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7 Attorneys for Plaintiff,
SIMONETTE VILLENA
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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN DIEGO**
11 **(UNLIMITED JURISDICTION)**

12 SIMONETTE VILLENA, on behalf of
herself, and as an “aggrieved employee”
13 on behalf of other “aggrieved employees”
under the Labor Code Private Attorneys
14 General Act of 2004,

15 *Plaintiffs,*

16 vs.

17 MIDWAY VENTURE LLC, a California
18 limited liability company dba PACERS
19 SHOWGIRLS WORLDWIDE and PACERS
SHOWGIRLS INTERNATIONAL, PETER
20 BALOV, an individual; and DOES 1-50,
inclusive,
21

22 *Defendants.*

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

02/09/2021 at 04:56:28 PM

Clerk of the Superior Court
By Melinda McClure, Deputy Clerk

Case No.: 37-2021-00005970-CU-OE-CTL

**COMPLAINT FOR VIOLATIONS OF THE
LABOR CODE AND CIVIL PENALTIES
UNDER THE LABOR CODE PRIVATE
ATTORNEYS GENERAL ACT OF 2004,
LABOR CODE §§ 2698, ET SEQ.**

JURY TRIAL DEMANDED



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1 Plaintiff SIMONETTE VILLENA (hereafter “Plaintiff”), on behalf of herself, the State
2 of California, and other Aggrieved Employees, complains and alleges as follows:

3 **I. INTRODUCTION**

4 1. Plaintiff brings this representative action against Defendants MIDWAY
5 VENTURE LLC, dba PACERS SHOWGIRLS WORLDWIDE and PACERS SHOWGIRLS
6 INTERNATIONAL, PETER BALOV, and DOES 1-50 (collectively “Defendants”) for alleged
7 violations of the California Labor Code and Industrial Welfare Commission Order No. 5-2001
8 (hereafter “the Wage Order”).

9 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
10 her, the State of California, and all individuals Defendants employed or contracted with in
11 California as employees paid by commission, piece rate employees, or independent contractors,
12 including exotic dancers and workers in comparable positions (“the Aggrieved Employees”), for
13 civil penalties and other related relief. These claims are based on Defendants’ alleged failures to
14 (1) properly classify all Aggrieved Employees as employees instead of independent contractors,
15 (2) provide commission agreements to the Aggrieved Employees, (3) pay all wages for all hours
16 worked at the correct rates of pay, (4) provide all meal and rest periods, (5) separately compensate
17 the Aggrieved Employees for rest and recovery time, (6) provide accurate written wage
18 statements, and (7) timely pay final wages upon termination of employment. Defendants also
19 required financial patronage from the Aggrieved Employees to allow them to work and collected
20 and retained tips paid to the Aggrieved Employees. Accordingly, Plaintiff now seeks to recover
21 civil penalties and related relief through this representative action.

22 **II. JURISDICTION**

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

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

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



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

III. PARTIES

7. Plaintiff SIMONETTE VILLENA is a resident of California. Defendants contracted with Plaintiff to perform various services, including exotic dancing, from about July of 2018 until approximately late December of 2019 when Plaintiff's employment ended. At all relevant times, Plaintiff was an "employee" within the meaning of Title 8 California Code of Regulations Section 11050 and an "aggrieved employee" within the meaning of Labor Code Section 2699(c)".

8. Defendant MIDWAY VENTURE LLC, dba PACERS SHOWGIRLS WORLDWIDE and PACERS SHOWGIRLS INTERNATIONAL is a limited liability company organized and existing under the laws of California and therefore a citizen of California based on Plaintiff's information and belief.

9. Defendant PETER BALOV is a citizen of California based on Plaintiff's information and belief.

10. In relevant part, Labor Code section 558.1 states:

(a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.

(b) For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of Section 3294 of the Civil Code.

11. Based on Plaintiff's information and belief, Defendant PETER BALOV is a natural person and an owner, director, officer, and/or managing agent of Defendant MIDWAY VENTURE, LLC, who directly or indirectly, or through an agent or any other person, employed



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1 or exercised control over the wages, hours, or working conditions of Plaintiff and the Aggrieved
2 Employees. Therefore, he is liable to Plaintiff and the Aggrieved Employees for his violations
3 of, or causing Defendants to violate, Labor Code sections 203, 226, 226.7, and the Wage Order
4 pursuant to Labor Code section 558.1.

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

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

16 14. At all relevant times, in perpetrating the acts and omissions alleged herein,
17 Defendants, and each of them, acted pursuant to and in furtherance of a policy and/or practice, or
18 lack thereof, which resulted in Defendants not paying Plaintiff and other Aggrieved Employees
19 in accordance with applicable law as alleged herein.

20 15. Plaintiff is informed and believes and thereon alleges that each and every one of
21 the acts and omissions alleged herein was performed by and/or attributable to all Defendants, each
22 acting as agents, employees, and/or under the direction and control of each of the other
23 Defendants, and that said acts and failures to act were within the course and scope of said agency,
24 employment, and/or direction and control.

25 16. **THE AGGRIEVED EMPLOYEES:** The “Aggrieved Employees” are all
26 individuals Defendants employed or contracted with in California as employees paid by
27 commission, piece rate employees, or independent contractors, including exotic dancers, and
28 workers in comparable positions, during the period of December 3, 2019 to the present (“the



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1 PAGA Period”).

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

7 18. At all relevant times, in perpetrating the acts and omissions alleged herein,
8 Defendants, and each of them, acted pursuant to and in furtherance of a policy and/or practice, or
9 lack thereof, which resulted in Defendants not paying Plaintiff and other Aggrieved Employees
10 in accordance with applicable California labor laws as alleged herein.

11 **IV. FACTUAL ALLEGATIONS**

12 19. At all relevant times, Plaintiff and the Aggrieved Employees have been employees
13 of Defendants and entitled to the benefits and protections of California Labor Code sections 510,
14 1194, 1197, 1198, and the Wage Order.

15 20. At all relevant times, Defendants directed and controlled Plaintiff and the
16 Aggrieved Employees in all aspects of their work performance. Defendants required Plaintiff and
17 the Aggrieved Employees to perform exotic dancing on stage. Defendants required Plaintiff and
18 the Aggrieved Employees to arrive at work at fixed times. Defendants required Plaintiff and the
19 Aggrieved Employees to perform private exotic dances for Defendants’ customers. Defendants
20 fixed the price at \$20 for each said dance and \$150 for each private “VIP” dance without input
21 from Plaintiff or the Aggrieved Employees. Defendants did not allow Plaintiff and the Aggrieved
22 Employees to charge more or less for said dances. For the private VIP dances, Defendants’
23 customers paid said price directly to Defendants. Defendants decided that Plaintiff and the
24 Aggrieved Employees could collect on \$20 from patrons as their wages for non-private dances.
25 They did not receive any other compensation for their work for Defendants. Defendants required
26 Plaintiff and the Aggrieved Employees to return a portion of such wages to Defendants’
27 management. Defendants did not provide Plaintiff and the Aggrieved Employees with a
28 commission agreement that explained their pay structure. Additionally, Defendants operate as an



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1 adult entertainment establishment and the work Plaintiff and the Aggrieved Employees performed
2 was wholly within Defendants' usual course of business of exotic dancing and adult
3 entertainment. Defendants retained Plaintiff and the Aggrieved Employees to perform exotic
4 dances, privately and on stage, for Defendants' patrons, at worksites that Defendants designated
5 such as Pacers Showgirls International. Defendants knew or should have known their actions of
6 misclassifying employees as independent contractors violated California law.

7 21. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees
8 to work periods of over four continuous hours without a paid, continuous 10-minute rest break
9 free of duties and restrictions. Defendants interrupted, delayed, or shortened Plaintiff's and the
10 Aggrieved Employees' rest and meal periods so that they did not receive ten-minute paid rest
11 periods or thirty-minute meal periods free of duty. Defendants also restricted the rest periods and
12 meal periods of Plaintiff and the Aggrieved Employees because they expected Plaintiff and the
13 Aggrieved Employees to remain inside Defendants' establishment in San Diego for such rest
14 periods or for meal periods. Defendants only allowed payments to Plaintiff and the Aggrieved
15 Employees for work periods, not periods of rest and recovery. Defendants also prevented Plaintiff
16 and the Aggrieved Employees from using their mobile phones in the establishment.

17 22. At all relevant times, Defendants demanded monetary payments from Plaintiff and
18 the Aggrieved Employees to work a shift within the establishment. As a result of these payments
19 to Defendants, Plaintiff and the Aggrieved Employees at times earned less than the California
20 minimum hourly wage during their shifts.

21 23. At all relevant times, Defendants did not record the start and stop times of the daily
22 work periods of Plaintiff and the Aggrieved Employees, nor did they record the times meal
23 periods began and ended. Furthermore, Defendants did not issue itemized wages statements to
24 Plaintiff and the Aggrieved Employees.

25 24. At all relevant times, Plaintiff and the Aggrieved Employees worked for
26 Defendants in excess of 40 hours per week and 8 hours per day. Plaintiff and the Aggrieved
27 Employees worked for Defendants in excess of 12 hours per day and all 7 days in the same
28 workweek. In spite of this, Defendants did not pay any overtime or doubletime premium rates to



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1 Plaintiff and the Aggrieved Employees for any such overtime and doubletime hours.

2 25. At all relevant times, Plaintiff and the Aggrieved Employees received monetary
3 tips from Defendants' customers for dances they performed on stage. Defendants required
4 Plaintiff and the Aggrieved Employees to share such monetary tips with other employees,
5 including management, disc jockeys, bouncers, security, and valet.

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

- 8 A. Misclassified as independent contractors;
- 9 B. Not provided with commission agreements that explained their pay
10 structure;
- 11 C. Not paid for all hours worked at the correct rates of pay, including
12 minimum, overtime, and doubletime hours
- 13 D. Not provided with all rest breaks and timely meal periods;
- 14 E. Not paid one hour's pay for each workday in which Defendants failed to
15 provide them with one or more timely rest periods;
- 16 F. Not separately compensated for rest and recovery periods and
17 nonproductive work time;
- 18 G. Not paid one hour's pay for each workday in which Defendants failed to
19 provide them with one or more timely meal periods;
- 20 H. Required to patronize Defendants to work a shift within the establishment;
- 21 I. Required to share their tips with Defendants' management and others;
- 22 J. Not provided with accurate and complete wage statements; and
- 23 K. Not timely paid all earned and unpaid wages during their employment with
24 Defendants and at the time such employment ended.

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

26 **CIVIL PENALTIES**

27 **(Lab. Code §§ 2698, et seq.)**

28 **(By Plaintiff, on behalf of herself and the other Aggrieved Employees, against all
Defendants)**

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



1 **A. WILLFUL INDEPENDENT CONTRACTOR MISCLASSIFICATION**

2 28. Labor Code Section 226.8 states:

3 (a) It is unlawful for any person or employer to engage in any of the following
4 activities:

5 (1) Willful misclassification of an individual as an independent contractor.

6 (2) Charging an individual who has been willfully misclassified as an
7 independent contractor a fee, or making any deductions from compensation, for
8 any purpose, including for goods, materials, space rental, services, government
9 licenses, repairs, equipment maintenance, or fines arising from the individual's
employment where any of the acts described in this paragraph would have
violated the law if the individual had not been misclassified.

10 (b) If the Labor and Workforce Development Agency or a court issues a
11 determination that a person or employer has engaged in any of the enumerated
12 violations of subdivision (a), the person or employer shall be subject to a civil
13 penalty of not less than five thousand dollars (\$5,000) and not more than fifteen
thousand dollars (\$15,000) for each violation, in addition to any other penalties or
fines permitted by law.

14 (c) If the Labor and Workforce Development Agency or a court issues a
15 determination that a person or employer has engaged in any of the enumerated
16 violations of subdivision (a) and the person or employer has engaged in or is
17 engaging in a pattern or practice of these violations, the person or employer shall
18 be subject to a civil penalty of not less than ten thousand dollars (\$10,000) and
not more than twenty-five thousand dollars (\$25,000) for each violation, in
addition to any other penalties or fines permitted by law.

19 29. "Willful misclassification means avoiding employee status for an individual by
20 voluntarily and knowingly misclassifying that individual as an independent contractor." (Id., §
21 (i)(4)).

22 30. Labor Code § 2753 provides for joint and several liability for a person who
23 "knowingly advises an employer to treat an individual as an independent contractor to avoid
24 employee status for that individual." Plaintiff is informed and believes that PETER BALOV is
25 and was, at relevant times, an owner, director, officer, or managing agent of Defendants and
26 violated or caused to be violated the provisions regulating the misclassification of employees as
27 independent contractors. Therefore, PETER BALOV is individually liable.

28 ///



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1 31. At all relevant times, Plaintiff and the Aggrieved Employees were employees of
2 Defendants. Defendants engaged, suffered, and permitted Plaintiff and the Aggrieved Employees
3 to work. Defendants were clearly aware that Plaintiff and the other Aggrieved Employees worked
4 for them and had the power to prevent Plaintiff and the Aggrieved Employees from working.
5 Defendants also exercised control over Plaintiff and the other Aggrieved Employees' wages,
6 hours, and working conditions. Further, Defendants had the right to control and exercised such
7 control over the manner in which Plaintiff and the other Aggrieved Employees performed their
8 work for Defendants. Plaintiff and the Aggrieved Employees worked at Defendants' direction,
9 and their opportunity for profit or loss did not depend in any way upon their skills. Plaintiff and
10 the other Aggrieved Employees required no special skill to render their services for Defendants.
11 The services they rendered were at all times an integral part of Defendants' business. The
12 relationship between Plaintiff and the other Aggrieved Employees, on one hand, and Defendants,
13 on the other, was terminable at will without cause. Despite these circumstances, Defendants
14 willfully misclassified Plaintiff and the other Aggrieved Employees as independent contractors.
15 Defendants knew or should have known their actions of misclassifying employees as independent
16 contractors violated California law.

17 32. Defendants misclassified Plaintiff and the Aggrieved Employees as independent
18 contractors and engaged in a pattern and/or practice of so doing. Through their misclassification
19 of Plaintiff and the other Aggrieved Employees, Defendants have engaged in a pattern and
20 practice of willful misclassification of their employees as independent contractors for their own
21 financial benefit. Each person or entity referenced above collectively as Defendants advised the
22 other to treat Plaintiff and the Aggrieved Employees at issue in this case as independent
23 contractors.

24 **B. FAILURE TO PROVIDE SIGNED AND COMPLETE COMMISSION**
25 **AGREEMENTS**

26 33. Labor Code § 2751 states:

27 (a) Whenever an employer enters into a contract of employment with an
28 employee for services to be rendered within this state and the contemplated
method of payment of the employee involves commissions, the contract shall be



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1 in writing and shall set forth the method by which the commissions shall be
2 computed and paid.

3 (b) The employer shall give a signed copy of the contract to every employee
4 who is a party thereto and shall obtain a signed receipt for the contract from each
5 employee. In the case of a contract that expires and where the parties
6 nevertheless continue to work under the terms of the expired contract, the contract
7 terms are presumed to remain in full force and effect until the contract is
8 superseded or employment is terminated by either party.

9 (c) As used in this section, “commissions” has the meaning set forth in
10 Section 204.1. For purposes of this section only, “commission” does not include
11 any of the following:

12 (1) Short-term productivity bonuses such as are paid to retail clerks.

13 (2) (Temporary, variable incentive payments that increase, but do not
14 decrease, payment under the written contract.

15 (3) Bonus and profit-sharing plans, unless there has been an offer by
16 the employer to pay a fixed percentage of sales or profits as compensation
17 for work to be performed.

18 34. At all relevant times, Defendants have failed to provide Plaintiff and the Aggrieved
19 Employees with signed commission agreements. As a result, Defendants have violated California
20 Labor Code § 2751.

21 **C. FAILURE TO PAY ALL WAGES FOR ALL HOURS WORKED AT THE**
22 **CORRECT RATES OF PAY**

23 35. Section 2 of the Wage Order defines “hours worked” as “the time during which an
24 employee is subject to the control of an employer, and includes all the time the employee is
25 suffered or permitted to work, whether or not required to do so.” As the California Supreme Court
26 has explained, this definition is disjunctive, meaning time can be an “hour worked” if either (a)
27 the employee is subject to the employer's control, or (b) the employer suffers or permits the
28 employee to work during that time, whether or not the employee is required to do so. *Mendiola*
v. CPS Sec. Solutions, Inc. (2015) 60 Cal. 4th 833, 838 (citing *Morillion v. Royal Packing Co.*
(2000) 22 Cal.4th 575, 582-83).

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

(A) Daily Overtime - General Provisions



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(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

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

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

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

38. Labor Code section 226.2 states:

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

...

(3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:

(i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any



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1 premium compensation for overtime, by the total hours worked during the
2 workweek, exclusive of rest and recovery periods.

3 (ii) The applicable minimum wage.

4 39. In relevant part, California Labor Code § 510 states,

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

14 40. Labor Code section 1194 invalidates any agreement between an employer and an
15 employee to work for less than the minimum wage required under the applicable Wage Order.

16 41. Labor Code section 1197 makes it unlawful for an employer to pay an employee
17 less than the minimum wage required under the applicable Wage Order for all hours worked
18 during a payroll period.

19 42. Labor Code section 1198 makes it unlawful for an employer to employ an
20 employee under conditions that violate the Wage Order.

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

26 44. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees
27 to pay them at the beginning of each shift to allow Plaintiff and the Aggrieved Employees to
28 work, required Plaintiff and the Aggrieved Employees to return a portion of the \$20 they collected
from patrons for the dances they performed, and did not allow Plaintiff and the Aggrieved
Employees to leave the premises during meal periods. Moreover, Defendants failed to separately
pay Plaintiff and the Aggrieved Employees for rest and recovery periods and for nonproductive



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1 work time. Defendants only paid Plaintiff and the Aggrieved Employees a rate they set for dances.
2 As such, Defendants failed to pay minimum, overtime and doubletime wages to Plaintiff and the
3 Aggrieved Employees for all hours worked.

4 45. Plaintiff is informed and believes that, at all relevant times, Defendants maintained
5 a policy and/or practice, or lack thereof, which resulted in Defendants' failure to compensate the
6 Aggrieved Employees for all hours worked at the correct rate of pay as required by California
7 law.

8 **D. UNPROVIDED REST PERIODS**

9 46. Labor Code § 1198 states,

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

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

15 Rest Periods:

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

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

26 48. In addition, Labor Code Section 226.7 states

27 (b) An employer shall not require an employee to work during a meal
28 or rest or recovery period mandated pursuant to an applicable statute, or



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applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

49. Pursuant to the Labor Code and the Wage Order, Defendants were required to compensate Plaintiff and the Aggrieved Employees separately for paid rest periods of at least 10 minutes for each four-hour period of work or major fraction thereof.

50. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees to work periods of over four continuous hours without a paid, continuous ten-minute rest break free of duties and restrictions. Defendants interrupted, delayed, or shortened Plaintiff's and the Aggrieved Employees' rest periods so that they did not receive ten-minute paid rest periods free of duty. Defendants also prohibited Plaintiff and the Aggrieved Employees from leaving the premises for rest breaks. Defendants only allowed payments to Plaintiff and the Aggrieved Employees for work periods, not periods of rest and recovery. Defendants also prevented Plaintiff and the Aggrieved Employees from using their mobile phones in the establishment.

51. Plaintiff is informed and believes that, at relevant times within the applicable limitations period, Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants not providing the Aggrieved Employees with additional wages for all rest breaks not provided to them as required by California Labor Code § 226.7.

E. UNPROVIDED MEAL PERIODS

52. Labor Code § 1198 states,

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



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1 53. In relevant part, Labor Code Section 512 states

2
3 “An employer may not employ an employee for a work period of more than
4 five hours per day without providing the employee with a meal period of
5 not less than 30 minutes, except that if the total work period per day of the
6 employee is no more than six hours, the meal period may be waived by
7 mutual consent of both the employer and employee. An employer may not
8 employ an employee for a work period of more than 10 hours per day
 without providing the employee with a second meal period of not less than
 30 minutes, except that if the total hours worked is no more than 12 hours,
 the second meal period may be waived by mutual consent of the employer
 and the employee only if the first meal period was not waived.”

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

10 Meal Periods:

- 11
12 (A) No employer shall employ any person for a work period of more
13 than five (5) hours without a meal period of not less than 30
14 minutes, except that when a work period of not more than six (6)
15 hours will complete the day’s work the meal period may be waived
16 by mutual consent of the employer and the employee...
- 17 (B) If an employer fails to provide an employee a meal period in
18 accordance with the applicable provisions of this order, the
19 employer shall pay the employee one (1) hour of pay at the
20 employee’s regular rate of compensation for each workday that the
21 meal period is not provided.

22 55. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the
23 Aggrieved Employees were entitled to be provided with uninterrupted meal periods of at least 30
24 minutes for each day they worked five or more hours. Pursuant to California Labor Code § 512,
25 they were also entitled to a second 30-minute meal period when they worked more than ten (10)
26 hours in a workday.

27 56. Defendants interrupted, delayed, or shortened Plaintiff’s and the Aggrieved
28 Employees’ meal periods so that Plaintiff and the Aggrieved Employees did not receive 30-
 minute meal periods free of duty. Defendants also restricted the meal periods of Plaintiff and the
 Aggrieved Employees because they expected Plaintiff and the Aggrieved Employees to remain
 inside Defendants’ establishment in San Diego for such meal periods. Defendants also prevented



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1 Plaintiff and the Aggrieved Employees from using their mobile phones in the establishment.

2 57. Plaintiff is informed and believes and thereon alleges that, at relevant times within
3 the applicable limitations period, Defendants have maintained a policy, practice, or a lack of a
4 policy which resulted in Defendants not providing the Aggrieved Employees with additional
5 wages for all meal periods not provided to them as required by California Labor Code § 226.7.

6 **F. INCOMPLETE AND INACCURATE WAGE STATEMENTS**

7 58. Pursuant to California Labor Code § 226(a), Plaintiff and the Aggrieved
8 Employees were entitled to receive, semimonthly or at the time of each payment of wages, an
9 accurate itemized statement showing: a) gross wages earned; b) net wages earned; c) all applicable
10 hourly rates in effect during the pay period; and d) the corresponding number of hours worked at
11 each hourly rate by the employee.

12 59. Pursuant to California Labor Code section 226(e), an employee is deemed to suffer
13 injury if the employer fails to provide a wage statement. Also, an employee is deemed to suffer
14 injury if the employer fails to provide accurate and complete information as required by California
15 Labor Code section 226(a) and the employee cannot “promptly and easily determine” from the
16 wage statement alone one or more of the following:

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

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

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

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

28 60. “Promptly and easily determine,” as stated in California Labor Code section



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226(e), means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

61. As alleged herein, as a result of Defendants' willful misclassification of Plaintiff and the other Aggrieved Employees, Defendants failed to properly itemize in written wage statements for Plaintiff and the Aggrieved Employees their gross and net wages earned, total hours worked, hourly rate of pay, and corresponding number of hours worked at each hourly rate.

62. Defendants' failure to provide Plaintiff and the other Aggrieved Employees with wage statements was knowing and intentional. Defendants had the ability to provide Plaintiff and the other Aggrieved Employees with accurate wage statements but intentionally failed to provide them with itemized wage statements. That Defendants' conduct was knowing and intentional is evident in that Defendants misclassified Plaintiff and the other Aggrieved Employees as independent contractors despite that Defendants exercised control over Plaintiff and the other Aggrieved Employees' wages, hours, and working conditions. Moreover, Defendants did this knowing that the work Plaintiff and the other Aggrieved Employees performed was wholly within the scope of Defendants' usual course of business of exotic dancing and adult entertainment. Defendants did this to circumvent California employment law to cheat Plaintiff and the other Aggrieved Employees out of the money they rightfully earned through their labor. Thus, Defendants' conduct was knowing and intentional.

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



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1 **G. UNTIMELY FINAL WAGES**

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

4 65. Labor Code § 202 provides that all earned and unpaid wages of an employee who
5 quits after providing at least 72-hours notice before quitting are due and payable at the time of
6 quitting and that all earned and unpaid wages of an employee who quits without providing at least
7 72-hours notice before quitting are due and payable within 72 hours.

8 66. By failing to pay wages to Plaintiff and the Aggrieved Employees, Defendants
9 failed to timely pay them all earned and unpaid wages in violation of Labor Code § 201 or
10 § 202.

11 **H. UNTIMELY WAGES DURING EMPLOYMENT**

12 67. Labor Code § 204 states

13 (a) All wages, other than those mentioned in Section 201, 201.3, 202,
14 204.1, or 204.2, earned by any person in any employment are due
15 and payable twice during each calendar month, on days designated
16 in advance by the employer as the regular paydays. Labor
17 performed between the 1st and 15th days, inclusive, of any calendar
18 month shall be paid for between the 16th and the 26th day of the
19 month during which the labor was performed, and labor performed
20 between the 16th and the last day, inclusive, of any calendar month,
21 shall be paid for between the 1st and 10th day of the following
22 month. ...

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

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

(c) However, when employees are covered by a collective bargaining
agreement that provides different pay arrangements, those



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arrangements shall apply to the covered employees.

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

68. Defendants failed to provide Plaintiff and the Aggrieved Employees all wages owed, including, but not limited to, all minimum, overtime and doubletime wages at the legal rates of pay for all minimum, overtime and doubletime hours worked. As a result, Defendants failed to pay Plaintiff and the Aggrieved Employees all wages within the time periods set by California Labor Code § 204.

I. UNLAWFUL TIP COLLECTION

69. In relevant part, California Labor Code § 350(e) provides as follows:

(e) “Gratuity” includes any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron. Any amounts paid directly by a patron to a dancer employed by an employer subject to Industrial Welfare Commission Order No. 5 or 10 shall be deemed a gratuity.

70. The State of California, Department of Industrial Relations, Division of Labor Standards Enforcement issued an opinion on June 22, 2001, interpreting California Labor Code section 350(e) and the Industrial Welfare Commission Order No. 5 and 10. This opinion provides that “a patron at a striptease theater gives \$30 to a dancer, consisting of \$20 for the dance fee (which may have been pre-set by the employer) plus \$10 as an additional amount for the dancer's services. Under A.B. 2509, the dancer is entitled to keep the entire \$30.00.” The opinion goes on to discuss the history behind the current law, including its effort to ban the practice of imposing stage fees on dancers.

71. California Labor Code § 351 provides as follows:

No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or



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1 left for. An employer that permits patrons to pay gratuities by credit card shall pay
2 the employees the full amount of the gratuity that the patron indicated on the credit
3 card slip, without any deductions for any credit card payment processing fees or
4 costs that may be charged to the employer by the credit card company. Payment
of gratuities made by patrons using credit cards shall be made to the employees
not later than the next regular payday following the date the patron authorized the
credit card payment.

5 72. Labor Code section 353 requires every employer to keep accurate records of all
6 gratuities received, whether received directly from the employee or indirectly by means of
7 deductions from the wages of the employee or otherwise.

8 73. At all relevant times, Defendants did not allow Plaintiff and the Aggrieved
9 Employees to retain all of the tips they received from Defendants' customers, and instead required
10 that they share their tips with other employees, including management, disc jockeys, bouncers,
11 security, and valet.

12 74. By unlawfully collecting tips from Plaintiff and the Aggrieved Employees,
13 Defendants violated California Labor Code §§ 351 and 353.

14 **J. REQUIRING PATRONAGE**

15 75. In relevant part, California Labor Code § 450 states:

16 (A) No employer, or agent or officer thereof, or other person, may
17 compel or coerce any employee, or applicant for employment, to patronize
18 his or her employer, or any other person, in the purchase of anything of
value.

19 76. At all relevant times during the applicable limitations period, Defendants required
20 Plaintiff and other Aggrieved Employees to pay Defendants as a necessary condition of
21 employment each work shift. As a result, Defendants required Plaintiff and other Aggrieved
22 Employees to patronize Defendants in violation of California Labor Code § 450.

23 **K. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS**

24 77. Labor Code § 1174 states:

25 Every person employing labor in this state shall:

26 ...

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

28 (d) Keep, at a central location in the state or at the plants or
establishments at which employees are employed, payroll records showing



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1 the hours worked daily by and the wages paid to, and the number of piece-
2 rate units earned by and any applicable piece rate paid to, employees
3 employed at the respective plants or establishments. These records shall be
4 kept in accordance with rules established for this purpose by the
5 commission, but in any case shall be kept on file for not less than three
6 years. An employer shall not prohibit an employee from maintaining a
7 personal record of hours worked, or, if paid on a piece-rate basis, piece-
8 rate units earned.

6 78. Labor Code § 1174.5 states:

7 Any person employing labor who willfully fails to maintain the records
8 required by subdivision (c) of Section 1174 or accurate and complete
9 records required by subdivision (d) of Section 1174, or to allow any
10 member of the commission or employees of the division to inspect records
11 pursuant to subdivision (b) of Section 1174, shall be subject to a civil
12 penalty of five hundred dollars (\$500).

11 79. Section 7 of Wage Order states,

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

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

24 80. Defendants willfully failed to maintain the records required by Labor Code § 1174
25 and the Wage Order. Defendants did not maintain payroll records of all hours worked by Plaintiff
26 and the Aggrieved Employees and all wages earned at the correct rates.

27 ///

28 ///



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1 **L. CIVIL PENALTIES SOUGHT**

2 81. During the applicable time period, Defendants violated California Labor Code §§
3 201, 202, 203, 204, 226, 226.2, 226.7, 226.8, 351, 353, 450, 510, 512, 558.1, 1174, 1194, 1197,
4 1198, 2751, and 2753.

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

8 83. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved
9 Employees are entitled to recover civil penalties for each of the Defendants' violations of
10 California Labor Code §§ 201, 202, 203, 204, 226, 226.2, 226.7, 226.8, 351, 353, 450, 510, 512,
11 558.1, 1174, 1194, 1197, 1198, 2751, and 2753 during the applicable limitations period in the
12 following amounts:

13 A. For violations of California Labor Code § 204, one hundred dollars
14 (\$100.00) for each Aggrieved Employee for each initial violation and two hundred dollars
15 (\$200.00) for each Aggrieved Employee for each subsequent violation (penalty amounts
16 established by California Labor Code § 210).

17 B. For violations of California Labor Code § 226(a), two hundred fifty dollars
18 (\$250.00) for each Aggrieved Employee for initial violation and one thousand dollars (\$1,000.00)
19 for each Aggrieved Employee for each subsequent violation (penalty amounts established by
20 California Labor Code § 226.3).

21 C. For violations of California Labor Code §§ 510 and 512, fifty dollars
22 (\$50.00) for each Aggrieved Employee for initial violation and one hundred dollars (\$100.00) for
23 each Aggrieved Employee for each subsequent violation (penalty amounts established by
24 California Labor Code § 558).

25 D. For violations of California Labor Code § 226.8, twenty-five thousand
26 dollars (\$25,000.00) for each aggrieved employee for each violation of California Labor Code
27 section 226.8 as part of a pattern or practice in addition to any other penalties or fines permitted
28 by law (penalties set by Labor Code section 226.8(c)); or alternatively, fifteen thousand dollars



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1 (\$15,000.00) for each aggrieved employee for each violation of California Labor Code section
2 226.8 in addition to any other penalties or fines permitted by law (penalties set by Labor Code
3 section 226.8(b)).

4 E. For violations of California Labor Code § 1197, one hundred dollars
5 (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two hundred
6 fifty dollars (\$250.00) for each Aggrieved Employee for each subsequent violation, per pay period
7 (regardless of whether the initial violations were intentionally committed) (penalty amounts
8 established by California Labor Code § 1197.1).

9 F. For violations of California Labor Code §§ 201, 202, 203, 226.2, 226.7,
10 351, 353, 450, 1194, 1198, 2751, and 2753, one hundred dollars (\$100.00) for each Aggrieved
11 Employee per pay period for each initial violation and two hundred dollars (\$200.00) for each
12 aggrieved employee per pay period for each subsequent violation (penalty amounts established
13 by California Labor Code § 2699(f)(2)).

14 G. For the violations of California Labor Code § 1174, \$500 for each
15 Aggrieved Employee for each violation of California Labor Code § 1174 (penalty amounts
16 established by California Labor Code § 1174.5).

17 **M. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS**

18 84. Plaintiff has complied with the procedures for bringing suit specified in California
19 Labor Code § 2699.3. By letter dated December 3, 2020, Plaintiff gave written notice by certified
20 mail to the Labor and Workforce Development Agency (“LWDA”) and Defendants of the specific
21 provisions of the California Labor Code alleged to have been violated, including the facts and
22 theories to support the alleged violations. A true and correct copy of Plaintiff’s notice to the
23 LWDA dated December 3, 2020 is attached hereto as **Exhibit A**. The LWDA has not responded
24 to Plaintiff’s letter.

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

28 ///



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1 **VI. PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, on behalf of herself and the Aggrieved Employees, prays for
3 relief and judgment against Defendants as follows:

- 4 A. Civil penalties;
5 B. Costs of suit; and
6 C. Reasonable attorneys' fees.

7
8 **DEMAND FOR JURY TRIAL**

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

11 Respectfully submitted,

12 THE SPIVAK LAW FIRM

13 Dated: February 9, 2021

14 By



15 DAVID SPIVAK
16 MARALLE MESSRELIAN
17 Attorneys for Plaintiff, SIMONETTE
18 VILLENA, and the Aggrieved Employees



27 SPIVAK LAW

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EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION, CERTIFIED MAIL AND EMAIL

December 3, 2020

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Simonette Villena / Peter Balov*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004, California Labor Code §§ 2698, *et seq.*, Simonette Villena (hereafter “Villena”) provides notice on behalf of herself and of all individuals currently and formerly employed or contracted with in California as employees paid by commission, piece rate employees, or independent contractors, including exotic dancers (hereafter “the Aggrieved Employees”) for Midway Venture LLC, a California limited liability company does business as Pacers Showgirls Worldwide and Pacers Showgirls International, and Peter Balov, an individual (hereafter, collectively “Pacers”) of violations of California Labor Code §§ 98.6, 201, 202, 203, 204, 226, 226.2, 226.7, 226.8, 351, 353, 450, 510, 512, 558.1, 1102.5, 1174, 1194, 1197, 1198, 2751, and 2753.

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

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Statement of Facts

Villena began working for Pacers in San Diego, California as a dancer on or about July 4, 2018. Pacers contracted with Villena to perform various services, including exotic dancing, from this date when their relationship began to late December of 2019. In doing so, Pacers misclassified Pacers and other Aggrieved Employees as independent contractors. Pacers employed Villena as a non-exempt exotic dancer that Pacers paid per each private dance she performed during her work shifts. Villena continuously worked for Pacers as a dancer until late December of 2019 when Pacers ended her employment for objecting to (1) sexual harassment by Pacers' general manager (subject of a complaint to the Department of Fair Employment and Housing and (2) compelling her to share her tips with management and others.

Villena and the Aggrieved Employees were only compensated \$20.00 for each dance. They did not receive any other compensation for their work for Pacers. Pacers did not provide Villena and the Aggrieved Employees with a commission agreement that explained their pay structure.

Pacers interrupted, delayed, or shortened their rest and meal periods so that Villena and the Aggrieved Employees did not receive ten minute paid rest periods or 30 minute meal periods free of duty. Pacers also restricted the rest periods of Villena and the Aggrieved Employees because it expected them to remain inside Pacers' establishment in San Diego for such rest periods or for meal periods. Pacers also prevented them from using their mobile phones in the establishment.

At all relevant times, Pacers required Villena and the Aggrieved Employees to work periods of over four continuous hours without a paid, continuous 10-minute rest break free of duties and restrictions. Pacers prohibited them from leaving the premises for rest breaks. Pacers only allowed payments to Villena and the Aggrieved Employees for work periods, not periods of rest and recovery.

Additionally, Pacers demanded monetary payments from Villena and the Aggrieved Employees to work a shift within the establishment. As a result of these payments to Pacers, Villena and the Aggrieved Employees at times earned less than the California minimum hourly wage during their shifts.

Pacers did not record the start and stop times of the daily work periods of Villena and the Aggrieved Employees, nor did it record the times meal periods began and ended. Furthermore, Pacers did not issue itemized wages statements to Villena and the Aggrieved Employees.

Villena and the Aggrieved Employees worked for Pacers in excess of 40 hours per week and 8 hours per day. Villena and the Aggrieved Employees worked for Pacers in excess of 12 hours per day and all 7 days in the same workweek. In spite of this, Pacers did not pay an overtime or doubletime premium rates to Villena and the Aggrieved Employees for any such overtime and doubletime hours.

Villena and the Aggrieved Employees received monetary tips from Pacers' customers for dances they performed on stage. Pacers required Villena and the Aggrieved Employees to share such monetary tips with Pacers' management. Villena notified Pacers of her objection to this practice and Pacers terminated her employment in response.

At all relevant times, Villena and the Aggrieved Employees were employees of Pacers. Pacers directed and controlled Villena and the Aggrieved Employees in all aspects of their work performance. Pacers required Villena and the Aggrieved Employees to perform exotic dancing on stage. Pacers required Villena and the Aggrieved Employees to arrive for work at fixed times. Pacers required Villena and the Aggrieved Employees to perform private exotic dances for Pacers' customers. Pacers fixed the price at \$20 for each said dance and \$150 for each private "VIP" dance without input from Villena and the Aggrieved Employees. Pacers did not allow Villena and the Aggrieved Employees to charge more or less for said dances. For the private VIP dances, Pacers' customers paid said price directly to Pacers. Pacers decided that Villena and the Aggrieved Employees could collect on \$20 from patrons as their wages for non-private dances. Pacers required Villena and the Aggrieved Employees to return a portion of such wages to Pacers' management.

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

- a) Pacers misclassified Villena and the Aggrieved Employees as independent contractors;
- b) Pacers failed to provide commission agreements to Villena and the Aggrieved Employees;
- c) Pacers failed to authorize and permit Villena and the Aggrieved Employees to take rest periods;
- d) Pacers failed to provide Villena and the Aggrieved Employees with all meal periods;
- e) Pacers failed to compensate Villena and the Aggrieved Employees at one hour's pay for each work day with one or more unprovided rest breaks;
- f) Pacers failed to separately compensate Villena and the Aggrieved Employees for rest and recovery time and for work other than the private dances they performed for Pacers' patrons;
- g) Pacers failed to compensate Villena and the Aggrieved Employees at one hour's pay for each work day with one or more unprovided meal periods;
- h) Pacers failed to pay Villena and the Aggrieved Employees minimum wages for all hours worked;
- i) Pacers required financial patronage from Villena and the Aggrieved Employees to allow them to work;
- j) Pacers failed to pay Villena and the Aggrieved Employees one and one-half times the State minimum wage for all hours worked over eight hours in one workday, over 40 hours in one workweek, and/or up to eight hours on the seventh consecutive workday in a workweek;
- k) Pacers failed to pay Villena and the Aggrieved Employees double the State minimum wage for all hours worked over twelve hours in

one workday and/or over eight hours on the seventh consecutive workday in a workweek;

- l) Pacers collected and retained tips Pacers's patrons paid to Villena and the other Aggrieved Employees;
- m) Pacers failed to provide Villena and the Aggrieved Employees with accurate wage statements; and
- n) Pacers failed to timely pay Villena and the Aggrieved Employees all earned and unpaid wages during, and at the conclusion of, their employment with Pacers.

Accordingly, Villena now seeks civil penalties on behalf of herself and the Aggrieved Employees based on Pacers alleged violations of the California Labor Code and the Wage Order.

Wage Order 5

Wage Order 5 applies to "all persons in the public housekeeping industry." *Id.*, § 1. The phrase "public housekeeping industry" includes Pacers' night clubs/bars/cocktail lounges like those where Pacers employed Villena and the other Aggrieved Employees. *Id.*, § 2(P)(1). At all relevant times during the applicable limitations period, Pacers employed Villena as a non-exempt employee. Accordingly, Villena and the Aggrieved Employees are entitled to the protections of the Wage Order.

Willful Independent Contractor Misclassification **(Lab. Code § 226.8)**

Labor Code section 226.8 states:

- (a) It is unlawful for any person or employer to engage in any of the following activities:
 - (1) Willful misclassification of an individual as an independent contractor.

- (2) Charging an individual who has been willfully misclassified as an independent contractor a fee, or making any deductions from compensation, for any purpose, including for goods, materials, space rental, services, government licenses, repairs, equipment maintenance, or fines arising from the individual's employment where any of the acts described in this paragraph would have violated the law if the individual had not been misclassified.
- (b) If the Labor and Workforce Development Agency or a court issues a determination that a person or employer has engaged in any of the enumerated violations of subdivision (a), the person or employer shall be subject to a civil penalty of not less than five thousand dollars (\$5,000) and not more than fifteen thousand dollars (\$15,000) for each violation, in addition to any other penalties or fines permitted by law.
- (c) If the Labor and Workforce Development Agency or a court issues a determination that a person or employer has engaged in any of the enumerated violations of subdivision (a) and the person or employer has engaged in or is engaging in a pattern or practice of these violations, the person or employer shall be subject to a civil penalty of not less than ten thousand dollars (\$10,000) and not more than twenty-five thousand dollars (\$25,000) for each violation, in addition to any other penalties or fines permitted by law.

“Willful misclassification means avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.” (*Id.*, § (i)(4).)

At all relevant times, Villena and the other Aggrieved Employees were employees of Pacers. Pacers engaged, suffered, and permitted Villena and the Aggrieved Employees to work. Pacers was clearly aware that Villena and the other

Aggrieved Employees worked for it and had the power to prevent them from working for Villena. Pacers also exercised control over Villena and the other Aggrieved Employees' wages, hours, and working conditions. Further, Pacers had the right to control and exercised such control over the manner in which Villena and the other Aggrieved Employees performed their work for Pacers. They worked at Pacers's direction, and their opportunity for profit or loss did not depend in any way upon their skills. Villena and the other Aggrieved Employees required no special skill to render their services for Pacers. The services they rendered were at all times an integral part of Pacers's business. The relationship between Villena and the other Aggrieved Employees, on one hand, and Pacers, on the other, was terminable at will without cause. Despite these circumstances, Pacers willfully misclassified Villena and the other Aggrieved Employees as independent contractors. It has engaged in a pattern and/or practice of doing so.

Accordingly, Villena seeks civil penalties on behalf of herself and Aggrieved Employees as follows:

1. \$25,000.00 for each Aggrieved Employee for each violation of California Labor Code section 226.8 as part of a pattern or practice (based on Pacers's pattern and/or practice of committing such violations) in addition to any other penalties or fines permitted by law (penalties set by Labor Code section 226.8(c)); or alternatively,
2. \$15,000.00 for each Aggrieved Employee for each violation of California Labor Code section 226.8 in addition to any other penalties or fines permitted by law (penalties set by Labor Code section 226.8(b)).

Failure to Provide Signed and Complete Commission Agreements
(Lab. Code § 2751)

Labor Code § 2751 states:

- (a) Whenever an employer enters into a contract of employment with an employee for services to be rendered within this state and the contemplated method of payment of the employee involves

commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid.

- (b) The employer shall give a signed copy of the contract to every employee who is a party thereto and shall obtain a signed receipt for the contract from each employee. In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party.
- (c) As used in this section, “commissions” has the meaning set forth in Section 204.1 . For purposes of this section only, “commission” does not include any of the following:
 - (1) Short-term productivity bonuses such as are paid to retail clerks.
 - (2) (Temporary, variable incentive payments that increase, but do not decrease, payment under the written contract.
 - (3) Bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

At all relevant times, Pacers has failed to provide Villena and the Aggrieved Employees with signed commission agreements. As a result, Pacers has violated California Labor Code § 2751. Accordingly, Villena seeks civil penalties on behalf of herself and the Aggrieved Employees for violations of Labor Code § 2751 at \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 2751 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 2751 occurred (penalties set by Labor Code § 2699(f)(2)).

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

- (A) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
- (B) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

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

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30

minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

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

Regarding timing of the first meal period, *Brinker* states “in the context of an eight-hour shift, ‘[a]s a general matter,’ one rest break should fall on either side of the meal break.” *Brinker*, 53 Cal.4th at 1031-1032; *Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, 1275, reh’g denied (Dec. 1, 2014), review denied (Feb. 11, 2015); Dept. Industrial Relations, DLSE Opinion Letter No. 2001.09.17 (Sept. 17, 2001) at p. 4. (“As a general matter, the first rest period should come sometime before the meal break...”). This only makes sense based on the language of the meal period law. An employer must “employ” an employee before a meal period is due. An employer who requires an employee to clock out for a meal period upon arrival for work has yet to “employ” the employee at all for the day.

Pacers has intentionally and improperly failed to provide Villena and the Aggrieved Employees all rest breaks and/or meal periods, including, but not limited to, two 30-minute meal periods on workdays of over 10 hours. As a result, Pacers violated California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Villena seeks civil penalties on behalf of herself and the Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee per pay period in which initial violations of California Labor Code § 226.7 occurred, and \$200 for each Aggrieved Employee per pay period in which subsequent violations of § 226.7 occurred (penalties set by California Labor Code § 2699(f)(2));

2. \$50 for each Aggrieved Employee per pay period in which initial violations of California Labor Code § 512 occurred in addition to an amount sufficient to recover underpaid wages, and \$100 for each Aggrieved Employee per pay period in which subsequent violations of § 512 occurred in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee per pay period in which initial violations of California Labor Code § 1198 occurred, and \$200 for each Aggrieved Employee per pay period in which subsequent violations of § 1198 occurred (penalties set by California Labor Code § 2699(f)(2)).

Failure to Pay Wages For All Hours Worked At The Correct Rates of Pay
(Lab. Code §§ 510, 1194, 1197, and 1198)

Under Labor Code section 1197, “The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.” Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Section 4 of Wage Order states,

“Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.”

In relevant part, section 2(K) of the Wage Order states, “Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]

In relevant part, Labor Code section 1194 states:

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

Under California Labor Code § 510,

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

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

The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 in a workweek unless the employee receives one and one half (1½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours

worked on the seventh (7th) consecutive day of work in a workweek;
and

- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.
- (c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one fortieth (1/40) of the employee's weekly salary.

Because Pacers required Villena and the Aggrieved Employees to pay it at the beginning of each shift to allow them to work, required them to return a portion of the \$20 they collected from patrons for the dances they performed, and because Pacers did not allow Villena and the Aggrieved Employees to leave the premises during meal periods, Pacers failed to pay minimum, overtime and doubletime wages to Villena and the Aggrieved Employees for all hours worked. Accordingly, Villena seeks civil penalties on behalf of herself and the Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee per pay period in which initial violations of California Labor Code § 510 occurred in addition to an amount sufficient to recover underpaid wages, and \$100 for each Aggrieved Employee per pay period in which subsequent violations of § 510 occurred in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee per pay period in which initial violations of § 1194 occurred, and \$200 for each Aggrieved Employee per pay period in which subsequent violations of § 1194 occurred (penalties set by Labor Code § 2699(f)(2)).
3. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code section 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally

committed), in addition to an amount sufficient to recover unpaid wages and liquidated damages (penalties set by California Labor Code section 1197.1); and

4. \$100 for each Aggrieved Employee for each initial violation of California Labor Code section 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code section 2699(f)(2)).

Failure to Separately Compensate for Rest and Recovery Periods
(Lab. Code § 226.2)

In relevant part, Labor Code section 226.2 states,

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

...

(3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:

(i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.

As described above, Pacers failed to separately pay Villena and the Aggrieved Employees for rest and recovery periods and for nonproductive work time. It only paid them a rate it set for dances. Accordingly, on behalf of herself and the Aggrieved Employees, Villena seeks against Pacers civil penalties as follows:

\$100 for each Aggrieved Employee for each initial violation of California Labor Code section 226.2, subdivisions (a)(1) and (a)(4) and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code section 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with an accurate itemized statement in writing showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,
- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,
- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

As alleged herein, Pacers failed to provide Villena and the Aggrieved Employees with itemized wage statements. Pacers failed to properly itemize in writing each employee's gross wages earned, net wages earned, and other requirements of California Labor Code § 226. As a result, Pacers has violated California Labor Code § 226. Accordingly, Villena seeks civil penalties on behalf of herself and the Aggrieved Employees as follows: \$250 for each Aggrieved Employee for

each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

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

As alleged herein, Pacers failed to provide Villena and the Aggrieved Employees all wages owed, including, but not limited to, all minimum, overtime and doubletime wages at the legal rates of pay for all minimum, overtime and doubletime hours worked. As a result, Pacers failed to pay Villena and the Aggrieved Employees all wages within the time periods set by California Labor Code § 204. As a result, Pacers has violated California Labor Code § 204. Accordingly, Villena seeks civil penalties on behalf of herself and the Aggrieved Employees as follows:

1. For all initial violations of Labor Code § 204 that are deemed to be neither willful nor intentional, \$100.00 for each Aggrieved Employee per pay period for each violation (penalties set by California Labor Code § 210);
2. For all initial violations of Labor Code § 204 that are deemed to be either willful or intentional, \$200.00 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, per pay period for each violation (penalties set by California Labor Code § 210); and

For all subsequent violations of Labor Code § 204, regardless of whether the initial violation of Labor Code § 204 is deemed to be either willful or intentional, \$200.00 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, per pay period for each violation (penalties set by California Labor Code § 210).

Failures to Timely Pay Wages Upon Termination
(Lab. Code §§ 201-203)

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

Under Labor Code § 203, if an employer willfully fails to pay, without abatement or reduction, in accordance §§ 201 and 202, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

By failing to pay wages to Villena and other Aggrieved Employees as set forth above, Pacers is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of herself and other Aggrieved Employees, Villena seeks civil penalties from Pacers as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));

2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Tip Violations
(Lab. Code §§ 351 and 353)

Under Labor Code § 350, Pacers was an “employer” and Villena and the Aggrieved Employees were at all times “employees.” Under Labor Code § 350, Pacers was at all times “employing” Villena and the Aggrieved Employees. Labor Code § 351 prohibits an employer or agent of the employer from collecting, taking, or receiving any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deducting any amount from wages due an employee on account of a gratuity, or requiring an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Labor Code § 351 declares that every gratuity is the sole property of the employee or employees to whom it was paid, given, or left for. Labor Code § 353 requires every employer to keep accurate records of all gratuities received by him, whether received directly from the employee or indirectly by means of deductions from the wages of the employee or otherwise. At all relevant times, Pacers required Villena and the Aggrieved Employees to share their tips with Pacers’ management. Thus, Villena, on behalf of herself and other Aggrieved Employees who are/were employees, seeks civil penalties under Labor Code Section 2699(f)(2) in the amounts of \$100 per employee for Pacers’s initial violation of Labor Code Section 351, and \$200 per employee for each subsequent violation per pay period.

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Requiring Patronage
(Lab. Code § 450)

In relevant part, California Labor Code § 450 states:

- (A) No employer, or agent or officer thereof, or other person, may compel or coerce any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value.

At all relevant times during the applicable limitations period, Pacers required Villena and other Aggrieved Employees to pay Pacers as a necessary condition of employment each work shift. As a result, Pacers required Villena and other Aggrieved Employees to patronize Villena in violation of California Labor Code § 450. Accordingly, Villena seeks civil penalties on behalf of herself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee per pay period in which initial violations of California Labor Code § 450 occurred, and \$200 for each Aggrieved Employee per pay period in which subsequent violation of § 450 occurred (penalties set by California Labor Code § 2699(f)(2)).

Failure To Maintain Accurate Employment Records
(Lab. Code §§ 1175 and 1198)

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

Every person employing labor in this state shall:

...

- (c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.
- (d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the

commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code § 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of Wage Order states,

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

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

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

Pacers willfully failed to maintain the records required by § 1174 and the Wage Order. Pacers did not maintain payroll records of all hours worked by Villena and the Aggrieved Employees and all wages earned at the correct rates. Accordingly, Villena seeks civil penalties from Pacers on behalf of herself and the Aggrieved Employees as follows:

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

Retaliation
(Lab. Code § 98.6)

A person shall not discharge an employee because the employee has filed a bona fide complaint or claim relating to his or her rights that are under the jurisdiction of the Labor Commissioner or made a written or oral complaint that he or she is owed unpaid wages. Lab. Code § 98.6(a).

Pacers terminated Villena for objecting to conduct that violated the California Labor Code. During the course of her employment, Pacers required Villena and the Aggrieved Employees to return to Pacers's management a portion of the \$20 they collected from patrons as their wages for non-private dances. Pacers also required Villena and the Aggrieved Employees to share their monetary tips with Pacers' management. Villena notified Pacers of her objection to this practice and Pacers terminated her employment in response.

Villena seeks civil penalties under California Labor Code § 98.6(b)(3) in an amount not to exceed \$10,000 for each violation by Pacers, of California Labor Code § 98.6(a), as well as attorney's fees and costs under Lab. Code § 2699(g).

Retaliation
(Lab. Code § 1102.5)

An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Lab. Code § 1102.5(c).

Pacers terminated Villena for objecting to conduct that violated the California Labor Code. During the course of her employment, Pacers required Villena and the Aggrieved Employees to return to Pacers's management a portion of the \$20 they collected from patrons as their wages for non-private dances. Pacers also required Villena and the Aggrieved Employees to share their monetary tips with Pacers' management. Villena notified Pacers of her objection to this practice. Because of her complaints regarding Pacers' noncompliance with the California Labor Code, Pacers terminated Villena in violation of California Labor Code § 1102.5(c).

Villena seeks civil penalties under California Labor Code § 1102.5(f) in an amount not to exceed \$10,000 for each violation by Avalon of California Labor Code § 1102.5(c), as well as attorney's fees and costs under Labor Code § 2699(g).

Individual Liability
(Labor Code § 558.1)

In relevant part, California Labor Code § 558.1 states:

- (a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.
- (b) For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who

is an owner, director, officer, or managing agent of the employer, and the term “managing agent” has the same meaning as in subdivision (b) of § 3294 of the Civil Code.

Section 17 of the Wage Order states:

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

At all relevant times herein, Peter Balov owned and operated Midway Venture LLC and employed Villena and the Aggrieved Employees. Peter Balov was the “owner,” “managing agent,” and sole director of Midway Venture LLC. Peter Balov directly or indirectly, or through an agent or any other person, employed and exercised control over the wages, hours, or working conditions of Villena and the Aggrieved Employees and caused the violations to the Labor Code and Wage Order described above.

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Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Simonette Villena
Walter Haines, Esq.

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