees, including Plaintiffs and other
non-party Aggrieved Employees, to discharge their wage payment obligations to their
employees. Upon information and belief, Defendants’ payroll debit card program was not
voluntary or optional to Plaintiffs and other non-party Aggrieved Employees and Defendants

1 had a practice and/or policy of automatically issuing payroll debit cards to Plaintiffs and other
2 non-party Aggrieved Employees without giving them the option to elect their form of payment
3 for their wages. Plaintiffs and other non-party Aggrieved Employees received their wages on a
4 payroll debit card without a choice of an alternative method, including a written check.

5 123. Moreover, under Defendants' payroll debit program, Defendants did not permit
6 Plaintiffs and other non-party Aggrieved Employees to withdraw their entire wages in at least
7 one transaction without incurring a fee. For example, Plaintiffs utilized ATMs to try to
8 withdraw their respective wages, but neither could obtain their entire amounts because ATMs
9 only disburse cash in limited denominations. Additionally, Plaintiffs also encountered
10 approximately \$3.00 in ATM fees each time either utilized an ATM to withdraw funds from
11 their payroll debit card, and approximately a 50-cent charge when either utilized their payroll
12 debit card in point-of-sale merchant transactions, which resulted in a discount in pay.

13 124. California courts recognize a policy favoring the full and prompt payment of
14 wages to employees. Defendants' payroll card program is inconsistent with this policy and for
15 the reasons alleged herein violates California Labor Code sections 212 and 213. Plaintiffs and
16 other non-party Aggrieved Employees are therefore entitled to recover civil penalties pursuant
17 to Labor Code sections 225.5 and/or 2699(a), (f), and (g).

18 **COLLECTING OR RECEIVING WAGES ALREADY PAID**
19 **VIOLATION OF LABOR CODE SECTIONS 221 AND 224**

20 125. At all times relevant, California Labor Code section 221 provides that it shall be
21 unlawful for any employer to collect or receive from an employee any part of wages theretofore
22 paid by said employer to said employee. California Labor Code section 224 also provides in
23 pertinent part that it is lawful to withhold a portion of the employee's wages if "a deduction is
24 expressly authorized in writing by the employee."

25 126. During the relevant time period, Defendants unlawfully deducted a portion of
26 wages previously paid to Plaintiffs and other non-party Aggrieved Employees in violations of
27 California Labor Code section 221. Defendants systematically, and on a company-wide basis,
28 provided Plaintiffs and other non-party Aggrieved Employees with payroll debit cards as

1 payment of their wages and/or final wages. Under Defendants' payroll debit card program,
2 Plaintiffs and other non-party Aggrieved Employees were assessed various fees in connection
3 with their use of the payroll debit cards. Plaintiffs and other non-party Aggrieved Employees
4 were required to pay per-transaction fees, ATM fees, in-person teller fees, and/or other fees to
5 obtain and/or spend their earned and due wages. The fees charged to Plaintiffs and other non-
6 party Aggrieved Employees resulted in a discount of their wage.

7 127. Defendants' payroll debit card program, which resulted in a discount of wages
8 to employees, is tantamount to taking deductions from Plaintiffs' and other non-party Aggrieved
9 Employees' paychecks without their written authorization and therefore constitutes an unlawful
10 deduction of wages, in violation of Labor Code sections 221 and 224.

11 128. Plaintiffs and other non-party Aggrieved Employees are therefore entitled to
12 recover civil penalties pursuant to Labor Code sections 225.5 and/or 2699(a), (f), and (g).

13 **SECRET PAYMENT OF A LOWER WAGE**

14 **VIOLATION OF LABOR CODE SECTION 223**

15 129. At all times, California Labor Code section 223 makes it unlawful for an
16 employer to secretly pay wages lower than required by statute while purporting to pay legal
17 wages.

18 130. During the relevant time period, Defendants willfully and systematically issued
19 payroll debit cards to Plaintiffs and other non-party Aggrieved Employees. The payroll debit
20 cards discounted the wages of Plaintiffs and other non-party Aggrieved Employees by charging
21 various fees in connection with the use of the payroll debit cards. Defendants' payroll debit
22 card program resulted in the payment of less than statutorily required wages to Plaintiffs and
23 other non-party Aggrieved Employees. In doing so, Defendants acted with the intent to deprive
24 Plaintiffs and other non-party Aggrieved Employees of statutory wages, including, but not
25 limited to, overtime wages and minimum wages, to which they were entitled to under California
26 law. Thus, Defendants paid Plaintiffs and other non-party Aggrieved Employees lower wages
27 than those they were entitled to while purporting that Plaintiffs and other non-party Aggrieved
28 Employees were properly paid.

1 131. Defendants' failure to pay Plaintiffs and other non-party Aggrieved Employees
2 the correct designated wage, while purporting to pay legal wages, is a violation of California
3 Labor Code section 223. Plaintiffs and other non-party Aggrieved Employees are therefore
4 entitled to recover civil penalties pursuant to Labor Code sections 225.5 and/or 2699(a), (f), and
5 (g).

6 **FAILURE TO PAY COSTS OF MEDICAL OR PHYSICAL EXAMINATION**

7 **VIOLATION OF LABOR CODE SECTION 222.5**

8 132. At all relevant times herein, California Labor Code section 222.5 requires
9 employers to pay for the costs an employee incurs for obtaining any required medical or physical
10 examination.

11 133. During the relevant time period, Defendants implemented, on a company-wide
12 basis, an employer-imposed requirement that Plaintiff Mayo Jijon and other non-party
13 Aggrieved Employees undergo mandatory drug testing and/or physical examinations upon
14 hiring, but required them to do so at their own expense. As stated, Defendants had a company-
15 wide policy requiring that all employees travel to a specified medical facility on their own time
16 and use their own means of transportation to undergo drug testing and/or physical examinations.
17 At all times, Defendants were in control of scheduling the date and time for the testing and/or
18 examinations, selecting the provider/facility where the testing and/or examinations were to take
19 place, and determining the scope of the testing and/or examinations.

20 134. For example, Plaintiff Mayo Jijon followed Defendants' instructions to obtain a
21 drug test, traveled for approximately 30-40 minutes roundtrip from Defendants' office to Pacific
22 Medical Clinic, located at 1534 E. Warner Avenue, Suite A, Santa Ana, and spent approximately
23 two (2) hours waiting at the medical facility and undergoing the mandatory drug test. However,
24 Defendants did not compensate Plaintiff Mayo Jijon and other non-party Aggrieved Employees
25 for the time they spent traveling to and from the medical facilities, the time they spent
26 undergoing the drug testing and/or physical examinations, or reimburse them for the travel
27 expenses they incurred getting to and from the medical facilities. Defendants' policy and/or
28 practice of not paying for all costs Plaintiff Mayo Jijon and other non-party Aggrieved

1 Employees incurred obtaining mandatory drug testing and/or physical examinations is in
2 violation of California Labor Code section 222.5.

3 135. Plaintiff Mayo Jijon and other non-party Aggrieved Employees are therefore
4 entitled to recover civil penalties pursuant to Labor Code sections 2699(a), (f), and (g).

5 **FAILURE TO REIMBURSE NECESSARY BUSINESS EXPENSES**

6 **VIOLATION OF LABOR CODE SECTION 2802**

7 136. At all times herein set forth, California Labor Code section 2802 provides that
8 an employer must reimburse employees for all necessary expenditures and losses incurred by
9 the employee in the performance of his or her job. The purpose of Labor Code section 2802 is
10 to prevent employers from passing off their cost of doing business and operating expenses on
11 to their employees. *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1144
12 (2014). The applicable wage order, IWC Wage Order 5-2001, provides that: "[w]hen the
13 employer requires the use of tools or equipment or they are necessary to the performance of a
14 job, such tools and equipment shall be provided and maintained by the employer, except that an
15 employee whose wages are at least two (2) times the minimum wage may provide and maintain
16 hand tools and equipment customarily required by the particular trade or craft."

17 137. During the relevant time period, Defendants, on a company-wide basis, required
18 Plaintiffs and other non-party Aggrieved Employees to wear uniforms bearing the company
19 logo (including shirts, safety vests, and/or hats) on a daily basis, but only provided their
20 employees one safety vest and one hat, which forced Plaintiffs and other non-party Aggrieved
21 Employees to launder their uniforms more frequently than they would otherwise do laundry,
22 and incur expenses in doing so. Thus, Defendants failed to provide Plaintiffs and other non-
23 party Aggrieved Employees with an adequate number of uniforms in relation to their scheduled
24 shifts and for the tasks they were required to perform, forcing Plaintiffs and other non-party
25 Aggrieved Employees to incur laundry expenses for the upkeep of their uniforms, as the nature
26 of their work resulted in their uniforms becoming soiled, sweaty, acquire an unpleasant odor,
27 and/or stained with toxic chemicals, such that they were unable to mix these clothes in with
28 their other laundry.

138. For example, Plaintiff Mayo Jijon had to wash his uniform items separately from any other clothing items and incurred additional utility and laundry expenses. As another example, Plaintiff Cruz had to wash his uniform items separately from any other clothing items at a laundromat, thus incurring additional laundry expenses, usually at a cost of approximately \$10 per month. Therefore, Defendants failed to maintain uniforms they required Plaintiffs and other non-party Aggrieved Employees to wear during their shifts and forced them to incur the cost of maintaining employee uniforms.

139. Defendants could have provided Plaintiffs and other non-party Aggrieved Employees with the actual tools for use on the job, such as an adequate number of uniforms or access to laundering services. Or, Defendants could have reimbursed employees for their laundering expenses. Instead, Defendants passed these operating costs off onto Plaintiffs and other non-party Aggrieved Employees. At all relevant times, Plaintiffs did not earn at least two (2) times the minimum wage.

140. Plaintiffs and other non-party Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor Code sections 2699(a), (f), and (g).

**FAILURE TO PROVIDE WRITTEN NOTICE OF MATERIAL TERMS OF
EMPLOYMENT**

VIOLATION OF LABOR CODE SECTION 2810.5 (a)(1)(A)-(C)

141. California's Wage Theft Prevention Act was enacted to ensure that employers provide employees with basic information material to their employment relationship at the time of hiring, and to ensure that employees are given written and timely notice of any changes to basic information material to their employment. Codified at California Labor Code section 2810.5, the Wage Theft Prevention Act provides that at the time of hiring, an employer must provide written notice to employees containing basic and material payroll information, including, among other things, the rate(s) of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, the regular payday designated by the employer, and any allowances claims as part of the minimum wage, including meal or lodging allowances. Labor Code § 2810.5(a)(1)(A)-(C).

142. During the relevant time period, Defendants failed to provide Plaintiffs and other non-party Aggrieved Employees with written notice that lists all the requisite information set forth in Labor Code section 2810.5(a)(1)(A)-(C).

143. Defendants' failure to provide Plaintiffs and other non-party Aggrieved Employees with written notice of basic information regarding their employment with Defendants are in violation of Labor Code section 2810.5. Plaintiffs and other non-party Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor Code sections 2699(a), (f), and (g).

REQUEST FOR JURY TRIAL

Plaintiffs request a trial by jury.

PRAYER FOR RELIEF

Plaintiffs, on behalf of all other non-party Aggrieved Employees, pray for relief and judgment against Defendants, jointly and severally, as follows:

1. For civil penalties and attorneys' fees in excess of twenty-five thousand dollars (\$25,000). Plaintiffs reserve the right to amend their prayer for relief to seek a different amount.

As to the First Cause of Action

2. That the Court declare, adjudge and decree that Defendants violated the following California Labor Code provisions as to Plaintiffs and/or other non-party Aggrieved Employees: 510 and 1198 (by failing to pay all overtime compensation); 1182.12, 1194, 1197, and 1198 (by failing to pay at least minimum wages for all hours worked); 226.7, 512(a), 516, and 1198 (by failing to provide all meal periods); 226.7, 516, and 1198 (by failing to authorize and permit all rest periods); 226.7, 516, and 1198 (by failing to provide heat recovery periods); 226(a), 1174(d), and 1198 (by failing to provide accurate wage statements and maintain accurate payroll records); 204 (by failing timely to pay all earned wages during; 201, 202, and 203 (by failing timely to pay all earned wages upon termination); 212 and 213 (by failing to make earned wages accessible without discount); 221 and 224 (by collecting and/or receiving wages already paid); 223 (by secretly paying wages lower than required by statute); 222.5 (by failing to compensate for mandatory physical examinations and/or drug testing); 2802 (by failing to

1 reimburse business expenses); and 2810.5 (by failing to provide written notice of information
2 material to employment).

3 3. For civil penalties, pursuant to California Labor Code sections 210, 225.5, 226.3,
4 256, 558, 1174.5, and 2699 (a), (f), and (g), for violations of California Labor Code sections
5 201, 202, 203, 204, 212, 213, 221, 222.5, 223, 224, 226(a), 226.7, 510, 512(a), 516, 1174(d),
6 1182.12, 1194, 1197, 1198, 2802, and 2810.5;

7 4. For attorneys' fees and costs pursuant to California Labor Code section
8 2699(g)(1), and any and all other relevant statutes, for Defendants' violations of California
9 Labor Code sections 201, 202, 203, 204, 212, 213, 221, 222.5, 223, 224, 226(a), 226.7, 510,
10 512(a), 516, 1174(d), 1182.12, 1194, 1197, 1198, 2802, and 2810.5;

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

12 6. For such other and further relief as the Court may deem equitable and
13 appropriate.
14

15 Dated: February 16, 2021

Respectfully submitted,

Capstone Law APC

17
18 By: 

Bevin Allen Pike
Orlando Villalba
Daniel Jonathan
Trisha K. Monesi

Attorneys for Plaintiffs Mario Cruz
and Benito Mayo Jijon

EXHIBIT “1”

ALEXANDER LIMA
310.712.8142 Direct
Alexander.Lima@capstonelawyers.com

December 11, 2020

VIA ONLINE SUBMISSION

California Labor & Workforce Development Agency
ATTN: PAGA Administrator
(<https://dir.tfaforms.net/295>)

Subject: *Mario Cruz v. Bemus Landscape, Inc.*

Dear PAGA Administrator:

This office represents Mario Cruz in connection with his claims under the California Labor Code. Mr. Cruz was an employee of BEMUS LANDSCAPE, INC. ("BEMUS").

The employer may be contacted directly at the address below:

BEMUS LANDSCAPE, INC.
951 CALLE NEGOCIO, SUITE D
SAN CELMENTE, CA 92673

BEMUS LANDSCAPE, INC.
PO BOX 74268
SAN CLEMENTE, CA 92673

Mr. Cruz intends to seek civil penalties, attorney's fees, costs, and other available relief for violations of the California Labor Code, which are recoverable under sections 2698, *et seq.*, the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Mr. Cruz seeks relief on behalf of himself, the State of California, and other persons who are or were employed by BEMUS in California as a non-exempt, hourly paid employee and who received at least one wage statement ("aggrieved employees"). This letter is sent in compliance with the notice and reporting requirements of California Labor Code section 2699.3.

BEMUS employed Mr. Cruz as a non-exempt, hourly paid Gardener from approximately September 2019 to February 2020. Mr. Cruz worked for BEMUS out of its facilities in Santa Ana, California. During his employment, Mr. Cruz typically worked eight (8) hours or more per day, five (5) days per week, from 6:45 a.m. to 3:15 p.m. Mr. Cruz's primary job duties included, without limitation, installing piping and irrigation systems; operating landscaping equipment, including leaf blowers, lawnmowers, trimmers, and hedge clippers; planting and removing trees; and applying pesticides/herbicides.

BEMUS has committed one or more of the following Labor Code violations against Mr. Cruz, the facts and theories of which follow, making him an "aggrieved employee" pursuant to California Labor Code section 2699(c):¹

¹ These facts, theories, and claims are based on Mr. Cruz's experience and counsel's review of those records currently available relating to Mr. Cruz's employment. Discovery conducted in litigation of wage and hour

BEMUS's Company-Wide and Uniform Payroll and HR Practices

BEMUS LANDSCAPE, INC. is a California corporation and provides full-service landscape management throughout Southern California. Upon information and belief, BEMUS maintains a single, centralized Human Resources (HR) department at its corporate headquarters in San Clemente, California, for all non-exempt, hourly paid employees working for BEMUS in California, including Mr. Cruz and other aggrieved employees. At all relevant times, BEMUS issued and maintained uniform, standardized scheduling and timekeeping practices and procedures for all non-exempt, hourly paid employees in California, including Mr. Cruz and other aggrieved employees, regardless of their location or position.

Upon information and belief, BEMUS maintains a centralized Payroll department at its corporate headquarters in San Clemente, California, which processes payroll for all non-exempt, hourly paid employees working for BEMUS in California, including Mr. Cruz and other aggrieved employees. Further, BEMUS issues the same formatted wage statements in the same manner for all non-exempt, hourly paid employees working in California, including Mr. Cruz and other aggrieved employees, irrespective of their location, position, or manner in which each employee's employment ended. In other words, BEMUS utilized the same methods and formulas when calculating wages due to Mr. Cruz and other aggrieved employees in California.

Violation of California Labor Code §§ 510 and 1198 – Unpaid Overtime

California Labor Code sections 510 and 1198 and the applicable Industrial Welfare Commission ("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 (1½) 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. An employee's regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee, including nondiscretionary bonuses and incentive pay.

BEMUS willfully failed to pay all overtime wages owed to Mr. Cruz and other aggrieved employees. During the relevant time period, Mr. Cruz and other aggrieved employees were not paid overtime premiums for all of the hours they worked in excess of eight (8) hours in a day, in excess of twelve (12) hours in a day, and/or in excess of forty (40) hours in a week, because all hours that they worked were not recorded.

First, during the relevant period, BEMUS had, and continues to have, a company-wide policy and/or practice of failing to accurately record hours worked by its employees and thus restricted overtime accrual. BEMUS did not provide employees with any mechanism, such as a handwritten timesheet, time clock, or electronic timekeeping system, to track and record their hours worked. Instead, BEMUS had its supervisors input all employee time through the Aspire Crew Mobile App, which was only accessible to BEMUS supervisors, and thus maintained exclusive control and discretion over employee punch-in and punch-out times. Thus, Mr. Cruz and other aggrieved employees could only be clocked in and clocked out when they physically located their BEMUS supervisor, but would not be compensated for the time

claims such as these often reveals additional claims that the aggrieved employee was not initially aware of (because the aggrieved employee was not aware of the law's requirements, the employer misinformed its employee of the law's requirements, or because the employer effectively hid the violations). Thus, Mr. Cruz reserves the right to supplement this letter with additional facts, theories, and claims if he becomes aware of them subsequent to the submission of this letter.

they remained under the control of BEMUS before their supervisors clocked them in or after their supervisors clocked them out.

For example, BEMUS required Mr. Cruz and other aggrieved employees to report to BEMUS's main yard before their scheduled shift start-time for "sign-in," which included the loading of gardening equipment onto BEMUS's gardening trucks and waiting for the coordination of carpools to job sites, all before their BEMUS supervisors clocked them in. As result, BEMUS did not compensate Mr. Cruz and other aggrieved employees for this time worked. Additionally, BEMUS did not compensate Mr. Cruz and other aggrieved employees for the time they spent unloading gardening trucks upon their return to BEMUS's main yard and after BEMUS supervisors clocked them out. Because BEMUS failed to provide Mr. Cruz and other aggrieved employees with any mechanism to record their actual hours worked themselves and, instead, granted BEMUS supervisors exclusive control and discretion over employee time records, Mr. Cruz and other aggrieved employees were not paid for all hours worked.

Second, BEMUS's company-wide timekeeping practices and/or policies did not permit employees, including Mr. Cruz and other aggrieved employees, to accurately track the start and stop times of their meal periods or allow them to report a short, missed, or interrupted meal period. As stated, because BEMUS's supervisors logged the start and stop times of meal periods through the Aspire Crew Mobile App, which Mr. Cruz and other aggrieved employees did not have access to, BEMUS, upon information and belief, would record that compliant meal periods were taken, even if that was not the case. For example, Mr. Cruz and other aggrieved employees would have their meal periods interrupted and/or cut short 15 minutes four (4) days per week, in order to complete their work duties, but were unable to record that their meal periods were shortened. As a result, BEMUS's supervisors recorded 30-minute meal periods were taken, even when they were not, and Mr. Cruz and other aggrieved employees were not paid for all hours worked.

Third, BEMUS has systematically, and on a company-wide basis, understaffed its job sites, pursuant to its labor budget practices, while assigning heavy workloads, thereby failing to provide adequate meal period coverage to permit employees to take compliant meal periods. Further, BEMUS's customer/client management practices led to the creation of "punch lists" wherein BEMUS's management would create lists of additional tasks that gardening crews were required to complete based on customer/client feedback. Because BEMUS understaffed its job sites, there was no one available to relieve employees needing meal period coverage, and Mr. Cruz and other aggrieved employees were not always afforded uninterrupted 30-minute meal periods during shifts when they were entitled to receive a meal period. For example, Mr. Cruz and other aggrieved employees were required to work through and/or return early from meal periods, in order to complete their assigned tasks. Consequently, Mr. Cruz and other aggrieved employees performed work during meal periods for which they were not paid.

Additionally, due to the lack of meal period coverage, BEMUS required Mr. Cruz and other aggrieved employees to remain on or near the job site premises for their meal periods. Because Mr. Cruz and other aggrieved employees were restricted from leaving the premises during meal periods, they were denied the ability to use their meal periods freely for their own purposes. Thus, BEMUS effectively maintained control over Mr. Cruz and other aggrieved employees during meal periods. BEMUS also had a company-wide practice and/or policy of failing to schedule meal periods, which further caused Mr. Cruz and other aggrieved employees to not be relieved of their duties for compliant meal periods.

BEMUS knew or should have known that, as a result of these company-wide practices and/or policies, Mr. Cruz and other aggrieved employees were performing work off-the-clock before or after their shifts and during their meal periods, and were suffered or permitted to perform work for which they were not paid. BEMUS also knew, or should have known, that it did not compensate Mr. Cruz and other aggrieved employees applicable overtime rates of pay for overtime hours that they worked.

Because Mr. Cruz and other aggrieved employees regularly worked shifts of eight (8) hours a day or more or forty (40) hours a week or more, some of this off-the-clock work qualified for overtime premium pay. Therefore, Mr. Cruz and other aggrieved employees were not paid overtime wages for all of the overtime hours they actually worked. BEMUS's failure to pay Mr. Cruz and other aggrieved employees the balance of overtime compensation, as required by California law, violates the provisions of California Labor Code sections 510 and 1198.

Furthermore, on information and belief, BEMUS did not pay other aggrieved employees the correct overtime rate for the recorded overtime hours that they generated. In addition to an hourly wage, BEMUS paid other aggrieved employees incentive pay, nondiscretionary bonuses, and/or other forms of remuneration. However, in violation of the California Labor Code, BEMUS failed to incorporate all compensation, including incentive pay, nondiscretionary bonuses, and/or other forms of remuneration, into the calculation of the regular rate of pay for purposes of calculating the overtime wage rate. Therefore, during times when other aggrieved employees worked overtime and received these other forms of pay, BEMUS failed to pay all overtime wages by paying a lower overtime rate than required.

For example, BEMUS paid other aggrieved employees nondiscretionary bonuses or incentive pay. On information and belief, these nondiscretionary bonuses and/or incentive pay were listed on other aggrieved employees' wage statements as "Ref. Incentive." During pay periods that other aggrieved employees were paid overtime wages, BEMUS failed to incorporate the nondiscretionary bonuses and/or incentive pay into other aggrieved employees' regular rate of pay and, as a result, paid them at incorrect and lower rates of pay for overtime hours worked. Specifically, BEMUS paid other aggrieved employees 1.5 times their hourly rate of pay instead of 1.5 times their regular rate of pay. BEMUS's failure to properly calculate the overtime rates of pay based on all remuneration paid has resulted in an underpayment of overtime wages to other aggrieved employees on a company-wide basis.

Mr. Cruz and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 1182.12, 1194, 1197, 1197.1, and 1198 – Unpaid Minimum Wages

California Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198 require employers to pay employees the minimum wage fixed by the IWC. The payment of a lesser wage than the minimum so fixed is unlawful. Compensable work time is defined in Wage Order No. 5 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").

As set forth above, as result of BEMUS's company-wide policy and/or practice of not permitting employees to record all their hours worked and limiting overtime accrual, BEMUS failed to record all hours worked outside scheduled shifts or during meal periods. Also, as stated above, BEMUS maintained a policy and/or practice requiring Mr. Cruz and other aggrieved employees to perform work off-the-clock prior to clocking in at the start of their shifts and after the end of their shifts. Furthermore, due to BEMUS's policies and/or practices of understaffing while assigning heavy workloads of completing daily crew punch lists, requiring employees to stay on or near the job site premises during meal periods, and failure to schedule meal periods, Mr. Cruz and other aggrieved employees were forced to forego meal periods, have their meal periods interrupted, and/or were otherwise not relieved of all duties during meal periods.

Moreover, BEMUS maintained and implemented a company-wide policy of requiring employees to travel to a medical facility on their own time to undergo mandatory drug testing and/or physical examinations. At all times, BEMUS was in control of scheduling the date and time for the testing and/or physical examinations, selecting the provider or facility where the testing and/or physical examinations were to take place, and determining the scope of the testing and/or physical examinations. For example, BEMUS gave other aggrieved employees strict instructions to obtain drug testing and/or physical examinations, and other aggrieved employees underwent the testing and/or examinations for the sole benefit of BEMUS. Other aggrieved employees were required to travel for approximately 30-40 minutes roundtrip from BEMUS's office to Pacific Medical Clinic, located at 1534 E. Warner Avenue, Suite A, Santa Ana, and spend time undergoing the mandatory drug testing and/or physical examinations. However, BEMUS did not compensate other aggrieved employees for the time they spent traveling to and from the medical facilities and undergoing the mandatory drug testing and/or physical examinations.

Thus, BEMUS did not pay minimum wages for all hours worked by Mr. Cruz and other aggrieved employees. To the extent that these off-the-clock hours did not qualify for overtime premium payment, BEMUS did not pay at least minimum wages for those hours worked off-the-clock in violation of California Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198. Accordingly, BEMUS regularly failed to pay at least minimum wages to Mr. Cruz and other aggrieved employees for all of the hours they worked in violation of California Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198.

Mr. Cruz and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 1197.1 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226.7, 512(a), 516, and 1198 – Failure to Provide Meal Periods

California Labor Code sections 226.7, 512(a), 516, and 1198 and the applicable IWC Wage Order require employers to provide meal periods and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal or rest period 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 period 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.

First, as stated, BEMUS did not have a mechanism in place for employees to track and record the start and stop times of their meal periods. Instead, BEMUS gave its supervisors exclusive control and discretion over employee punch-in and punch-out times, including meal period start and stop times, through the Aspire Crew Mobile App. Because Mr. Cruz and other aggrieved employees did not have access to the timekeeping system, they were unable to record when their meal periods were late, interrupted or cut short. Thus, Mr. Cruz and other aggrieved employees were forced to work off-the clock during their meal periods, but were not provided a means by BEMUS to account for this time worked during meal periods.

Second, as stated, BEMUS had, and continues to have, company-wide policies and/or practices of utilizing labor budgets, understaffing while assigning heavy workloads, and failing to schedule meal periods, which prevented Mr. Cruz and other aggrieved employees from taking timely, uninterrupted 30-minute meal periods to which they were entitled. As a result, Mr. Cruz and other aggrieved employees were forced to work in excess of five (5) hours before taking a meal period and, at times, had their meal periods interrupted. For example, Mr. Cruz was required to take his meal periods late after having worked in excess of five (5) hours or more into his shift, and, at times, would have his meal periods interrupted to complete work duties or to discuss work assignments.

Furthermore, as stated above, in conjunction with these policies and/or practices, BEMUS required Mr. Cruz and other aggrieved employees to remain on the premises for their meal periods. Because Mr. Cruz and other aggrieved employees were restricted from leaving the premises during meal periods, they were denied the ability to use their meal periods freely for their own purposes. Thus, BEMUS effectively maintained control over other aggrieved employees during meal periods. Consequently, Mr. Cruz and other aggrieved employees suffered interrupted meal periods and/or missed meal periods.

Third, BEMUS did not provide other aggrieved employees with second 30-minute meal periods on days that they worked in excess of ten (10) hours in one day. Upon information and belief, other aggrieved employees worked in excess of 10 hours per day but were not provided with second 30-minute meal periods. Mr. Cruz and other aggrieved employees did not sign valid meal period waivers on days that they were entitled to meal periods and were not relieved of all duties.

Furthermore, BEMUS had a company-wide policy of requiring all newly hired employees to sign blanket meal period waivers at or near their time of hire. BEMUS took the position that non-exempt, hourly paid employees had waived their rights to second meal periods for the entirety of their employment and on that basis did not provide them with all meal periods to which they were entitled. BEMUS's presumption that second meal periods would not be provided for shifts in excess of ten (10) hours but less than twelve (12) hours due to use of blanket second meal period waivers, and imposition of the burden on employees to revoke the meal period waiver in writing, discouraged and impeded other aggrieved employees from taking all second meal periods to which they were entitled.

In addition, an employer's obligation to provide a meal period is only "triggered" when the employer "employs an employee for a work period of more than five hours per day." *Brinker*, 53 Cal. 4th at 1039 ("If an employer engages, suffers, or permits anyone to work for a full five hours, its meal break obligation is triggered.").

[A]fter the meal break obligation is triggered . . . an employer is put to a choice: it must (1) afford an off-duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on-duty meal period if circumstances permit. Failure to do one of these will render the employer liable for premium pay. *Id.* (citing Cal. Labor Code § 226.7; Wage Order No. 5, subd. 11(A), (B)).

That BEMUS requires employees to sign meal period waivers in advance (as opposed to on a specific work day) renders them invalid and unenforceable, because BEMUS's obligation to provide other aggrieved employees with meal periods did not arise until BEMUS had employed them for a full five (5) hours.

At all times herein mentioned, BEMUS knew or should have known that, as a result of these policies, Mr. Cruz and other aggrieved employees were prevented from being relieved of all duties and required to perform some of their assigned duties during meal periods. BEMUS further knew or should have known

that BEMUS did not pay Mr. Cruz and other aggrieved employees meal period premium wages when meal periods were late, interrupted, shortened, or missed.

Furthermore, BEMUS engaged in a company-wide practice and/or policy of not paying all meal period premiums owed when compliant meal periods are not provided. Because of this practice and/or policy, Mr. Cruz and other aggrieved employees have not received premium pay for all missed, interrupted, or late meal periods. Alternatively, to the extent that BEMUS did pay other aggrieved employees for missed, late, and interrupted meal periods, BEMUS did not pay other aggrieved employees at the correct rate of pay for premium wages because BEMUS systematically failed to include all forms of compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms of remuneration in the regular rate of pay.

Accordingly, BEMUS failed to provide all meal periods in violation of California Labor Code sections 226.7, 512, 516, and 1198. Mr. Cruz and other aggrieved employees are therefore entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226.7, 516, and 1198 – Failure to Authorize and Permit Rest Periods

California Labor Code sections 226.7, 516, 1198 and the applicable IWC Wage Order require employers to provide rest periods and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal or rest period is not provided. California 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 (3½) hours.

To comply with its obligation to authorize and permit rest periods under California 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, et al. v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 269-270 (2016).

During the relevant time period, BEMUS regularly failed to authorize and permit Mr. Cruz and other aggrieved employees to take a ten (10) minute rest period per each four (4) hour period worked or major fraction thereof. As with meal periods, BEMUS's company-wide policies and/or practices, of understaffing and assigning heavy workloads prevented Mr. Cruz and other aggrieved employees from being relieved of all duty in order to take compliant rest periods. For example, Mr. Cruz frequently missed his rest periods due to his heavy workload of completing daily punch lists. Additionally, BEMUS failed to schedule rest periods, which, coupled with BEMUS's failure to provide adequate rest period coverage, further led to Mr. Cruz and other aggrieved employees not being authorized and permitted to take compliant rest periods.

Furthermore, BEMUS maintained and implemented a company-wide practice and/or policy requiring that Mr. Cruz and other aggrieved employees remain on the work premises during their rest periods. Because Mr. Cruz and other aggrieved employees were restricted from leaving the work premises during rest periods, they were denied the ability to use their rest periods freely for their own purposes. Thus, BEMUS effectively maintained control over Mr. Cruz and other aggrieved employees during rest periods,

and, as a result of this rest period policy, BEMUS did not relinquish control over Mr. Cruz and other aggrieved employees during rest periods.

As a result of BEMUS's practices and policies, Mr. Cruz and other aggrieved employees worked shifts in excess of 3.5 hours, in excess of 6 hours, and/or in excess of 10 hours without receiving all uninterrupted 10-minute rest periods to which they were entitled. For example, Mr. Cruz missed rest periods at least nine (9) times per week in order to complete all of the work-related duties BEMUS assigned to him.

BEMUS also has engaged in a company-wide practice and/or policy of not paying all rest period premiums owed when compliant rest periods are not authorized and permitted. Because of this practice and/or policy, Mr. Cruz and other aggrieved employees have not received premium pay for all missed rest periods. Alternatively, to the extent that BEMUS did pay other aggrieved employees one (1) additional hour of premium pay for missed rest periods, BEMUS did not pay other aggrieved employees at the correct rate of pay for premium wages because BEMUS failed to include all forms of compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms of remuneration, in the regular rate of pay.

Accordingly, BEMUS failed to authorize and permit all rest periods in violation of California Labor Code sections 226.7, 516, and 1198. Mr. Cruz and other aggrieved employees are therefore entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226.7, 516, and 1198 & California Code of Regulations Title 8, Section 3395 – Failure to Provide Heat Recovery Periods

California Labor Code section 226.7(a) defines "recovery period" to mean a cooldown period afforded an employee to prevent heat illness. California Labor Code section 226.7 provides that no employer shall require an employee to work during any recovery period mandated by an applicable order of the California IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The applicable General Industry Safety Order provides that "[w]hen the outdoor temperature in the work area exceeds 80 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling." Cal. Code of Reg., Title 8, § 3395(d)(1). Furthermore, "[t]he amount of shade present shall be at least enough to accommodate the number of employees on recovery or rest periods, so that they can sit in a normal posture fully in the shade without having to be in physical contact with each other." *Id.* "Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times." *Id.*

During the relevant time period, BEMUS violated California Labor Code section 226.7 and California Code of Regulations, Title 8, section 3395(d), because BEMUS failed to provide Mr. Cruz and other aggrieved employees with recovery periods. For example, Mr. Cruz was not provided a shaded area for recovery and was not permitted to take recovery periods in a shaded area while working at various job sites.

BEMUS also has engaged in a company-wide practice and/or policy of not paying all recovery period premiums owed when compliant recovery periods are not provided. Because of this practice and/or policy, Mr. Cruz and other aggrieved employees have not received premium pay for all missed recovery periods. Alternatively, to the extent that BEMUS did pay other aggrieved employees for missed recovery periods, BEMUS did not pay other aggrieved employees at the correct rate of pay, because BEMUS systematically failed to include all compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms of remuneration, in the regular rate of pay.

Accordingly, BEMUS failed to authorize and permit all recovery periods in violation of California Labor Code sections 226.7, 516, and 1198. Mr. Cruz and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226(a), 1174(d), and 1198 – Non-Compliant Wage Statements and Failure to Maintain Accurate Payroll Records

California Labor Code section 226(a) requires employers to make, keep and provide true, accurate, and complete employment records. BEMUS has not provided Mr. Cruz and other aggrieved employees with properly itemized wage statements. Labor Code section 226(e) provides that if an employer fails to comply with providing an employee with properly itemized wages statements as set forth in 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, BEMUS has knowingly and intentionally provided Mr. Cruz and other aggrieved employees with uniform, incomplete, and inaccurate wage statements. For example, BEMUS issued uniform wage statements to Mr. Cruz and other aggrieved employees that fail to correctly list: gross wages earned; total hours worked; net wages earned; and all applicable hourly rates in effect during the pay period, including overtime rates of pay, and the corresponding number of hours worked at each hourly rate. Specifically, BEMUS violated sections 226(a)(1), 226(a)(2), 226(a)(5), and 226(a)(9).

Because BEMUS did not record the time spent Mr. Cruz and other aggrieved employees spent working off-the-clock, BEMUS did not list the correct amount of gross wages and net wages earned by Mr. Cruz and other aggrieved employees, in compliance with section 226(a)(1) and 226(a)(5), respectively. For the same reason, BEMUS failed to accurately list the total number of the hours worked by Mr. Cruz and other aggrieved employees, in violation of section 226(a)(2), and failed to list the applicable hourly rates of pay in effect during the pay period and the corresponding accurate number of hours worked at each hourly rate, in violation of section 226(a)(9).

Also, because BEMUS did not calculate other aggrieved employees' regular rate of pay correctly for purposes of paying overtime wages, BEMUS did not list the correct amount of gross wages earned by other aggrieved employees in compliance with section 226(a)(1) and did not list the correct amount of net wages earned by other aggrieved employees in violation of section 226(a)(5). BEMUS also failed to correctly list all applicable hourly rates in effect during the pay period, namely, correct overtime rates of pay and correct rates of pay for premium wages, in violation of section 226(a)(9).

The wage statement deficiencies also include, among other things, failing to list the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; failing to list all deductions; failing to list 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; failing to list the name and address of the legal entity that is the employer; failing to list the inclusive dates of the period for which aggrieved employees were paid; and/or failing to state all hours worked as a result of not recording or stating the hours they worked off-the-clock.

California 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 “[keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. . . .” Labor Code section 1174.5 provides that employers are subject to a \$500 civil penalty if they fail to maintain accurate and complete records as required by section 1174(d). During the relevant time period, and in violation of Labor Code section 1174(d), BEMUS willfully failed to maintain accurate payroll records for Mr. Cruz and other aggrieved employees showing the daily hours they worked and the wages paid thereto as a result of failing to record the off-the-clock hours that they worked.

California Labor Code section 1198 provides that the maximum hours of work and the standard conditions of labor shall be those fixed by the Labor Commissioner and as set forth in the applicable IWC Wage Orders. Section 1198 further provides that “[t]he employment of any employees for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.” Pursuant to the applicable IWC Wage Order, employers are required to keep accurate time records showing when the employee begins and ends each work period and meal period. During the relevant time period, BEMUS failed, on a company-wide basis, to keep accurate records of work period and meal period start and stop times for Mr. Cruz and other aggrieved employees, in violation of section 1198. Furthermore, in light of BEMUS’s failure to provide other aggrieved employees with second 30-minute meal periods to which they were entitled, BEMUS kept no records of meal start and end times for second meal periods.

Because BEMUS failed to provide the correct net and gross wages earned, applicable rates of pay, and number of total hours worked on wage statements, Mr. Cruz and other aggrieved employees have been prevented from verifying, solely from information on the wage statements themselves, that they were paid correctly and in full. Instead, Mr. Cruz and other aggrieved employees have had to look to sources outside of the wage statements themselves and reconstruct time records to determine whether in fact they were paid correctly and the extent of underpayment, thereby causing them injury.

Mr. Cruz and other aggrieved employees are entitled to recover civil penalties, attorney’s fees, costs, and interest thereon pursuant to Labor Code sections 226.3, 1174.5, and/or 2699(a), (f)-(g).

Violation of California Labor Code § 204 – Failure to Timely Pay Wages During Employment

California Labor Code section 204 requires that all wages earned by any person in any employment between the 1st and the 15th days, inclusive, 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, and that all wages earned by any person in any employment between the 16th and the last day, inclusive, 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. California 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, California 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, BEMUS failed to pay Mr. Cruz and other aggrieved employees all wages due to them, including, but not limited to, overtime wages; minimum wages; and/or meal, rest, and recovery period premium wages, within any time period specified by California Labor Code section 204.

Mr. Cruz and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 210 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 201, 202, and 203 – Failure to Timely Pay Final Wages Upon Termination

California Labor Code sections 201, 202, and 203 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and 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.

BEMUS willfully failed to pay Mr. Cruz and other aggrieved employees who are no longer employed by BEMUS all their earned wages, including, but not limited to, overtime wages; minimum wages; and/or meal, rest, and recovery premium wages, either at the time of discharge, or within seventy-two (72) hours of their leaving BEMUS employ in violation of California Labor Code sections 201, 202, and 203.

Mr. Cruz and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 256 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 212 and 213 – Unlawful Direct Deposit and Discount of Wages

California Labor Code section 212 prohibits employers from issuing any instruments for the payment of wages unless such instruments are negotiable and payable in cash on demand and without discount. California Labor Code section 213 permits employers to pay employees via direct deposit so long as the employee authorizes payment via direct deposit. Under California law, employers are also permitted to fulfill their wage payment obligations to employees by using payroll debit cards, but only under certain circumstances. Employer use of payroll debit cards is permitted only so long as the employee is given the choice as to whether to accept a payroll debit card as a form of payment. *Johnson v. Sunrise Senior Living Management, Inc.*, No. 16 CV 00443 BRO RAOx, 2016 WL 8929249, *9 (C.D. Cal. May 5, 2016). In *Johnson*, the court stated that the Division of Labor Standards Enforcement ("DLSE") decision deeming payroll debit card program permissible relied heavily on:

. . . [T]he fact that the pay programs were optional, thereby allowing an employee to either participate in the program or receive his or her pay in some other way, such as direct deposit. Specifically, the DLSE opined that "[t]he success of the described procedure, in practice, will of course require that . . . it is presented as an *alternative* method for wage payment for which [the employees'] participation is optional." The DLSE also stated, "[i]t is significant that the program does not mandate employee participation in the Money Network Service and that it is designed to provide an alternative for employees receiving their wage payment. Employees are also given the option of having their pay direct deposited into an account of their choosing. . . ." (internal citations omitted).

In addition, employers can only utilize payroll debit card programs if they provide employees with effective access to their wages without discount. The DLSE has interpreted Labor Code sections 212 and 213 as permitting employer use of payroll debit cards where the following requirements are satisfied:

- (1) [T]he “wages [are] payable at some established place of business in the state and there be at least 30 days of sufficient funds for payment,”
- (2) the employees are “fully informed of the service and procedures and that it is represented as an alternative method for wage payment for which their participation is optional,”
- (3) the employees receive “an itemized wage statement,” and
- (4) “at least one transaction per pay period [is] without fee.”

Ortiz v. Randstad North America, L.P., No. C-13-5050 MMC, 2015 WL 6202298 at 3.

Further, the DLSE notes that the Labor Code manifests:

... [A] strong public policy that prohibits an employer (or its agent) from imposing conditions or obstacles which interfere with or prevent an employee’s (*sic*) from promptly receiving their due wages *in full*. The imposition of a fee in order to readily *access* one’s earned and paid wages under a payroll card program which is designed to discharge the employer’s wage payment obligations could impermissibly interfere with an employee’s receipt of paid wages by creating a financial condition which would have the *effect* of reducing or discounting wages because such fee would be charged against the same account in which wages are deposited. (emphases in original)

DLSE opinion letter 2008.07.07. The DLSE has also acknowledged that payroll service providers “effectively act as *agents* of the client employers in discharging the employer’s wage payment obligations.” *Id.* In a second opinion letter, the DLSE stated that “[w]hile the Labor Code does not purport to regulate the specific arrangements between employers and payroll service providers, both an employer and, under the express language in Labor Code § 212- their *agent*, must comply with its requirements.” *DLSE opinion letter* 2008.07.07.2.

During the relevant time period, BEMUS had an agreement with a payroll service provider for the issuance of payroll cards to employees, including Mr. Cruz and other aggrieved employees, to discharge its wage payment obligations to its employees. Upon information and belief, BEMUS’s payroll debit card program was not voluntary or optional to Mr. Cruz and other aggrieved employees. BEMUS had a practice and/or policy of automatically issuing payroll debit cards to Mr. Cruz and other aggrieved employees without giving them the option to elect their form of payment for their wages. Mr. Cruz and other aggrieved employees received their wages on a payroll debit card without a choice of an alternative method, including a written check.

Moreover, under BEMUS’s payroll debit program, BEMUS did not permit Mr. Cruz and other aggrieved employees to withdraw their entire wages in at least one transaction without incurring a fee. For example, Mr. Cruz utilized ATMs to try to withdraw his wages, but could not obtain the entire amount because ATMs only disburse cash in limited denominations. Additionally, Mr. Cruz also encountered approximately \$3.00 in ATM fees each time he utilized an ATM to withdraw funds from his payroll debit card, and an approximately 50-cent charge when utilizing his payroll debit card in point-of-sale merchant transactions, which resulted in a discount in his pay.

California courts recognize a policy favoring the full and prompt payment of wages to employees. BEMUS’s payroll card program is inconsistent with this policy. Because BEMUS’s company-wide payroll debit card program is involuntary and denies aggrieved employees of easy access to the entirety of their wages, the program violates California Labor Code sections 212 and 213. Mr. Cruz and other

aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 225.5 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 221 and 224 – Unlawful Deductions

California Labor Code section 221 provides that it shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee. California Labor Code section 224 also provides in pertinent part that it is lawful to withhold a portion of the employee's wages if "a deduction is expressly authorized in writing by the employee." During the relevant time period, BEMUS unlawfully deducted a portion of wages previously paid to Mr. Cruz and other aggrieved employees in violation of California Labor Code section 221.

BEMUS systematically, and on a company-wide basis, provided Mr. Cruz and other aggrieved employees with payroll debit cards as payment of their wages and/or final wages. Under BEMUS's payroll debit card program, Mr. Cruz and other aggrieved employees were assessed various fees in connection with their use of the payroll debit cards. Mr. Cruz and other aggrieved employees were required to pay per-transaction fees, ATM fees, in-person teller fees, and/or other fees to obtain and/or spend their earned and due wages. The fees charged to Mr. Cruz and other aggrieved employees resulted in a discount of their wages.

BEMUS's payroll debit card program, which resulted in a discount of wages to employees, is tantamount to taking deductions from Mr. Cruz's and other aggrieved employees' paychecks without their written authorization and therefore constitutes an unlawful deduction of wages, in violation of Labor Code sections 221 and 224. Mr. Cruz and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 225.5 and/or 2699(a), (f)-(g).

Violation of California Labor Code § 223 – Secret Payment of Lower Wages

California Labor Code section 223 makes it unlawful for an employer to secretly pay wages lower than required by statute while purporting to pay legal wages.

During the relevant time period, BEMUS willfully and systematically issued payroll debit cards to Mr. Cruz and other aggrieved employees. The payroll debit cards discounted the wages of Mr. Cruz and other aggrieved employees by charging various fees in connection with the use of the payroll debit cards. BEMUS's payroll debit card program resulted in the payment of less than statutorily required wages to Mr. Cruz and other aggrieved employees. In doing so, BEMUS acted with the intent to deprive Mr. Cruz and other aggrieved employees of statutory wages, including, but not limited to, overtime wages and minimum wages to which they were entitled to under California law. Thus, BEMUS paid Mr. Cruz and other aggrieved employees lower wages than those they were entitled to while purporting that Mr. Cruz and other aggrieved employees were properly paid.

Mr. Cruz and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 225.5 and/or 2699(a), (f)-(g).

Violation of California Labor Code § 222.5 – Failure to Pay for Costs of Mandatory Physical Exams and/or Drug Testing

At all times herein set forth, California Labor Code section 222.5 requires employers to pay for the costs an employee incurs for obtaining any required medical or physical examination.

During the relevant time period, BEMUS implemented, on a company-wide basis, an employer-imposed requirement that other aggrieved employees undergo mandatory drug testing and/or physical examinations, but required them to do so at their own expense. As stated, BEMUS had a company-wide policy requiring that all employees travel to a specified medical facility on their own time to undergo drug testing and/or physical examinations. At all times, BEMUS was in control of scheduling the date and time for the testing and/or physical examinations, selecting the provider/facility where the testing and/or physical examinations were to take place, and determining the scope of the testing and/or physical examinations.

However, BEMUS did not compensate other aggrieved employees for the time they spent traveling to and from their drug testing and/or physical examinations, or for the time they spent undergoing the drug testing and/or physical examinations. BEMUS's policy and/or not paying for all costs other aggrieved employees incurred undertaking mandatory drug testing and/or physical examinations is in violation of California Labor Code section 222.5.

Other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Violation of California Labor Code § 2802 – Unreimbursed Business Expenses

California 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, BEMUS required Mr. Cruz and other aggrieved employees to wear uniforms bearing the company logo (including shirts, safety vests, and/or hats) on a daily basis, but only provided their employees one safety vest and one hat, which forced Mr. Cruz and other aggrieved employees to launder their uniforms frequently and incur expenses in doing so. Thus, BEMUS failed to provide Mr. Cruz and other aggrieved employees with an adequate number of uniforms in relation to their scheduled shifts and for the tasks they were required to perform, forcing Mr. Cruz and other aggrieved employees to incur laundry expenses for the upkeep of their uniforms, as the nature of their work resulted in their uniforms becoming stained with toxic chemicals, such that they were unable to mix these clothes in with their other laundry. For example, Mr. Cruz had to wash his uniform items separately from any other clothing items at a laundromat, thus incurring additional laundry expenses, usually at a cost of approximately \$10 per month.

BEMUS could have provided Mr. Cruz and other aggrieved employees with the actual tools for use on the job, such as an adequate number of uniforms and/or access to laundering services, or could have reimbursed employees for their laundering expenses. Instead, BEMUS passed these operating costs off onto Mr. Cruz and other aggrieved employees. At all relevant times, Mr. Cruz did not earn at least two (2) times the minimum wage.

Thus, BEMUS had, and continues to have, a company-wide policy and/or practice of not reimbursing employees for expenses necessarily incurred in violation of California Labor Code section 2802. Mr.

Cruz and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Violation of California Labor Code § 2810.5(a)(1)(A)-(C) – Failure to Provide Notice of Material Terms of Employment

California's Wage Theft Prevention Act was enacted to ensure that employers provide employees with basic information material to their employment relationship at the time of hiring, and to ensure that employees are given written and timely notice of any changes to basic information material to their employment. Codified at California Labor Code section 2810.5, the Wage Theft Prevention Act provides that at the time of hiring, an employer must provide written notice to employees of the rate(s) of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, the regular payday designated by the employer, and any allowances claims as part of the minimum wage, including meal or lodging allowances. Effective January 1, 2015, an employer's written notice pursuant to section 2810.5 must also include a statement that the employee may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates.

BEMUS failed to provide Mr. Cruz and other aggrieved employees written notice that lists all the requisite information set forth in Labor Code section 2810.5(a)(1)(A)-(C). Specifically, BEMUS failed to provide Mr. Cruz and other aggrieved employees with the overtime rate(s) of pay, in violation of section 2810.5(a)(1)(A). BEMUS's failure to provide Mr. Cruz and other aggrieved employees with written notice of basic information regarding their employment with BEMUS is in violation of Labor Code section 2810.5.

Mr. Cruz and other aggrieved employees are therefore entitled to recover penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

California Labor Code § 558(a)

California Labor Code section 558(a) provides "[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. . . . (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid. . . ." 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." BEMUS, at all relevant times, was an employer or person acting on behalf of an employer(s) who violated Mr. Cruz's and other aggrieved employees' rights by violating various sections of the California Labor Code.

Accordingly, Mr. Cruz seeks the remedies set forth in Labor Code section 558 for himself, the State of California, and all other aggrieved employees. Specifically, pursuant to PAGA, and in particular California Labor Code sections 2699(a), 2699.3(a) and 2699.3(c), 2699.5, and 558, Mr. Cruz, acting in the public interest as a private attorney general, seeks assessment and collection of civil penalties for himself, all other aggrieved employees, and the State of California against BEMUS for violations of California Labor Code sections 201, 202, 203, 204, 212, 213, 221, 222.5, 223, 224, 226(a), 226.7, 510, 512, 516, 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2802, and 2810.5.

Therefore, on behalf of all aggrieved employees, Mr. Cruz seeks all applicable penalties related to these violations of the California Labor Code pursuant to PAGA.

Pre-Litigation Demand

This notice shall further serve as Mr. Cruz's reasonable attempt to settle his dispute with BEMUS prior to litigation. Pursuant to *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004), this notice serves to inform BEMUS of Mr. Cruz's aforementioned grievances and the proposed remedies as detailed below, while affording BEMUS a reasonable opportunity to satisfy Mr. Cruz's demands.

Demand is hereby made that BEMUS shall, within 30 calendar days of this notice, agree, in writing to the following corrective actions:

1. BEMUS shall pay Mr. Cruz and all other aggrieved employees employed by BEMUS at any time during the past three years from the date of this notice unpaid wages and compensation for the above-referenced violations.
2. BEMUS shall comply with all California labor laws and ensure that its non-exempt employees are paid overtime wages and minimum wages for all hours worked and provided lawful meal, rest, and recovery periods.
3. BEMUS shall conduct a survey or interview all current and former aggrieved employees in California who worked for BEMUS in the past three years to obtain information from them regarding the above-referenced violations, including, but not limited to: the number of meal periods which were not provided; the number of rest periods which were not authorized and permitted; the number of recovery periods which were not provided; and the number of employees who were required to pay for mandatory medical examinations and uniform maintenance expenses, or other expenditures in the discharge of their duties, with the investigation to be completed within 60 days.
4. BEMUS shall pay each aggrieved employee one hour of pay at his or her regular rate of pay for each work day he or she was not provided one or more meal periods, as required by Labor Code sections 226.7, 512, 516, and 1198. BEMUS also shall pay each aggrieved employee one hour of pay at his or her regular rate of pay for each work day he or she was not authorized and permitted one or more rest periods, as required by Labor Code sections 226.7, 516, and 1198. Additionally, BEMUS also shall pay each aggrieved employee one hour of pay at his or her regular rate of pay for each work day he or she was not provided one or more recovery periods, as required by Labor Code sections 226.7, 516, and 1198.
5. BEMUS shall reimburse those aggrieved employees who were required to pay for any business expenses incurred for BEMUS's benefit, including, but not limited to, costs of mandatory drug tests and uniform maintenance or laundering expenses, as required by Labor Code sections 222.5 and 2802.
6. BEMUS shall pay each aggrieved employee unpaid wages and compensation for violations arising from its unlawful use of payroll debit cards, including unlawful direct deposit and discount of wages (Labor Code sections 212 and 213), unlawful deductions (Labor Code sections 221 and 224), and secret payment of lower wages (Labor Code section 223).
7. BEMUS shall pay accrued legal interest to all aggrieved employees at the rate of 10% per annum for said unpaid wages.

8. BEMUS shall provide Mr. Cruz and all aggrieved employees employed by BEMUS at any time during the past three years from the date of this notice corrected wage statements that include the requisite information set forth in Labor Code section 226(a).
9. BEMUS shall provide all aggrieved employees written notice of basic information regarding their employment that includes the requisite information set forth in Labor Code section 2810.5(a)(1)(A)-(C).
10. BEMUS shall pay waiting time penalties, equal to 30 days of pay, to each former aggrieved employee who was not paid all wages due as described herein.
11. BEMUS shall pay all penalties arising from the violations of the Labor Code and IWC Wage Order sections referenced above and pursuant to PAGA, Labor Code sections 2698, *et seq.*, including, but not limited to, penalties under Labor Code sections 210, 225.5, 226.3, 256, 558, 1174.5, 1197.1, and 2699, and Wage Order No. 5-2001, section 20.

Thank you for your attention to this matter. If you have any questions, please contact me at the phone number or address below:

Alexander Lima
Capstone Law APC
1875 Century Park East, Suite 1000
Los Angeles, CA 90067
(310) 556-4811

Best Regards,

A handwritten signature in black ink, appearing to read 'Alexander Lima', followed by three dots.

Alexander Lima

Copy: BEMUS LANDSCAPE, INC. (via U.S. Certified Mail)

tone
LAW APC
ury Park East, Ste 1000
s, CA 90067

CERTIFIED MAIL®



7020 1290 0000 3958 7221

BEMUS LANDSCAPE, INC.
951 CALLE NEGOCIO, SUITE D
SAN CELMENTE, CA 92673



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BEMUS LANDSCAPE, INC.
951 CALLE NEGOCIO, SUITE D
SAN CELMENTE, CA 92673



9590 9402 1512 5362 2523 14

2. Article Number (Transfer from service label)

7020 1290 0000 3958 7221

PS Form 3811, July 2015 PSN 7530-02-000-9053

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A. Signature

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☐ Agent
☐ Addressee

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- ☐ Return Receipt (electronic) \$
- ☐ Certified Mail Restricted Delivery \$
- ☐ Adult Signature Required \$
- ☐ Adult Signature Restricted Delivery \$

Postage

\$ 1.63

Total Postage and Fees

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Street and Apt. No., or PO Box No.

City, State, ZIP+4®

BEMUS LANDSCAPE, INC.
951 CALLE NEGOCIO, SUITE D
SAN CELMENTE, CA 92673

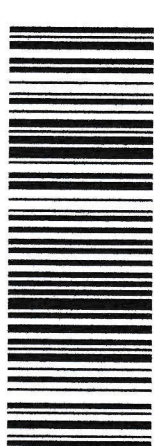
Postmark
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Cruz v. Bemus
Landscape, Inc.

PS Form 3800, April 2015 PSN 7530-02-000-9047

See Reverse for Instructions

tone
LAW APC
ury Park East, Ste 1000
es, CA 90067



7020 1290 0000 3958 7726

BEMUS LANDSCAPE, INC.
PO BOX 74268
SAN CLEMENTE, CA 92673



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
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1. Article Addressed to:

BEMUS LANDSCAPE, INC.
PO BOX 74268
SAN CLEMENTE, CA 92673



9590 9402 1512 5362 2522 77

2. Article Number (Transfer from service label)

7020 1290 0000 3958 7726

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

- ☐ Agent
- ☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

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- ☒ Certified Mail®
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- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery over \$500

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- ☐ Adult Signature Required \$
- ☐ Adult Signature Restricted Delivery \$

Postage

\$ 1.63

Total Postage and Fees

\$ 7.93

Sent To

BEMUS LANDSCAPE, INC.

Street and Apt. No., PO BOX 74268

City, State, ZIP+4® SAN CLEMENTE, CA 92673

Postmark
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Cruz v. Bemus
Landscape, Inc.

PS Form 3800, April 2015 PSN 7530-02-000-9047

See Reverse for Instructions

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

BEMUS LANDSCAPE, INC.
PO BOX 74268
SAN CLEMENTE, CA 92673



9590 9402 1512 5362 2522 77

2. Article Number (Transfer from service label)

7020 1290 0000 3958 7726

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Vicki Harlow ☐ Agent ☐ Addressee

B. Received by (Printed Name)

Vicki Harlow

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over \$500)

- ☐ Priority Mail Express®
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- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053

Domestic Return Receipt

EXHIBIT “2”



1875 Century Park East, Suite 1000
Los Angeles, California 90067
310.556.4811 Main | 310.943.0396 Fax

ALEXANDER LIMA
310.712.8142 Direct
Alexander.Lima@capstonelawyers.com

December 11, 2020

VIA ONLINE SUBMISSION

California Labor & Workforce Development Agency
ATTN: PAGA Administrator
(<https://dir.tfaforms.net/295>)

Subject: *Benito Mayo Jijon v. Bemus Landscape, Inc.*

Dear PAGA Administrator:

This office represents Benito Mayo Jijon in connection with his claims under the California Labor Code. Mr. Mayo Jijon was an employee of BEMUS LANDSCAPE, INC. ("BEMUS").

The employer may be contacted directly at the address below:

BEMUS LANDSCAPE, INC.
951 CALLE NEGOCIO, SUITE D
SAN CELMENTE, CA 92673

BEMUS LANDSCAPE, INC.
PO BOX 74268
SAN CLEMENTE, CA 92673

Mr. Mayo Jijon intends to seek civil penalties, attorney's fees, costs, and other available relief for violations of the California Labor Code, which are recoverable under sections 2698, *et seq.*, the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Mr. Mayo Jijon seeks relief on behalf of himself, the State of California, and other persons who are or were employed by BEMUS in California as a non-exempt, hourly paid employee and who received at least one wage statement ("aggrieved employees"). This letter is sent in compliance with the notice and reporting requirements of California Labor Code section 2699.3.

BEMUS employed Mr. Mayo Jijon as a non-exempt, hourly paid Gardener from approximately December 2019 to May 2020. Mr. Mayo Jijon worked for BEMUS out of its facilities in Santa Ana, California. During his employment, Mr. Mayo Jijon typically worked eight (8) hours or more per day, five (5) days per week, from 6:45 a.m. to 3:15 p.m. Mr. Mayo Jijon's primary job duties included, without limitation, installing piping and irrigation systems; operating landscaping equipment, including leaf blowers, lawn mowers, trimmers, and hedge clippers; planting and removing trees; and applying pesticides/herbicides.

BEMUS has committed one or more of the following Labor Code violations against Mr. Mayo Jijon, the facts and theories of which follow, making him an “aggrieved employee” pursuant to California Labor Code section 2699(c):¹

BEMUS’s Company-Wide and Uniform Payroll and HR Practices

BEMUS LANDSCAPE, INC. is a California corporation and provides full-service landscape management throughout Southern California. Upon information and belief, BEMUS maintains a single, centralized Human Resources (HR) department at its corporate headquarters in San Clemente, California, for all non-exempt, hourly paid employees working for BEMUS in California, including Mr. Mayo Jijon and other aggrieved employees. At all relevant times, BEMUS issued and maintained uniform, standardized scheduling and timekeeping practices and procedures for all non-exempt, hourly paid employees in California, including Mr. Mayo Jijon and other aggrieved employees, regardless of their location or position.

Upon information and belief, BEMUS maintains a centralized Payroll department at its corporate headquarters in San Clemente, California, which processes payroll for all non-exempt, hourly paid employees working for BEMUS in California, including Mr. Mayo Jijon and other aggrieved employees. Further, BEMUS issues the same formatted wage statements in the same manner for all non-exempt, hourly paid employees working in California, including Mr. Mayo Jijon and other aggrieved employees, irrespective of their location, position, or manner in which each employee’s employment ended. In other words, BEMUS utilized the same methods and formulas when calculating wages due to Mr. Mayo Jijon and other aggrieved employees in California.

Violation of California Labor Code §§ 510 and 1198 – Unpaid Overtime

California Labor Code sections 510 and 1198 and the applicable Industrial Welfare Commission (“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 (1½) 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. An employee’s regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee, including nondiscretionary bonuses and incentive pay.

BEMUS willfully failed to pay all overtime wages owed to Mr. Mayo Jijon and other aggrieved employees. During the relevant time period, Mr. Mayo Jijon and other aggrieved employees were not paid overtime premiums for all of the hours they worked in excess of eight (8) hours in a day, in excess of twelve (12) hours in a day, and/or in excess of forty (40) hours in a week, because all hours that they worked were not recorded.

First, during the relevant period, BEMUS had, and continues to have, a company-wide policy and/or practice of failing to accurately record hours worked by its employees and thus restricted overtime

¹ These facts, theories, and claims are based on Mr. Mayo Jijon’s experience and counsel’s review of those records currently available relating to Mr. Mayo Jijon’s employment. Discovery conducted in litigation of wage and hour claims such as these often reveals additional claims that the aggrieved employee was not initially aware of (because the aggrieved employee was not aware of the law’s requirements, the employer misinformed its employee of the law’s requirements, or because the employer effectively hid the violations). Thus, Mr. Mayo Jijon reserves the right to supplement this letter with additional facts, theories, and claims if he becomes aware of them subsequent to the submission of this letter.

accrual. BEMUS did not provide employees with any mechanism, such as a handwritten timesheet, time clock, or electronic timekeeping system, to track and record their hours worked. Instead, BEMUS had its supervisors input all employee time through the Aspire Crew Mobile App, which was only accessible to BEMUS supervisors, and thus maintained exclusive control and discretion over employee punch-in and punch-out times. Thus, Mr. Mayo Jijon and other aggrieved employees could only be clocked in and clocked out when they physically located their BEMUS supervisor, but would not be compensated for the time they remained under the control of BEMUS before their supervisors clocked them in or after their supervisors clocked them out.

For example, BEMUS required Mr. Mayo Jijon and other aggrieved employees to report to BEMUS's main yard before their scheduled shift for "sign-in," which included the loading of gardening equipment onto BEMUS gardening trucks and waiting for the coordination of carpools to job sites, all before their BEMUS supervisors clocked them in. As result, BEMUS did not compensate Mr. Mayo Jijon and other aggrieved employees for this time worked. Additionally, BEMUS did not compensate Mr. Mayo Jijon and other aggrieved employees for the time they spent unloading gardening trucks upon their return to BEMUS's main yard and after BEMUS supervisors clocked them out. Because BEMUS failed to provide Mr. Mayo Jijon and other aggrieved employees with any mechanism to record their actual hours worked themselves and, instead, granted BEMUS supervisors exclusive control and discretion over employee time records, Mr. Mayo Jijon and other aggrieved employees were not paid for all hours worked.

Second, BEMUS's company-wide timekeeping practices and/or policies did not permit employees, including Mr. Mayo Jijon and other aggrieved employees, to accurately track the start and stop times of their meal periods or allow them to report a short, missed, or interrupted meal period. As stated, because BEMUS's supervisors logged the start and stop times of meal periods through the Aspire Crew Mobile App, which Mr. Mayo Jijon and other aggrieved employees did not have access to, BEMUS, upon information and belief, would record that compliant meal periods were taken, even if that was not the case. For example, other aggrieved employees would have their meal periods interrupted and/or cut short, in order to complete their work duties, but were unable to record that their meal periods were shortened. As a result, BEMUS's supervisors recorded 30-minute meal periods were taken, even when they were not, and other aggrieved employees were not paid for all hours worked.

Third, BEMUS has systematically, and on a company-wide basis, understaffed its job sites, pursuant to its labor budget practices, while assigning heavy workloads, thereby failing to provide adequate meal period coverage to permit employees to take compliant meal periods. Further, BEMUS's customer/client management practices led to the creation of "punch lists" wherein BEMUS's management would create lists of additional tasks that gardening crews were required to complete based on customer/client feedback. Because BEMUS understaffed its job sites, there was no one available to relieve employees needing meal period coverage, and other aggrieved employees were not always afforded uninterrupted 30-minute meal periods during shifts when they were entitled to receive a meal period.

Additionally, due to the lack of meal period coverage, BEMUS required Mr. Mayo Jijon and other aggrieved employees to remain on or near the job site premises for their meal periods. Because Mr. Mayo Jijon and other aggrieved employees were restricted from leaving the premises during meal periods, they were denied the ability to use their meal periods freely for their own purposes. Thus, BEMUS effectively maintained control over Mr. Mayo Jijon and other aggrieved employees during meal periods. BEMUS also had a company-wide practice and/or policy of failing to schedule meal periods, which further caused other aggrieved employees to not be relieved of their duties for compliant meal periods. For example, other aggrieved employees were required to work through and/or return early from meal periods, in order to complete their assigned tasks. Consequently, other aggrieved employees performed work during meal periods for which they were not paid.

BEMUS knew or should have known that, as a result of these company-wide practices and/or policies, Mr. Mayo Jijon and other aggrieved employees were performing work off-the-clock before or after their shifts and during their meal periods, and were suffered or permitted to perform work for which they were not paid. BEMUS also knew, or should have known, that it did not compensate Mr. Mayo Jijon and other aggrieved employees applicable overtime rates of pay for overtime hours that they worked.

Because Mr. Mayo Jijon and other aggrieved employees regularly worked shifts of eight (8) hours a day or more or forty (40) hours a week or more, some of this off-the-clock work qualified for overtime premium pay. Therefore, Mr. Mayo Jijon and other aggrieved employees were not paid overtime wages for all of the overtime hours they actually worked. BEMUS's failure to pay Mr. Mayo Jijon and other aggrieved employees the balance of overtime compensation, as required by California law, violates the provisions of California Labor Code sections 510 and 1198.

Furthermore, on information and belief, BEMUS did not pay other aggrieved employees the correct overtime rate for the recorded overtime hours that they generated. In addition to an hourly wage, BEMUS paid other aggrieved employees incentive pay, nondiscretionary bonuses, and/or other forms of remuneration. However, in violation of the California Labor Code, BEMUS failed to incorporate all compensation, including incentive pay, nondiscretionary bonuses, and/or other forms of remuneration, into the calculation of the regular rate of pay for purposes of calculating the overtime wage rate. Therefore, during times when other aggrieved employees worked overtime and received these other forms of pay, BEMUS failed to pay all overtime wages by paying a lower overtime rate than required.

For example, BEMUS paid other aggrieved employees nondiscretionary bonuses or incentive pay. On information and belief, these nondiscretionary bonuses and/or incentive pay were listed on other aggrieved employees' wage statements as "Ref. Incentive." During pay periods that other aggrieved employees were paid overtime wages, BEMUS failed to incorporate the nondiscretionary bonuses and/or incentive pay into other aggrieved employees' regular rate of pay and, as a result, paid them at incorrect and lower rates of pay for overtime hours worked. Specifically, BEMUS paid other aggrieved employees 1.5 times their hourly rate of pay instead of 1.5 times their regular rate of pay. BEMUS's failure to properly calculate the overtime rates of pay based on all remuneration paid has resulted in an underpayment of overtime wages to other aggrieved employees on a company-wide basis.

Mr. Mayo Jijon and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 1182.12, 1194, 1197, 1197.1, and 1198 – Unpaid Minimum Wages

California Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198 require employers to pay employees the minimum wage fixed by the IWC. The payment of a lesser wage than the minimum so fixed is unlawful. Compensable work time is defined in Wage Order No. 5 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").

As set forth above, as result of BEMUS's company-wide policy and/or practice of not permitting employees to record all their hours worked and limiting overtime accrual, BEMUS failed to record all hours worked outside scheduled shifts or during meal periods. Also, as stated above, BEMUS maintained a policy and/or practice requiring Mr. Mayo Jijon and other aggrieved employees to perform work off-the-clock prior to clocking in at the start of their shifts and after the end of their shifts. Furthermore, due to BEMUS's policies and/or practices of understaffing while assigning heavy workloads of completing

daily crew punch lists, requiring employees to stay on or near the job site premises during meal periods, and failure to schedule meal periods, Mr. Mayo Jijon and other aggrieved employees were forced to forego meal periods, have their meal periods interrupted, and/or were otherwise not relieved of all duties during meal periods.

Moreover, BEMUS maintained and implemented a company-wide policy of requiring employees to travel to a medical facility on their own time to undergo mandatory drug testing and/or physical examinations. At all times, BEMUS was in control of scheduling the date and time for the testing and/or physical examinations, selecting the provider or facility where the testing and/or physical examinations were to take place, and determining the scope of the testing and/or physical examinations. For example, BEMUS gave Mr. Mayo Jijon and other aggrieved employees strict instructions to obtain drug testing and/or physical examinations, and Mr. Mayo Jijon and other aggrieved employees underwent the testing and/or examinations for the sole benefit of BEMUS. Mr. Mayo Jijon was required to travel for approximately 30-40 minutes roundtrip from BEMUS' office to Pacific Medical Clinic, located at 1534 E. Warner Avenue, Suite A, Santa Ana, and spend two (2) hours waiting for and undergoing Defendants' mandatory drug test. However, BEMUS did not compensate Mr. Mayo Jijon and other aggrieved employees for the time they spent traveling to and from the medical facilities and undergoing the mandatory drug testing and/or physical examinations.

Thus, BEMUS did not pay minimum wages for all hours worked by Mr. Mayo Jijon and other aggrieved employees. To the extent that these off-the-clock hours did not qualify for overtime premium payment, BEMUS did not pay at least minimum wages for those hours worked off-the-clock in violation of California Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198. Accordingly, BEMUS regularly failed to pay at least minimum wages to Mr. Mayo Jijon and other aggrieved employees for all of the hours they worked in violation of California Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198.

Mr. Mayo Jijon and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 1197.1 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226.7, 512(a), 516, and 1198 – Failure to Provide Meal Periods

California Labor Code sections 226.7, 512(a), 516, and 1198 and the applicable IWC Wage Order require employers to provide meal periods and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal or rest period 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 period 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.

First, as stated, BEMUS did not have a mechanism in place for employees to track and record the start and stop times of their meal periods. Instead, BEMUS gave its supervisors exclusive control and discretion over employee punch-in and punch-out times, including meal period start and stop times,

through the Aspire Crew Mobile App. Because Mr. Mayo Jijon and other aggrieved employees did not have access to the timekeeping system, they were unable to record when their meal periods were late, interrupted or cut short. Thus, Mr. Mayo Jijon and/or other aggrieved employees were forced to work off-the clock during their meal periods, but were not provided a means by BEMUS to account for this time worked during meal periods.

Second, as stated, BEMUS had, and continues to have, company-wide policies and/or practices of utilizing labor hours, understaffing while assigning heavy workloads, and failing to schedule meal periods, which prevented other aggrieved employees from taking timely, uninterrupted 30-minute meal periods to which they were entitled. As a result, other aggrieved employees were forced to work in excess of five (5) hours before taking a meal period and, at times, had their meal periods interrupted. For example, other aggrieved employees were required to take their meal periods late after having worked in excess of five (5) hours or more into their shift, and, at times, would have their meal periods interrupted to complete work duties or to discuss work assignments.

Furthermore, as stated above, in conjunction with these policies and/or practices, BEMUS required Mr. Mayo Jijon and other aggrieved employees to remain on or near the job site premises for their meal periods. Because Mr. Mayo Jijon and other aggrieved employees were restricted from leaving the premises during meal periods, they were denied the ability to use their meal periods freely for their own purposes. Thus, BEMUS effectively maintained control over Mr. Mayo Jijon and other aggrieved employees during meal periods.

Third, BEMUS did not provide other aggrieved employees with second 30-minute meal periods on days that they worked in excess of ten (10) hours in one day. Upon information and belief, other aggrieved employees worked in excess of 10 hours per day but were not provided with second 30-minute meal periods. Mr. Mayo Jijon and other aggrieved employees did not sign valid meal period waivers on days that they were entitled to meal periods and were not relieved of all duties.

Furthermore, BEMUS had a company-wide policy of requiring all newly hired employees to sign blanket meal period waivers at or near their time of hire. BEMUS took the position that non-exempt, hourly paid employees had waived their rights to second meal periods for the entirety of their employment and on that basis did not provide them with all meal periods to which they were entitled. BEMUS's presumption that second meal periods would not be provided for shifts in excess of ten (10) hours but less than twelve (12) hours due to use of blanket second meal period waivers, and imposition of the burden on employees to revoke the meal period waiver in writing, discouraged and impeded other aggrieved employees from taking all second meal periods to which they were entitled.

In addition, an employer's obligation to provide a meal period is only "triggered" when the employer "employs an employee for a work period of more than five hours per day." *Brinker*, 53 Cal. 4th at 1039 ("If an employer engages, suffers, or permits anyone to work for a full five hours, its meal break obligation is triggered.").

[A]fter the meal break obligation is triggered . . . an employer is put to a choice: it must (1) afford an off-duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on-duty meal period if circumstances permit. Failure to do one of these will render the employer liable for premium pay. *Id.* (citing Cal. Labor Code § 226.7; Wage Order No. 5, subd. 11(A), (B)).

That BEMUS requires employees to sign meal period waivers in advance (as opposed to on a specific work day) renders them invalid and unenforceable, because BEMUS's obligation to provide other

aggrieved employees with meal periods did not arise until BEMUS had employed them for a full five (5) hours.

At all times herein mentioned, BEMUS knew or should have known that, as a result of these policies, Mr. Mayo Jijon and other aggrieved employees were prevented from being relieved of all duties and required to perform some of their assigned duties during meal periods. BEMUS further knew or should have known that BEMUS did not pay Mr. Mayo Jijon and other aggrieved employees meal period premium wages when meal periods were late, interrupted, shortened, or missed.

Furthermore, BEMUS engaged in a company-wide practice and/or policy of not paying all meal period premiums owed when compliant meal periods are not provided. Because of this practice and/or policy, Mr. Mayo Jijon and other aggrieved employees have not received premium pay for all missed, interrupted, or late meal periods. Alternatively, to the extent that BEMUS did pay other aggrieved employees for missed, late, and interrupted meal periods, BEMUS did not pay other aggrieved employees at the correct rate of pay for premium wages because BEMUS systematically failed to include all forms of compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms of remuneration in the regular rate of pay.

Accordingly, BEMUS failed to provide all meal periods in violation of California Labor Code sections 226.7, 512, 516, and 1198. Mr. Mayo Jijon and other aggrieved employees are therefore entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226.7, 516, and 1198 – Failure to Authorize and Permit Rest Periods

California Labor Code sections 226.7, 516, 1198 and the applicable IWC Wage Order require employers to provide rest periods and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal or rest period is not provided. California 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 (3½) hours.

To comply with its obligation to authorize and permit rest periods under California 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, et al. v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 269-270 (2016).

During the relevant time period, BEMUS regularly failed to authorize and permit Mr. Mayo Jijon and other aggrieved employees to take a ten (10) minute rest period per each four (4) hour period worked or major fraction thereof. As with meal periods, BEMUS's company-wide policies and/or practices, of understaffing and assigning heavy workloads prevented Mr. Mayo Jijon and other aggrieved employees from being relieved of all duty in order to take compliant rest periods. For example, Mr. Mayo Jijon frequently missed his rest periods due to his heavy workload of completing daily punch lists. Additionally, BEMUS failed to schedule rest periods, which, coupled with BEMUS's failure to provide adequate rest period coverage, further led to Mr. Mayo Jijon and other aggrieved employees not being authorized and permitted to take compliant rest periods.

Furthermore, BEMUS maintained and implemented a company-wide practice and/or policy requiring that Mr. Mayo Jijon and other aggrieved employees remain on the work premises during their rest periods. Because Mr. Mayo Jijon and other aggrieved employees were restricted from leaving the work premises during rest periods, they were denied the ability to use their rest periods freely for their own purposes. Thus, BEMUS effectively maintained control over Mr. Mayo Jijon and other aggrieved employees during rest periods, and, as a result of this rest period policy, BEMUS did not relinquish control over Mr. Mayo Jijon and other aggrieved employees during rest periods.

As a result of BEMUS's practices and policies, Mr. Mayo Jijon and other aggrieved employees worked shifts in excess of 3.5 hours, in excess of 6 hours, and/or in excess of 10 hours without receiving all uninterrupted 10-minute rest periods to which they were entitled. For example, Mr. Mayo Jijon missed all of his rest periods in order to complete all of the work-related duties BEMUS assigned to him.

BEMUS also has engaged in a company-wide practice and/or policy of not paying all rest period premiums owed when compliant rest periods are not authorized and permitted. Because of this practice and/or policy, Mr. Mayo Jijon and other aggrieved employees have not received premium pay for all missed rest periods. Alternatively, to the extent that BEMUS did pay other aggrieved employees one (1) additional hour of premium pay for missed rest periods, BEMUS did not pay other aggrieved employees at the correct rate of pay for premium wages because BEMUS failed to include all forms of compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms of remuneration, in the regular rate of pay.

Accordingly, BEMUS failed to authorize and permit all rest periods in violation of California Labor Code sections 226.7, 516, and 1198. Mr. Mayo Jijon and other aggrieved employees are therefore entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226.7, 516, and 1198 & California Code of Regulations Title 8, Section 3395 – Failure to Provide Heat Recovery Periods

California Labor Code section 226.7(a) defines "recovery period" to mean a cooldown period afforded an employee to prevent heat illness. California Labor Code section 226.7 provides that no employer shall require an employee to work during any recovery period mandated by an applicable order of the California IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The applicable General Industry Safety Order provides that "[w]hen the outdoor temperature in the work area exceeds 80 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling." Cal. Code of Reg., Title 8, § 3395(d)(1). Furthermore, "[t]he amount of shade present shall be at least enough to accommodate the number of employees on recovery or rest periods, so that they can sit in a normal posture fully in the shade without having to be in physical contact with each other." *Id.* "Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times." *Id.*

During the relevant time period, BEMUS violated California Labor Code section 226.7 and California Code of Regulations, Title 8, section 3395(d), because BEMUS failed to provide Mr. Mayo Jijon and other aggrieved employees with recovery periods. For example, Mr. Mayo Jijon was not provided a shaded area for recovery and was not permitted to take recovery periods in a shaded area while working at various job sites.

BEMUS also has engaged in a company-wide practice and/or policy of not paying all recovery period premiums owed when compliant recovery periods are not provided. Because of this practice and/or policy, Mr. Mayo Jijon and other aggrieved employees have not received premium pay for all missed recovery periods. Alternatively, to the extent that BEMUS did pay other aggrieved employees for missed recovery periods, BEMUS did not pay other aggrieved employees at the correct rate of pay, because BEMUS systematically failed to include all compensation, such as incentive pay, nondiscretionary bonuses, and/or other forms of remuneration in the regular rate of pay.

Accordingly, BEMUS failed to authorize and permit all recovery periods in violation of California Labor Code sections 226.7, 516, and 1198. Mr. Mayo Jijon and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 558 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 226(a), 1174(d), and 1198 – Non-Compliant Wage Statements and Failure to Maintain Accurate Payroll Records

California Labor Code section 226(a) requires employers to make, keep and provide true, accurate, and complete employment records. BEMUS has not provided Mr. Mayo Jijon and other aggrieved employees with properly itemized wage statements. Labor Code section 226(e) provides that if an employer fails to comply with providing an employee with properly itemized wages statements as set forth in 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, BEMUS has knowingly and intentionally provided Mr. Mayo Jijon and other aggrieved employees with uniform, incomplete, and inaccurate wage statements. For example, BEMUS issued uniform wage statements to Mr. Mayo Jijon and other aggrieved employees that fail to correctly list: gross wages earned; total hours worked; net wages earned; and all applicable hourly rates in effect during the pay period, including overtime rates of pay, and the corresponding number of hours worked at each hourly rate. Specifically, BEMUS violated sections 226(a)(1), 226(a)(2), 226(a)(5), and 226(a)(9).

Because BEMUS did not record the time spent Mr. Mayo Jijon and other aggrieved employees spent working off-the-clock, BEMUS did not list the correct amount of gross wages and net wages earned by Mr. Mayo Jijon and other aggrieved employees, in compliance with section 226(a)(1) and 226(a)(5), respectively. For the same reason, BEMUS failed to accurately list the total number of the hours worked by Mr. Mayo Jijon and other aggrieved employees, in violation of section 226(a)(2), and failed to list the applicable hourly rates of pay in effect during the pay period and the corresponding accurate number of hours worked at each hourly rate, in violation of section 226(a)(9).

Also, because BEMUS did not calculate other aggrieved employees' regular rate of pay correctly for purposes of paying overtime wages, BEMUS did not list the correct amount of gross wages earned by other aggrieved employees in compliance with section 226(a)(1) and did not list the correct amount of net wages earned by other aggrieved employees in violation of section 226(a)(5). BEMUS also failed to correctly list all applicable hourly rates in effect during the pay period, namely, correct overtime rates of pay and correct rates of pay for premium wages, in violation of section 226(a)(9).

The wage statement deficiencies also include, among other things, failing to list the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; failing to list all deductions; failing to list 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; failing to list the name and address of the legal entity that is the employer; failing to list the inclusive dates of the period for which aggrieved employees were paid; and/or failing to state all hours worked as a result of not recording or stating the hours they worked off-the-clock.

California 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. . . .” Labor Code section 1174.5 provides that employers are subject to a \$500 civil penalty if they fail to maintain accurate and complete records as required by section 1174(d). During the relevant time period, and in violation of Labor Code section 1174(d), BEMUS willfully failed to maintain accurate payroll records for Mr. Mayo Jijon and other aggrieved employees showing the daily hours they worked and the wages paid thereto as a result of failing to record the off-the-clock hours that they worked.

California Labor Code section 1198 provides that the maximum hours of work and the standard conditions of labor shall be those fixed by the Labor Commissioner and as set forth in the applicable IWC Wage Orders. Section 1198 further provides that “[t]he employment of any employees for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.” Pursuant to the applicable IWC Wage Order, employers are required to keep accurate time records showing when the employee begins and ends each work period and meal period. During the relevant time period, BEMUS failed, on a company-wide basis, to keep accurate records of work period and meal period start and stop times for Mr. Mayo Jijon and other aggrieved employees, in violation of section 1198. Furthermore, in light of BEMUS’s failure to provide other aggrieved employees with second 30-minute meal periods to which they were entitled, BEMUS kept no records of meal start and end times for second meal periods.

Because BEMUS failed to provide the correct net and gross wages earned, applicable rates of pay, and number of total hours worked on wage statements, Mr. Mayo Jijon and other aggrieved employees have been prevented from verifying, solely from information on the wage statements themselves, that they were paid correctly and in full. Instead, Mr. Mayo Jijon and other aggrieved employees have had to look to sources outside of the wage statements themselves and reconstruct time records to determine whether in fact they were paid correctly and the extent of underpayment, thereby causing them injury.

Mr. Mayo Jijon and other aggrieved employees are entitled to recover civil penalties, attorney’s fees, costs, and interest thereon pursuant to Labor Code sections 226.3, 1174.5, and/or 2699(a), (f)-(g).

Violation of California Labor Code § 204 – Failure to Timely Pay Wages During Employment

California Labor Code section 204 requires that all wages earned by any person in any employment between the 1st and the 15th days, inclusive, 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, and that all wages earned by any person in any employment between the 16th and the last day, inclusive, 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. California 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, California 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, BEMUS failed to pay Mr. Mayo Jijon and other aggrieved employees all wages due to them, including, but not limited to, overtime wages; minimum wages; and/or meal, rest, and recovery period premium wages, within any time period specified by California Labor Code section 204.

Mr. Mayo Jijon and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 210 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 201, 202, and 203 – Failure to Timely Pay Final Wages Upon Termination

California Labor Code sections 201, 202, and 203 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and 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.

BEMUS willfully failed to pay Mr. Mayo Jijon and other aggrieved employees who are no longer employed by BEMUS all their earned wages, including, but not limited to, overtime wages; minimum wages; and/or meal, rest, and recovery premium wages, either at the time of discharge, or within seventy-two (72) hours of their leaving BEMUS employ in violation of California Labor Code sections 201, 202, and 203.

Mr. Mayo Jijon and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 256 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 212 and 213 – Unlawful Direct Deposit and Discount of Wages

California Labor Code section 212 prohibits employers from issuing any instruments for the payment of wages unless such instruments are negotiable and payable in cash on demand and without discount. California Labor Code section 213 permits employers to pay employees via direct deposit so long as the employee authorizes payment via direct deposit. Under California law, employers are also permitted to fulfill their wage payment obligations to employees by using payroll debit cards, but only under certain circumstances. Employer use of payroll debit cards is permitted only so long as the employee is given the choice as to whether to accept a payroll debit card as a form of payment. *Johnson v. Sunrise Senior Living Management, Inc.*, No. 16 CV 00443 BRO RAOx, 2016 WL 8929249, *9 (C.D. Cal. May 5, 2016). In *Johnson*, the court stated that the Division of Labor Standards Enforcement ("DLSE") decision deeming payroll debit card program permissible relied heavily on:

... [T]he fact that the pay programs were optional, thereby allowing an employee to either participate in the program or receive his or her pay in some other way, such as direct deposit. Specifically, the DLSE opined that "[t]he success of the described procedure, in practice, will of course require that . . . it is presented as an *alternative* method for wage payment for which [the employees'] participation is optional." The DLSE also stated, "[i]t is significant that the program does not

mandate employee participation in the Money Network Service and that it is designed to provide an alternative for employees receiving their wage payment. Employees are also given the option of having their pay direct deposited into an account of their choosing. . . .” (internal citations omitted).

In addition, employers can only utilize payroll debit card programs if they provide employees with effective access to their wages without discount. The DLSE has interpreted Labor Code sections 212 and 213 as permitting employer use of payroll debit cards where the following requirements are satisfied:

- (1) [T]he “wages [are] payable at some established place of business in the state and there be at least 30 days of sufficient funds for payment,”
- (2) the employees are “fully informed of the service and procedures and that it is represented as an alternative method for wage payment for which their participation is optional,”
- (3) the employees receive “an itemized wage statement,” and
- (4) “at least one transaction per pay period [is] without fee.”

Ortiz v. Randstad North America, L.P., No. C-13-5050 MMC, 2015 WL 6202298 at 3.

Further, the DLSE notes that the Labor Code manifests:

... [A] strong public policy that prohibits an employer (or its agent) from imposing conditions or obstacles which interfere with or prevent an employee’s (*sic*) from promptly receiving their due wages *in full*. The imposition of a fee in order to readily *access* one’s earned and paid wages under a payroll card program which is designed to discharge the employer’s wage payment obligations could impermissibly interfere with an employee’s receipt of paid wages by creating a financial condition which would have the *effect* of reducing or discounting wages because such fee would be charged against the same account in which wages are deposited. (emphases in original)

DLSE opinion letter 2008.07.07. The DLSE has also acknowledged that payroll service providers “effectively act as *agents* of the client employers in discharging the employer’s wage payment obligations.” *Id.* In a second opinion letter, the DLSE stated that “[w]hile the Labor Code does not purport to regulate the specific arrangements between employers and payroll service providers, both an employer and, under the express language in Labor Code § 212- their *agent*, must comply with its requirements.” *DLSE opinion letter 2008.07.07.2*.

During the relevant time period, BEMUS had an agreement with a payroll service provider for the issuance of payroll cards to employees, including Mr. Mayo Jijon and other aggrieved employees, to discharge its wage payment obligations to its employees. Upon information and belief, BEMUS’s payroll debit card program was not voluntary or optional to Mr. Mayo Jijon and other aggrieved employees. BEMUS had a practice and/or policy of automatically issuing payroll debit cards to Mr. Mayo Jijon and other aggrieved employees without giving them the option to elect their form of payment for their wages. Mr. Mayo Jijon and other aggrieved employees received their wages on a payroll debit card without a choice of an alternative method, including a written check.

Moreover, under BEMUS’s payroll debit program, BEMUS did not permit Mr. Mayo Jijon and other aggrieved employees to withdraw their entire wages in at least one transaction without incurring a fee. For example, Mr. Mayo Jijon utilized ATMs to try to withdraw his wages, but could not obtain the entire

amount because ATMs only disburse cash in limited denominations. Additionally, Mr. Mayo Jijon also encountered approximately \$3.00 in ATM fees each time he utilized an ATM to withdraw funds from his payroll debit card, and an approximately 50-cent charge when utilizing his payroll debit card in point-of-sale merchant transactions, which resulted in a discount in his pay.

California courts recognize a policy favoring the full and prompt payment of wages to employees. BEMUS's payroll card program is inconsistent with this policy. Because BEMUS's company-wide payroll debit card program is involuntary and denies aggrieved employees of easy access to the entirety of their wages, the program violates California Labor Code sections 212 and 213. Mr. Mayo Jijon and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 225.5 and/or 2699(a), (f)-(g).

Violation of California Labor Code §§ 221 and 224 – Unlawful Deductions

California Labor Code section 221 provides that it shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee. California Labor Code section 224 also provides in pertinent part that it is lawful to withhold a portion of the employee's wages if "a deduction is expressly authorized in writing by the employee." During the relevant time period, BEMUS unlawfully deducted a portion of wages previously paid to Mr. Mayo Jijon and/or other aggrieved employees in violation of California Labor Code section 221.

BEMUS systematically, and on a company-wide basis, provided Mr. Mayo Jijon and other aggrieved employees with payroll debit cards as payment of their wages and/or final wages. Under BEMUS's payroll debit card program, Mr. Mayo Jijon and other aggrieved employees were assessed various fees in connection with their use of the payroll debit cards. Mr. Mayo Jijon and other aggrieved employees were required to pay per-transaction fees, ATM fees, in-person teller fees, and/or other fees to obtain and/or spend their earned and due wages. The fees charged to Mr. Mayo Jijon and other aggrieved employees resulted in a discount of their wages.

BEMUS's payroll debit card program, which resulted in a discount of wages to employees, is tantamount to taking deductions from Mr. Mayo Jijon's and other aggrieved employees' paychecks without their written authorization and therefore constitutes an unlawful deduction of wages, in violation of Labor Code sections 221 and 224. Mr. Mayo Jijon and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 225.5 and/or 2699(a), (f)-(g).

Violation of California Labor Code § 223 – Secret Payment of Lower Wages

California Labor Code section 223 makes it unlawful for an employer to secretly pay wages lower than required by statute while purporting to pay legal wages.

During the relevant time period, BEMUS willfully and systematically issued payroll debit cards to Mr. Mayo Jijon and other aggrieved employees. The payroll debit cards discounted the wages of Mr. Mayo Jijon and other aggrieved employees by charging various fees in connection with the use of the payroll debit cards. BEMUS's payroll debit card program resulted in the payment of less than statutorily required wages to Mr. Mayo Jijon and other aggrieved employees. In doing so, BEMUS acted with the intent to deprive Mr. Mayo Jijon and other aggrieved employees of statutory wages, including, but not limited to, overtime wages and minimum wages to which they were entitled to under California law. Thus, BEMUS paid Mr. Mayo Jijon and other aggrieved employees lower wages than those they were entitled to while purporting that Mr. Mayo Jijon and other aggrieved employees were properly paid.

Mr. Mayo Jijon and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 225.5 and/or 2699(a), (f)-(g).

Violation of California Labor Code § 222.5 – Failure to Pay for Costs of Mandatory Physical Exams and/or Drug Testing

At all times herein set forth, California Labor Code section 222.5 requires employers to pay for the costs an employee incurs for obtaining any required medical or physical examination.

During the relevant time period, BEMUS implemented, on a company-wide basis, an employer-imposed requirement that Mr. Mayo Jijon and other aggrieved employees undergo mandatory drug testing and/or physical examinations, but required them to do so at their own expense. As stated, BEMUS had a company-wide policy requiring that all employees travel to a specified medical facility on their own time to undergo drug testing and/or physical examinations. At all times, BEMUS was in control of scheduling the date and time for the testing and/or physical examinations, selecting the provider/facility where the testing and/or physical examinations were to take place, and determining the scope of the testing and/or physical examinations.

For example, Mr. Mayo Jijon was instructed by BEMUS to obtain a drug test. Mr. Mayo Jijon followed BEMUS's instructions, traveled for approximately 30-40 minutes roundtrip from BEMUS's office to Pacific Medical Clinic, located at 1534 E. Warner Avenue, Suite A, Santa Ana, and spent approximately two (2) hours waiting at the medical facility and undergoing the mandatory drug test. However, BEMUS did not compensate Mr. Mayo Jijon and other aggrieved employees for the time they spent traveling to and from their drug testing and/or physical examinations, or for the time they spent undergoing the drug testing and/or physical examinations.

BEMUS's policy and/or not paying for all costs Mr. Mayo Jijon and other aggrieved employees incurred undertaking mandatory drug testing and/or physical examinations is in violation of California Labor Code section 222.5. Mr. Mayo Jijon and other aggrieved employees are therefore entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Violation of California Labor Code § 2802 – Unreimbursed Business Expenses

California 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, BEMUS required Mr. Mayo Jijon and other aggrieved employees to wear uniforms bearing the company logo (including shirts, safety vests, and/or hats) on a daily basis, but only provided their employees one safety vest and one hat, which forced Mr. Mayo Jijon and other aggrieved employees to launder their uniforms frequently and incur expenses in doing so. Thus, BEMUS failed to provide Mr. Mayo Jijon and other aggrieved employees with an adequate number of uniforms in relation to their scheduled shifts and for the tasks they were required to perform, forcing Mr. Mayo Jijon and other aggrieved employees to incur laundry expenses for the upkeep of their uniforms, as the nature of their work resulted in their uniforms becoming stained with toxic chemicals, such that they were

unable to mix these clothes in with their other laundry. For example, Mr. Mayo Jijon had to wash his uniform items separately from any other clothing items, thus incurring additional utility and laundry expenses.

BEMUS could have provided Mr. Mayo Jijon and other aggrieved employees with the actual tools for use on the job, such as access to laundering services, or could have reimbursed employees for their laundering expenses. Instead, BEMUS passed these operating costs off onto Mr. Mayo Jijon and other aggrieved employees. At all relevant times, Mr. Mayo Jijon did not earn at least two (2) times the minimum wage.

Thus, BEMUS had, and continues to have, a company-wide policy and/or practice of not reimbursing employees for expenses necessarily incurred in violation of California Labor Code section 2802. Mr. Mayo Jijon and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Violation of California Labor Code § 2810.5(a)(1)(A)-(C) – Failure to Provide Notice of Material Terms of Employment

California's Wage Theft Prevention Act was enacted to ensure that employers provide employees with basic information material to their employment relationship at the time of hiring, and to ensure that employees are given written and timely notice of any changes to basic information material to their employment. Codified at California Labor Code section 2810.5, the Wage Theft Prevention Act provides that at the time of hiring, an employer must provide written notice to employees of the rate(s) of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, the regular payday designated by the employer, and any allowances claims as part of the minimum wage, including meal or lodging allowances. Effective January 1, 2015, an employer's written notice pursuant to section 2810.5 must also include a statement that the employee may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates.

BEMUS failed to provide Mr. Mayo Jijon and other aggrieved employees written notice that lists all the requisite information set forth in Labor Code section 2810.5(a)(1)(A)-(C). Specifically, BEMUS failed to provide Mr. Mayo Jijon and other aggrieved employees with the overtime rate(s) of pay, in violation of section 2810.5(a)(1)(A). BEMUS's failure to provide Mr. Mayo Jijon and other aggrieved employees with written notice of basic information regarding their employment with BEMUS is in violation of Labor Code section 2810.5.

Mr. Mayo Jijon and other aggrieved employees are therefore entitled to recover penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

California Labor Code § 558(a)

California Labor Code section 558(a) provides "[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. . . . (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid. . . ." 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." BEMUS, at all relevant times, was an employer or person acting on behalf of an employer(s) who violated Mr. Mayo Jijon's and other

aggrieved employees' rights by violating various sections of the California Labor Code. Accordingly, Mr. Mayo Jijon seeks the remedies set forth in Labor Code section 558 for himself, the State of California, and all other aggrieved employees. Specifically, pursuant to PAGA, and in particular California Labor Code sections 2699(a), 2699.3(a) and 2699.3(c), 2699.5, and 558, Mr. Mayo Jijon , acting in the public interest as a private attorney general, seeks assessment and collection of civil penalties for himself, all other aggrieved employees, and the State of California against BEMUS for violations of California Labor Code sections 201, 202, 203, 204, 212, 213, 221, 222.5, 223, 224, 226(a), 226.7, 510, 512, 516, 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, 2802, and 2810.5.

Therefore, on behalf of all aggrieved employees, Mr. Mayo Jijon seeks all applicable penalties related to these violations of the California Labor Code pursuant to PAGA.

Pre-Litigation Demand

This notice shall further serve as Mr. Mayo Jijon's reasonable attempt to settle his dispute with BEMUS prior to litigation. Pursuant to *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004), this notice serves to inform BEMUS of Mr. Mayo Jijon's aforementioned grievances and the proposed remedies as detailed below, while affording BEMUS a reasonable opportunity to satisfy Mr. Mayo Jijon's demands.

Demand is hereby made that BEMUS shall, within 30 calendar days of this notice, agree, in writing to the following corrective actions:

1. BEMUS shall pay Mr. Mayo Jijon and all other aggrieved employees employed by BEMUS at any time during the past three years from the date of this notice unpaid wages and compensation for the above-referenced violations.
2. BEMUS shall comply with all California labor laws and ensure that its non-exempt employees are paid overtime wages and minimum wages for all hours worked and provided lawful meal, rest, and recovery periods.
3. BEMUS shall conduct a survey or interview all current and former aggrieved employees in California who worked for BEMUS in the past three years to obtain information from them regarding the above-referenced violations, including, but not limited to: the number of meal periods which were not provided; the number of rest periods which were not authorized and permitted; the number of recovery periods which were not provided; and the number of employees who were required to pay for mandatory medical examinations, uniform maintenance expenses, or other expenditures in the discharge of their duties, with the investigation to be completed within 60 days.
4. BEMUS shall pay each aggrieved employee one hour of pay at his or her regular rate of pay for each work day he or she was not provided one or more meal periods, as required by Labor Code sections 226.7, 512, 516, and 1198. BEMUS also shall pay each aggrieved employee one hour of pay at his or her regular rate of pay for each work day he or she was not authorized and permitted one or more rest periods, as required by Labor Code sections 226.7, 516, and 1198. Additionally, BEMUS also shall pay each aggrieved employee one hour of pay at his or her regular rate of pay for each work day he or she was not provided one or more recovery periods, as required by Labor Code sections 226.7, 516, and 1198.
5. BEMUS shall reimburse those aggrieved employees who were required to pay for any business expenses incurred for BEMUS's benefit, including, but not limited to, costs of mandatory drug

tests and uniform maintenance or laundering expenses, as required by Labor Code sections 222.5 and 2802.

6. BEMUS shall pay each aggrieved employee unpaid wages and compensation for violations arising from its unlawful use of payroll debit cards, including unlawful direct deposit and discount of wages (Labor Code sections 212 and 213), unlawful deductions (Labor Code sections 221 and 224), and secret payment of lower wages (Labor Code section 223).
7. BEMUS shall pay accrued legal interest to all aggrieved employees at the rate of 10% per annum for said unpaid wages.
8. BEMUS shall provide Mr. Mayo Jijon and all aggrieved employees employed by BEMUS at any time during the past three years from the date of this notice corrected wage statements that include the requisite information set forth in Labor Code section 226(a).
9. BEMUS shall provide all aggrieved employees written notice of basic information regarding their employment that includes the requisite information set forth in Labor Code section 2810.5(a)(1)(A)-(C).
10. BEMUS shall pay waiting time penalties, equal to 30 days of pay, to each former aggrieved employee who was not paid all wages due as described herein.
11. BEMUS shall pay all penalties arising from the violations of the Labor Code and IWC Wage Order sections referenced above and pursuant to PAGA, Labor Code sections 2698, *et seq.*, including, but not limited to, penalties under Labor Code sections 210, 225.5, 226.3, 256, 558, 1174.5, 1197.1, and 2699, and Wage Order No. 5-2001, section 20.

Thank you for your attention to this matter. If you have any questions, please contact me at the phone number or address below:

Alexander Lima
Capstone Law APC
1875 Century Park East, Suite 1000
Los Angeles, CA 90067
(310) 556-4811

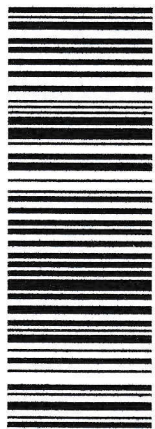
Best Regards,

A handwritten signature in black ink, appearing to read 'Alexander Lima', with a stylized flourish at the end.

Alexander Lima

Copy: BEMUS LANDSCAPE, INC. (via U.S. Certified Mail)

tone
LAW APC
ury Park East, Ste 1000
ss, CA 90067



7020 1290 0000 3958 7733

BEMUS LANDSCAPE, INC.
951 CALLE NEGOCIO, SUITE D
SAN CELMENTE, CA 92673



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City, State, ZIP+4® SAN CELMENTE, CA 92673

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Mayo Tijon V.
Bemus Landscape,
Inc.

PS Form 3800, April 2015 PSN 7530-02-000-9047

See Reverse for Instructions

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 PO BOX 74268
 SAN CLEMENTE, CA 92673



9590 9402 1512 5362 2522 84

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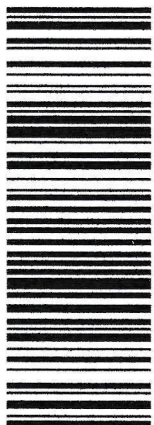
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Maya Dijon v. Bemus
 Landscape, Inc.

tone
 LAW APC
 ury Park East, Ste 1000
 s, CA 90067

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PO BOX 74268
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9590 9402 1512 5362 2522 84

2. Article Number (Transfer from service label)

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COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *Vicky Harlow*

☐ Agent

☐ Addressee

B. Received by (Printed Name)

Vicky Harlow

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

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- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

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