

FILED
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Sacramento
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rsanmiguel
By _____, Deputy
Case Number:
34-2021-00310576

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9

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SACRAMENTO
12

13 BRAD SMITH, as an individual and on behalf
14 of all others similarly aggrieved,

15 Plaintiffs,

16 vs.
17

18 BLUE DIAMOND GROWERS, a California
19 domestic non-profit corporation; BLUE
DIAMOND GROWERS SERVICES, a
20 California corporation; and BLUE DIAMOND
ALMOND GROWERS, a California
21 corporation; and DOES 1-50, inclusive,

22 Defendants.
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CASE NO. 34-2021-00310576

**FIRST AMENDED PRIVATE
ATTORNEYS GENERAL ACT
("PAGA") REPRESENTATIVE
COMPLAINT**

Action Filed: November 21, 2021
Trial Date: None set

BY FAX

1 Plaintiff BRAD SMITH (“Plaintiff”), an individual, on behalf himself and all other similarly
2 aggrieved employees (“Aggrieved Employees”), hereby files this Complaint against Defendants
3 BLUE DIAMOND GROWERS, a California domestic non-profit corporation; BLUE DIAMOND
4 GROWERS SERVICES, a California corporation; and BLUE DIAMOND ALMOND
5 GROWERS, a California corporation; and DOES 1-50, inclusive, (collectively referred to herein
6 as “Defendants”) and alleges based on information and belief as follows:

7 **THE PARTIES**

8 1. Plaintiff is, and at relevant times was, an individual domiciled in the State of California and
9 a citizen of the State of California who worked as a non-exempt employee for Defendants in the
10 State of California, for approximately thirteen years until his last day worked, on or about February
11 5, 2021. Plaintiff was a forklift driver in Defendants’ Sacramento, California facility.

12 2. Defendant BLUE DIAMOND GROWERS is a California domestic non-profit corporation
13 that, at all relevant times, was authorized to do business within the State of California and is doing
14 business in the State of California.

15 3. Defendant BLUE DIAMOND GROWERS SERVICES is a California corporation that, at
16 all relevant times, was authorized to do business within the State of California and is doing business
17 in the State of California.

18 4. Defendant BLUE DIAMOND ALMOND GROWERS is a California corporation that, at
19 all relevant times, was authorized to do business within the State of California and is doing business
20 in the State of California.

21 5. According to their website, Defendants have “three campuses in Northern California –
22 located in the cities of Sacramento, Salida and Turlock – which collectively employ more than
23 1,000 people.” See <https://careers.bluediamond.com/locations/> (last visited January 5, 2022).
24 According to their website, the Sacramento facility is 6,500 square feet; the Salida facility is 49
25 acres, and the Turlock facility is 200,000 square feet (estimating it will eventually be – if it is not
26 already – 500,000 square feet). *Id.*

27 6. According to their website, Defendants offer their employees multiple shifts, including day,
28 grave, and swing shifts. See <https://bdgrowers.wd1.myworkdayjobs.com/en-US/External> (last

1 visited January 5, 2022).

2 7. The true names and capacities of the DOE Defendants sued herein as DOES 1 through 50,
3 inclusive, are currently unknown to Plaintiff, who therefore sues each such Defendants by said
4 fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the
5 unlawful acts alleged herein. Plaintiff will seek leave of Court to amend this Complaint to reflect
6 the true names and capacities of the Doe Defendants when such identities become known.

7 8. Plaintiff is further informed and believes that, at all relevant times, each Defendant was the
8 principal, agent, partner, joint venturer, joint employer, officer, director, controlling shareholder,
9 subsidiary, affiliate, parent corporation, successor in interest and/or predecessor in interest of some
10 or all of the other Defendants, and was engaged with some or all of the other defendants in a joint
11 enterprise for profit, and bore such other relationships to some or all of the other Defendants so as
12 to be liable for their conduct with respect to the matters alleged in this complaint. Plaintiff is further
13 informed and believes and thereon alleges that each Defendant acted pursuant to and within the
14 scope of the relationships alleged above, and that at all relevant times, each Defendant knew or
15 should have known about, authorized, ratified, adopted, approved, controlled, aided and abetted the
16 conduct of all other Defendants.

17 9. At all relevant times, Defendants were and are legally responsible for all of the unlawful
18 conduct, policies, practices, acts and omissions complained of herein. Further, Defendants are
19 responsible for each of the unlawful acts or omissions complained of herein under the doctrine of
20 respondent superior. The conduct of Defendants' managers and supervisors was at all relevant times
21 undertaken as employees of Defendants, acting within the scope of their employment or authority
22 in all of the unlawful activities described herein.

23 10. Whenever and wherever reference is made in this complaint to any act or failure to act by a
24 Defendant or co-Defendant, such allegations and references shall also be deemed to mean the acts
25 and/or failures to act by each Defendant acting individually, jointly and severally.

26 **JURISDICTION AND VENUE**

27 11. This court possesses original subject matter jurisdiction over this matter. Venue is proper in
28 Sacramento County, California, because Defendants transact business in Sacramento County and

1 some of the complained of conduct occurred in this judicial district. *See also Crestwood Behavioral*
2 *Health, Inc. v. Superior Court* (2021) 60 Cal.App.5th 1069 (venue in a PAGA action is proper in
3 any county where the defendants committed Labor Code violations against some of its employees).

4 **JOINT LIABILITY**

5 12. Under California law, the definition of the term “to employ” is broadly construed under the
6 applicable IWC Wage Order(s) to have three alternative definitions, including: (1) to exercise
7 control over the wages, hours or working conditions; (2) to suffer or permit to work; or (3) to
8 engage, thereby creating a common law employment relationship. *See Martinez v. Combs*, 49
9 Cal.4th 35, 64 (2010). One reason that the IWC defined “employer” in terms of exercising control
10 was to reach situations in which multiple entities control different aspects of the employment
11 relationship. Supervision of the work, in the specific sense of exercising control over how services
12 are properly performed, is properly viewed as one of the “working conditions” mentioned in the
13 wage order. *Id.* at 76. A joint employer relationship exists when one entity hires and pays a worker,
14 and the other entity supervises the work. *Id.*

15 13. As such, California courts have recognized that the definition of “employer” for purposes
16 of enforcement of the California Labor Code goes beyond the concept of traditional employment
17 to reach irregular working arrangements for the purpose of preventing evasion and subterfuge of
18 California’s labor laws. *Martinez v. Combs* (2010) 49 Cal.4th 35, 65. Therefore, anyone who
19 directly or indirectly, or through an agent or any other person, engages, suffers, or permits any
20 person to work or exercises control over the wages, hours, or working conditions of any person,
21 may be liable for violations of the California Labor Code as to that person.

22 14. During Plaintiff’s employment with Defendants, Plaintiff and the Aggrieved Employees
23 were jointly employed by these Defendants, under the alternative definitions of “to employ”
24 adopted by the California Supreme Court in *Martinez*, supra. As discussed below, these Defendants
25 (1) exercised control over wages, hours and working conditions of Plaintiff and the Aggrieved
26 Employees (defined below); (2) suffered or permitted Plaintiff and the Aggrieved Employees to
27 work for them; and (3) engaged Plaintiff and the Aggrieved Employees to work for them.

28 15. Plaintiff is informed and believes, and thereon alleges that at all relevant times Defendants

1 operated as a single integrated enterprise with common ownership and centralized human resources
2 as a set forth herein. Plaintiff is further informed and believes and thereon alleges that Defendants
3 and each of them, are owned and operated by the same individuals and share the same
4 headquarters/principal place of business/principal executive office at 1802 C Street Sacramento,
5 California 95811. As a result, Defendants utilized the same unlawful policies and practices across
6 all of their locations/facilities and subjected all of the Aggrieved Employees to these same policies
7 and practices regardless of the location(s) or facilities where they worked.

8 16. Plaintiff is informed and believes, and thereon alleges that at all times relevant to this
9 Complaint, Defendants were the joint employers of Plaintiff and the Aggrieved Employees upon
10 whose behalf Plaintiff brings these allegations and cause of action, in that Defendants, exercised
11 sufficient control over Plaintiff and the Aggrieved Employees' wages, hours and working
12 conditions, and/or suffered or permitted Plaintiff and the Aggrieved Employees to work so as to be
13 considered the joint employers of Plaintiff and the Aggrieved Employees. Specifically, upon
14 information and belief, Plaintiff alleges that Defendants created a uniform set of policies, practices
15 and/or procedures concerning, inter alia, hourly and overtime pay, time-keeping practices, meal
16 and rest periods, payment of final wages, and other working conditions that were distributed to,
17 and/or applied to Plaintiff and the Aggrieved Employees, and further that Defendants uniformly
18 compensated and controlled the wages of Plaintiff and the Aggrieved Employees in a uniform
19 manner. Based on information and belief, Defendants collectively represented to Plaintiff and the
20 Aggrieved Employees that each was an "at-will" employee of Defendants, and that Defendants
21 collectively retained the right to terminate Plaintiff and the Aggrieved Employees' employment
22 with or without cause. Upon information and belief, Defendants further collectively represented to
23 Plaintiff and the Aggrieved Employees in writing the details of their compensation, and the manner
24 in which they were to take meal and rest periods, the procedures required by Defendants
25 collectively for recordation of hours worked and the policies applicable to Plaintiff and the
26 Aggrieved Employees by which Defendants collectively would evaluate the wage rates of Plaintiff
27 and the Aggrieved Employees.

28 17. Thus, Defendants collectively exercised the right to control the wages, hours and working

1 conditions of Plaintiff and the Aggrieved Employees. As such, Defendants collectively held the
2 right to control virtually every aspect of Plaintiff's and the Aggrieved Employees' employment,
3 including the instrumentality that resulted in the illegal conduct for which Plaintiff seeks relief in
4 this Complaint.

5 **FACTUAL ALLEGATIONS**

6 18. During the one-year and sixty-five day period preceding filing of this Complaint, Plaintiff
7 was employed by Defendants as a non-exempt employee in the State of California. Defendants, at
8 all relevant times, exercised control over Plaintiff and the other Aggrieved Employees (as defined
9 below) and suffered and/or permitted them to work.

10 19. Plaintiff worked for Defendants as a non-exempt forklift driver. Plaintiff typically worked
11 the day shift for ten-plus hour shifts for six days per week, or fifty-five to sixty hours per week.
12 Plaintiff's typical scheduled shift would begin at 5:00 a.m. and end at 3:30 p.m. or later. Plaintiff
13 was paid an hourly rate for hours counted by employer as time worked.

14 20. **Meal Breaks.** Plaintiff was not always provided proper meal periods during his
15 employment. Plaintiff was often forced to work through his meal periods or forced to take late,
16 shortened, interrupted and/or on-duty meal periods due to his workload/commentary from
17 supervisors pressuring Plaintiff to take improper meal periods or skip meal periods completely.
18 Notably, second meal periods were rarely if ever provided for those shifts that Plaintiff worked
19 more than ten (10) hours. Defendants also failed to pay Plaintiff an additional hour of wages at his
20 regular rate of pay for each workday a meal period was not provided.

21 21. **Rest Breaks.** Plaintiff did not receive compliant, timely net 10-minute rest periods every
22 four (4) hours or major fraction thereof. Plaintiff was often required to work through all or part of
23 his rest periods due to his workload/commentary from supervisors pressuring Plaintiff to take
24 improper rest periods or skip his rest periods completely. Employers are obligated under California
25 law to permit and authorize employees to take off-duty rest periods, meaning employers must
26 relieve employees of all duties and relinquish control over how employees spend their time.
27 *Augustus v. ABM Security Services, Inc.*, (2016) 5 Cal.5th 257. Accordingly, an employer cannot
28 require employees to stay on the work premises nor may an employer require employees to monitor

1 their cell phones and/or radios and/or other dispatch equipment during their rest periods as “one
2 cannot square the practice of compelling employees to remain at the ready, tethered by time and
3 policy to *particular locations* or communications devices, with the requirement to relieve
4 employees of all work duties and employer control during 10-minute rest periods. [emphasis
5 added].” *Id* at 269. Based on information and belief, Plaintiff and the Aggrieved Employees were
6 required to remain on the work premises during any rest periods and thus remained under employer
7 control during any rest periods, thereby rendering said rest periods improper. Also, Defendant did
8 not authorize nor permit Plaintiff to take any version of a third rest period for shifts lasting over ten
9 hours. Plaintiff was not paid rest period premiums at his regular rate of compensation for these
10 missed/improper rest periods.

11 **22. Unpaid Wages.** Defendants did not compensate Plaintiff for all hours worked by virtue of,
12 among other things, requiring that Plaintiff perform pre-shift and/or post-shift off-the-clock work
13 and work through uncompensated meal periods. For example, Plaintiff was required to spend time
14 suiting up in/removing his gear before/after his shift and/or at the beginning and end of meal
15 periods. He was not compensated for this time. This failure to compensate Plaintiff for all time
16 worked resulted in violations of California’s minimum and overtime wage laws as well as record-
17 keeping violations.

18 23. Moreover, on information and belief, Plaintiff regularly worked seven (7) consecutive days
19 but was not compensated at the appropriate premium wage rate(s) for those hours worked on the
20 seventh day.

21 **24. Wage Statements.** Additionally, Defendants failed to provide wage statements in
22 compliance with Labor Code section 226. Plaintiff's paystubs did not accurately reflect the correct
23 total hours worked for each pay period. Accordingly, Defendants have violated Labor Code section
24 226 as to Plaintiff.

25 **25. Waiting Time.** Upon termination, Defendants failed to furnish Plaintiff with his final
26 paycheck containing all earned and owed wages. Plaintiff's final paycheck did not include all
27 remuneration owed to Plaintiff as it was devoid of, including but not limited to, all owed minimum
28 and overtime wages and all meal and rest period premiums owed.

1 26. Plaintiff brings this complaint under the Private Attorneys General Act of 2004, Labor Code
2 sections 2698, *et seq.*, (“PAGA”), as a representative action on behalf of the State of California,
3 regarding violations of the Labor Code as to all similarly aggrieved individuals employed by
4 Defendants in the State of California as a non-exempt employee. This action is brought solely
5 pursuant to PAGA and seeks no relief beyond that available under PAGA.

6 27. During the period beginning one-year preceding the filing of the required PAGA notice
7 with the Labor Workforce and Development Agency, and continuing through the present, as alleged
8 herein, Defendants violated Labor Code sections 201-202, 204, 216, 221-223, 226, 226.7, 510,
9 512, 558, 558.1, 1174, 1194, 1197, 1198, 1199, 2810.5 and all relevant sections of the applicable
10 Wage Orders (to the extent violations of such Wage Orders give rise to violations under the Labor
11 Code sections enumerated herein), as to Plaintiff and all Aggrieved Employees employed by
12 Defendants who worked as non-exempt employees. These violations subject Defendants to civil
13 penalties as set forth in the foregoing statutes as well as other provisions of the Labor Code,
14 including without limitation Labor Code sections 203, 225.5, 256, 210, 1174.5, 1197.1 and
15 2699.

16 **THE “AGGRIEVED EMPLOYEES”**

17 28. Plaintiff brings this action on behalf of himself and all similarly situated aggrieved
18 employees. The other Aggrieved Employees shall be defined as follows: “All non-exempt
19 employees who were employed in California directly by Defendants at any time within the one year
20 and sixty-five days prior to the filing of the initial complaint.”

21 29. Plaintiff is an “aggrieved employee,” as that term is defined under Labor Code section
22 2699(c), as he was employed by Defendants during the applicable statutory limitations period and
23 suffered one or more of the Labor Code violations set forth herein. Accordingly, Plaintiff seeks to
24 recover on behalf of himself, the State of California, and all other Aggrieved Employees, the civil
25 penalties provided by PAGA, plus reasonable attorney's fees and costs. Plaintiff has standing to
26 bring a PAGA cause of action on behalf of the State and all Aggrieved Employees, as he was jointly
27 employed by Defendants and is thereby affected by one or more of the alleged violations. *See Huff*
28 *v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 757. A PAGA plaintiff has

1 authority to seek penalties for all known violations committed by the employer – regardless of
2 whether plaintiff experienced all violations personally. *Id.* at 760-761.

3 **COMPLIANCE WITH PAGA’S NOTIFICATION REQUIREMENT**

4 30. On February 23, 2021, Plaintiff, through his counsel, gave written notice by online filing
5 with the California Labor and Workforce Development Agency (“LWDA”) informing it that
6 Defendants failed to comply with California’s labor laws with regard to the allegations alleged in
7 this Complaint (“PAGA Letter”). Attached hereto as **Exhibit 1** is a true and correct copy of the
8 PAGA Letter also sent to Defendants at the offices of their Agents for Service of Process via
9 certified mail.

10 31. The PAGA Letter outlined Plaintiff’s claims for violations of the California Labor Code
11 and the applicable wage orders on behalf of himself, the State of California and other Aggrieved
12 Employees.

13 32. The LWDA did not provide notice of its intention to investigate Defendants’ violations after
14 expiration of the 65-day waiting time period, or at any time. To the extent any of the alleged
15 violations were curable, Defendants failed to cure within the time allotted by PAGA. Accordingly,
16 Plaintiff has exhausted the administrative remedies as required by Labor Code section 2699.3.
17 Consequently, Plaintiff’s right to file the instant lawsuit has duly accrued.

18 33. As such, Plaintiff seeks to recover the PAGA civil penalties through a representative action
19 permitted by PAGA and the California Supreme Court in *Arias v. Superior Court* (2009) 46 Cal.4th
20 969. Therefore, class certification of the PAGA claims is not required.

21 **FIRST CAUSE OF ACTION**

22 **VIOLATION OF PRIVATE ATTORNEYS GENERAL ACT,**

23 **LABOR CODE SECTIONS 2698, ET SEQ.**

24 **(On behalf of Plaintiff, Aggrieved Employees, and the State of California against all**
25 **Defendants)**

26 34. Plaintiff incorporates all preceding paragraphs as if fully alleged herein.

27 35. **Meal Breaks.** Under California law, Defendants were required to provide Plaintiff and the
28 Aggrieved Employees with one 30-minute meal break free from all duties for all shifts longer than

1 5 hours, and a second 30-minute meal break free from all duties for all shifts longer than 10 hours.
2 Meal periods can be waived, but only under the following circumstances: (1) if an employee's total
3 work period in a day is over five (5) hours but no more than six (6) hours, the required meal period
4 may be waived by mutual consent of the employer and employee, and (2) if an employee's total
5 work period in a day is over ten (10) hours but no more than twelve (12) hours, the required second
6 meal period may be waived by mutual consent of the employer and employee, but only if the first
7 meal period was not waived. Under California law, employers have an obligation to both (1) relieve
8 their employees for at least one meal period for shifts over five hours (see above), and (2) to record
9 having done so. If the employer fails to properly record a valid meal period, it is presumed no meal
10 period was provided.

11 36. Plaintiff and the Aggrieved Employees regularly worked periods of more than five (5) hours
12 in a workday without being provided a mandatory thirty-minute, duty-free meal period, and
13 regularly worked periods of more than ten and/or twelve hours in a workday without being provided
14 a mandatory second thirty-minute, duty-free meal period. Plaintiff and the Aggrieved Employees
15 were not always provided proper meal periods during their employment. Plaintiff and the
16 Aggrieved Employees were often forced to work through their meal periods or forced to take late,
17 shortened, interrupted and/or on-duty meal periods due to their workloads/commentary from
18 supervisors pressuring Plaintiff and the Aggrieved Employees to take improper meal periods or
19 skip meal periods completely. Notably, second meal periods were rarely if ever provided for those
20 shifts that Plaintiff and the Aggrieved Employees worked more than ten (10) hours. Defendants
21 also failed to pay Plaintiff and the Aggrieved Employees an additional hour of wages at their regular
22 rate of pay for each workday a meal period was not provided.

23 37. **Rest Breaks.** Labor Code section 226.7 and all applicable IWC Wage Orders require an
24 employer to authorize or permit an employee to take a rest period of ten (10) net minutes for every
25 four hours worked or major fraction thereof. Such rest periods must be in the middle of the four-
26 hour period "insofar as practicable." In *Brinker v. Restaurant Corp.*, 53 Cal.4th
27 1004 (2012), the California Supreme Court held that employees are entitled to a 10-minute paid
28 rest period for shifts from 3 ½ to 6 hours in a length, two 10-minute rest periods for shift more than

1 6 hours up to 10 hours, and three 10-minute rest periods for shift of more than 10 hours up to 14
2 hours. (*Id.* at 1029). The rest period requirement obligates employers to permit and authorize
3 employees to take off-duty rest periods, meaning employers must relieve employees of all duties
4 and relinquish control over how employees spend their time. *Augustus v. ABM Security Services,*
5 *Inc.*, (2016) 5 Cal.5th 257. If the employer fails to provide any required rest period, the employer
6 must pay the employee one hour of pay at the employee's regular rate of compensation for each
7 workday the employer did not provide at least one legally required rest period, pursuant to Labor
8 Code section 226.7.

9 38. Defendants failed to provide Plaintiff and the Aggrieved Employees all required and/or fully
10 compliant rest periods, or compensation in lieu thereof. Defendants employed policies and
11 procedures that ensured Plaintiff and the Aggrieved Employees would not receive all legally
12 required rest periods, as Defendants did not authorize nor permit all required rest periods in
13 compliance with the timing requirements under California law. Plaintiff and the Aggrieved
14 Employees did not receive compliant, timely net 10-minute rest periods every four (4) hours or
15 major fraction thereof. Plaintiff and the Aggrieved Employees were often required to work through
16 all or part of their rest periods due to their workloads/commentary from supervisors pressuring
17 Plaintiff and the Aggrieved Employees to take improper rest periods or skip rest periods
18 completely. Based on information and belief, Plaintiff and the Aggrieved Employees were required
19 to remain on the work premises during any rest periods and thus remained under employer control
20 during any rest periods, thereby rendering said rest periods improper. Also, Defendants did not
21 authorize nor permit Plaintiff and the Aggrieved Employees to take any version of a third rest period
22 for shifts lasting over ten hours. Plaintiff and the Aggrieved Employees were not paid rest period
23 premiums for these missed/improper rest periods.

24 39. **Unpaid Wages.** California law provides employees in California must be paid for all hours
25 worked, up to 40 per week or eight (8) per day, at a regular time rate no less than the mandated
26 minimum wage. California law also provides employees in California must be paid overtime, equal
27 to 1.5 times the employee's regular rate of pay, for all hours worked in excess of 40 per week or
28 eight (8) per day. Plaintiff and the Aggrieved Employees regularly worked time for which they

1 were not compensated. Notably, Plaintiff and the Aggrieved Employees were required to work
2 through meal periods they were not paid for and were required to perform pre-shift and/or post-
3 shift work for which they were not compensated. This off-the-clock work resulted in not only
4 record-keeping violations but also minimum and overtime wage violations.

5 40. California law further provides that any work performed up to eight (8) hours on the seventh
6 day of work in any one workweek shall be compensated at the rate of no less than 1.5 times the
7 regular rate of pay for an employee. In addition, any work in excess of eight (8) hours on any
8 seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate
9 of pay of an employee. Upon information and belief, Plaintiff and the Aggrieved Employees
10 regularly worked seven (7) consecutive days but were not compensated at the appropriate premium
11 wage rate(s) for those hours worked on the seventh day.

12 41. **Wage Statements.** Labor Code section 226(a) provides, in relevant part, that “[a]n
13 employer, semimonthly or at the time of each payment of wages, shall furnish to his or her
14 employee, either as a detachable part of the check, draft, or voucher paying the employee’s wages,
15 or separately if wages are paid by personal check or cash, an accurate itemized statement in writing
16 showing (1) gross wages earned, (2) total hours worked by the employee . . . , (5) net wages earned,
17 [and] (6) the inclusive dates of the period for which the employee is paid . . . , (8) the name and
18 address of the legal entity that is the employer . . . , (9) all applicable hourly rates in effect during
19 the pay period and the corresponding number of hours worked at each hourly rate by the employee
20”

21 42. Defendants knowingly and intentionally failed to provide Plaintiff and the Aggrieved
22 Employees with accurate itemized wage statements. Labor Code § 226(a) requires Defendants to
23 accurately report Plaintiff and the Aggrieved Employee’s total hours worked. Each and every wage
24 statement Defendants provided to Plaintiff and the Aggrieved Employees failed to accurately
25 itemize, in violation of Labor Code § 226(a), Plaintiff and the Aggrieved Employees’ accurate total
26 hours worked, as pre-shift, post-shift, and time spent working during unpaid meal periods were not
27 included within the total hours worked.

28 43. Failure to list all hours worked on a wage statement, gives rise to an inference of injury

1 under Labor Code Section 226 (*Maldonado v Epsilon Plastics, Inc.*, (2018) 22 Cal.App.5th 1308,
2 1337). Defendants' failure to accurately list all hours worked on all wage statements caused
3 confusion to Plaintiff and caused and continues to cause confusion to the Aggrieved Employees
4 over whether they were paid for all hours worked. As such, Plaintiff and the Aggrieved Employees
5 were injured by Defendants' failure to provide accurate wage statements.

6 **44. Inaccurate Records.** California law requires employers to keep "accurate and complete"
7 payroll records showing, among other things, the hours worked daily by all non-exempt employees.
8 Section 7 of all applicable IWC Wage Orders similarly requires employers to keep time records
9 showing, *inter- alia*, when the employees begin and end each work period and reflecting the times
10 during which all owed meal periods are provided each day. At all relevant times, Defendants have
11 failed, and continue to fail, to keep the required time records, as Defendants did not record the true
12 start and stop times of Plaintiff and the Aggrieved Employees' workdays and failed to record
13 employee meal periods. Defendants' failure to keep "accurate and complete" payroll records for
14 Plaintiff and the Aggrieved Employees violates Labor Code sections 1174, 1198-99, and Section 7
15 of all applicable IWC Wage Orders. These violations subject Defendants to civil penalties under
16 the Labor Code, including without limitation sections 1174.5 and 2699. Each violation of each
17 Labor Code section and Wage Order provision (to the extent violations of such Wage Orders give
18 rise to violations under the Labor Code sections enumerated herein), for each Aggrieved Employee,
19 results in a separate civil penalty.

20 **45. Waiting Time.** Labor Code section 201 requires employers to pay all wages earned and
21 unpaid at the time of discharge, immediately upon discharge. Labor Code section 202 states similar
22 provisions with respect to employees who resign. For all Aggrieved Employees no longer employed
23 by Defendants, Defendants still have not paid such aggrieved employees all wages earned and
24 unpaid at the time of discharge, in that Defendants have not paid for, *inter alia*, all owed minimum
25 and overtime wages. These violations subject Defendants to civil penalties under the Labor Code,
26 including without limitation Labor Code sections 203, 256 and 2699. Each violation results in a
27 separate civil penalty, for each Aggrieved Employee for each pay period during which the statutory
28 provisions were violated.

1 **46. Refusal to make payment.** Labor Code section 216 declares unlawful an employer's
2 refusal to pay wages due and payable and/or denial of the validity of any claim to wages due.
3 Defendants violated and continue to violate this section by failing to pay Plaintiff and the Aggrieved
4 Employees for all hours worked at the proper wage rate and by failing to pay Plaintiff and the
5 Aggrieved Employees an additional hour of pay for each meal/rest period not provided/that was
6 invalid. These violations subject Defendants to civil penalties under Labor Code section 225.5.
7 Each violation results in a separate civil penalty, for each Aggrieved Employee, for each pay period
8 during which the statute provisions were violated.

9 **47. Statutory Wage Violations.** California Labor Code section 223 makes it unlawful for an
10 employer to secretly pay wages lower than required by statute while purporting to pay legal wages.
11 As described above, Defendants willfully and systematically denied Plaintiff and the Aggrieved
12 Employees minimum and overtime wage compensation for all hours worked which resulted in the
13 payment of less than statutorily required wages to them. Defendants acted with the intent to deprive
14 them of statutory wages, including, but not limited to, overtime wages and minimum wages, to
15 which they were entitled to under California law.

16 **48.** Under the provisions of PAGA and Labor Code sections 201-202, 216, 221-223, 226, 226.2,
17 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198, 1199, 2810.5 and all relevant sections of the
18 applicable Wage Orders (to the extent violations of such Wage Orders give rise to violations under
19 the Labor Code sections enumerated herein), as well as all interpretations of these laws by
20 California Courts and administrative bodies, as well as any other law that is enforceable through
21 PAGA, Defendants are liable for all statutorily-specified penalties recoverable under PAGA as
22 enumerated in the relevant California Labor Code provisions listed herein, or for default PAGA
23 penalties under Labor Code Section 2699(f) for any violation of a Labor Code section without a
24 specified civil penalty.

25 **49.** As alleged above, Plaintiff complied with the procedures for bringing suit specified in Labor
26 Code sections 2699.3 and 2699.5 by giving written notice to the LWDA and to Defendants via
27 certified mail 65 days prior to the initial Complaint of the specific provisions of the Labor Code
28 and Wage Orders allegedly violated, including the facts and theories to support the alleged

1 violations.

2 50. Under Labor Code section 2699.3, the LWDA must give written notice by certified mail to
3 the parties it intends to investigate the alleged violations within 65 days of the date of Plaintiff's
4 written notice. As of the expiration of the statutory exhaustion period, the LWDA has not provided
5 the parties any notice of its intention to investigate Plaintiff's claims on behalf of the State of
6 California and the Aggrieved Employees. As of the filing of this Complaint, Defendants have not
7 responded to Plaintiff's PAGA notice in an attempt to cure. Accordingly, Plaintiff has exhausted
8 all administrative remedies required by law.

9 51. Pursuant to Labor Code section 2699(g), and/or any and all other applicable laws, Plaintiff
10 is entitled to recover civil penalties, costs, plus reasonable attorney's fees and costs, all in an amount
11 to be proved.

12 **PRAYER**

13 WHEREFORE, Plaintiff, prays for judgment against each Defendant, jointly and severally,
14 as follows:

- 15 1. For civil penalties according to proof;
- 16 2. For reasonable attorney's fees and costs of suit; and
- 17 3. For such other and further relief as the Court deems just and proper.

18
19 Dated: January 7, 2022

CROSNER LEGAL, P.C.

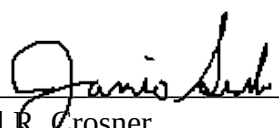
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22 Michael R. Crosner
23 Zachary M. Crosner
24 Blake R. Jones
25 Jamie Serb
26 Attorneys for Plaintiff BRAD SMITH
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EXHIBIT 1



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February 23, 2021

VIA ONLINE FILING ONLY:

California Labor & Workforce
 Development Agency
 ATTN: PAGA Administrator
 455 Golden Gate Avenue, 9th Floor
 San Francisco, CA 94102
PAGAFilings@dir.ca.gov

VIA CERTIFIED MAIL:

C T Corporation System,
 Agent for Service of Process for Blue Diamond Growers
 ATTN to the following employees authorized to accept service: Amanda Garcia, Vivian
 Imperial, Gladys Aguilera, Carlos Paz, Gabriela Sanchez, Daisy Montenegro, Beatrice Casarez-
 Barrientez, Jessie Gastelum, Peter Cayetano and Alberto Damonte
 818 West Seventh Street, Suite 930
 Los Angeles, CA 90017

C T Corporation System,
 Agent for Service of Process for Blue Diamond Almond Growers
 ATTN to the following employees authorized to accept service: Amanda Garcia, Vivian
 Imperial, Gladys Aguilera, Carlos Paz, Gabriela Sanchez, Daisy Montenegro, Beatrice Casarez-
 Barrientez, Jessie Gastelum, Peter Cayetano and Alberto Damonte
 818 West Seventh Street, Suite 930
 Los Angeles, CA 90017

C T Corporation System,
 Agent for Service of Process for Blue Diamond Growers Services

ATTN to the following employees authorized to accept service: Amanda Garcia, Vivian Imperial, Gladys Aguilera, Carlos Paz, Gabriela Sanchez, Daisy Montenegro, Beatrice Casarez-Barrientez, Jessie Gastelum, Peter Cayetano and Alberto Damonte
 818 West Seventh Street, Suite 930
 Los Angeles, CA 90017

Subject: *Brad Smith, on behalf of himself and all similarly aggrieved employees v. Blue Diamond Growers, et al.*, **Cal. Labor Code Sections 2699.3 and 2699.5 Notice of Labor Code Violations**

To the California Labor and Workforce Development Agency and above-named entities:

This office represents Complainant Brad Smith (hereinafter “Complainant”) in connection with his claims under the California Labor Code. Complainant was, at all relevant times herein mentioned, an employee of the above-named entities (hereinafter to be collectively referred to as “Employer”).

Employer may be contacted directly at the above addresses. Pursuant to California Labor Code sections 2699.3 and 2699.5, Complainant, on behalf of himself, and on behalf of similarly situated aggrieved current and former employees of Employer, hereby gives written notice (“Notice”) of their claims against Employer. This Notice is being provided via online filing to the California Labor and Workforce Development Agency (“LWDA”) and Employer via Employer’s principal executive office and via its Agent(s) for Service of Process (to the extent provided the California Secretary of State). This Notice also serves to demonstrate Complainant’s reasonable attempt at settlement with Employer. If Employer is interested in settling this matter before a lawsuit is filed, Employer may contact Crosner Legal, P.C. at the address listed at the close of this notice. This settlement attempt is in compliance with relevant California law. *Graham v. Daimler Chrysler Corp.* (2004) 24 Cal.4th 553, 561.

This letter is sent in compliance with the reporting requirements of California Labor Code sections 2699.3 and 2699.5. This letter further reserves any and all rights by Complainant to amend this notice to include, amend, or add further charges upon discovery of new violations of any of the provisions of the California Labor Code. In addition, to the extent that entities and/or other individuals are named and charged with violations of the Labor Code—making them liable on an individual basis as permitted by numerous Labor Code sections including, but not limited to sections 558.1 and 1197.1—Complainant reserves any and all rights to add, substitute, or change the name of employer entities and/or individuals responsible for the violations at issue. Any further amendments and changes to this notice shall relate back to the date of this notice.

Consequently, Employer is on notice that Complainant continues his investigation, with the full intent to amend and/or change this notice, to add any undiscovered violations of *any* of the provisions of the California Labor Code—to the extent that are applicable to this case—and to change and/or add the identities of any entities and/or individuals responsible for the violations contained herein. If Employer intends to cure the alleged violations within the statutory time period set forth in sections 2699 and 2699.3(a), the employer shall provide notice including a description of actions taken to cure. If the alleged violation is not cured within the statutory time period, employee will commence a civil action pursuant to section 2699.

Based on the following summary of the facts and theories upon which Complainant will base his claims, Complainant requests that the LWDA regard this Notice as written notice of his intent to seek civil penalties against Employer. The specific provisions of the California Labor Code that Employer has violated requiring this notice include but are not limited to California Labor Code sections 201-202, 203, 204, 226, 226.7, 216, 223, 233-234, 245-248.5, 510 512, 558, 558.1, 1174, 1194, 1197, 1198, 1199, 2810, 2810.5, and 2699. These violations subject Employer to civil penalties as set forth in (1) the foregoing statutes, (2) Labor Code sections 203, 210, 225.5, 226.3, 256, 1174.5, 1194.2, 1197.1, and 2699, and all applicable IWC Wage Orders, section 20.

The Named Entities Are Joint Employers of Complainants and Aggrieved Employees

California courts have recognized that the definition of “employer” for purposes of enforcement of the California Labor Code goes beyond the concept of traditional employment to reach irregular working arrangements for the purpose of preventing evasion and subterfuge of California’s labor laws. *Martinez v. Combs* (2010) 49 Cal.4th 35, 65. As such, anyone who directly or indirectly, or through an agent or any other person, engages, suffers, or permits any person to work or exercises control over the wages, hours, or working conditions of any person, may be liable for violations of the California Labor Code as to that person.

Complainant believes and hereon asserts that Employer and unknown entities must be classified as joint employers of Complainant for purposes of liability for civil penalties under PAGA, as the aforementioned entities engaged, suffered and permitted Complainant to perform services from which they benefited, and furthermore that the aforementioned entities had the right to exercise control over the wages, hours and/or working conditions of Complainant at all relevant times herein, so as to be considered the joint employers of Complainant. By reason of their status as joint employers of Complainant and similarly aggrieved employees, they are each liable for civil penalties for violation of the California Labor Code as to Complainant and similarly aggrieved employees.

Individual Liability Under Labor Code Section 558.1

Labor Code section 558(a) provides “[a]ny employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50.00) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation, one hundred dollars (\$100.00) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (3) Wages recovered pursuant to this section shall be paid to the affected employee.” Labor code section 558(c) provides that “[t]he civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.”

Labor Code section 558.1 permits joint and several liability as to both an individual and employer for violations of Labor Code sections 203, 226, 226.7, 1194, and 2802. Employer, at all relevant times, was an employer or person acting on behalf of an employer(s) who violated Complainant and similarly aggrieved employees’ rights by violating various sections of the California Labor Code. The California Legislature defines “other person acting on behalf of an employer” as “*a natural person* who is an owner, director, officer, or managing agent of the employer.” The “managing agent” definition mirrors that found in California’s punitive damages statute. (subdivision (b) of section 3294 of the Civil Code). Under that statute and supporting case law, “managing agents” are all employees who exercise substantial independent authority and judgment in their corporate decision-making such that their decisions ultimately determine corporate policy. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 566-67. For the reasons set forth above and others, at all relevant times, the above-listed individuals meet the criteria of managing agents under California law, and therefore, may be held liable under California Labor Code sections 558 and 558.1 for violations of Labor Code sections 203, 226, 226.7, and 1194 as further described in detail below.

Complainant intends to further name any unknown individuals responsible for violations arising under Labor Code sections 558 and 558.1 after further discovery. Complainant will ask the Court to relate the amendment of the PAGA charge and the operative complaint to the date of filing of these charges. Complainant asks and demands that Employer put these individuals on notice immediately to provide them as much notice possible to mount in defense. In the alternative, Complainant also offers to Employer to place those individuals on notice if Employer voluntarily provides their contact information.

The Employer; Summary of Labor Code Violations

Employer owns, operates, or otherwise manages an almond-processing company. While Employer may be a successful company/may have a noble mission, it does not comply with California labor law.

Employer failed/fails to keep accurate and complete time records for employees; failed/fails to pay Complainant and similarly aggrieved employees for all hours worked; failed/fails to pay Complainant and similarly aggrieved employees at least the minimum wage for all hours worked; failed/fails to pay all overtime wages; failed/fails to provide proper meal and rest periods and/or compensate with an additional hour of premium pay for each missed/improper meal and rest period; failed/fails to pay all wages earned on at least semimonthly paydays; refused/refuses to make and/or falsely denied the amount of payments due; failed/fails to provide accurate itemized wage statements; failed/fails to pay proper sick leave benefits; failed/fails to provide proper notices regarding sick pay; and failed/fails to pay all earned and unpaid wages upon separation of employment within the time limits prescribed by law. Further descriptions of the above-mentioned violations and others are explained below.

Complainant and similarly aggrieved employees

Complainant, Brad Smith, worked for Employer as a non-exempt forklift driver, for approximately thirteen years until his date of termination, on or about February 5, 2021. Complainant typically worked ten-plus hour shifts, or fifty-five to sixty hours per week. Complainant was paid an hourly rate for hours counted by employer as time worked.

At all relevant times, Complainant was an aggrieved employee as defined in Labor Code section 2699(c) (“any person who was employed by the alleged violator and against whom one or more of the violations was committed”). Complainant seeks recovery for the Labor Code violations set forth herein on behalf of himself and other current and former employees, including but not limited to: non-exempt employees, and similarly aggrieved employees who were employed by Employer in the State of California within one year of the filing of this Notice and who were subject to the same or similar Labor Code and IWC Wage Order violations as Complainant.

Labor Code Violations

Recordkeeping Requirement Violations: California Labor Code section 1174 requires employers to keep “accurate and complete” payroll records showing, among other things, the hours worked daily by all non-exempt employees. Section 7 of all applicable IWC Wage Orders similarly requires employers to keep time records reflecting the times during which all owed meal periods were provided each day.

At all relevant times, Employer has failed, and continues to fail, to keep the required time and pay records. Employer has failed/fails to keep accurate and complete records showing total hours worked by each employee at the proper pay rate. Furthermore, upon information and belief, Employer failed to keep accurate and complete records of the start and stop times of all owed meal periods.

Employer's failure to keep "accurate and complete" payroll records for Complainant and similarly aggrieved employees violates Labor Code sections 1174, 1198, 1199, and section 7 of all applicable IWC Wage Orders. These violations subject Employer to civil penalties under Labor Code sections 558.1, 226.6, 1174.5 and 2699. Each violation of each Labor Code section and Wage Order provision, for each aggrieved employee, results in a separate civil penalty.¹

Meal Period Violations: California law requires employers to provide employees a duty-free, uninterrupted thirty-minute meal period when an employee works more than five (5) hours in a workday, and it must be provided within the first five (5) hours the employee works. Lab. Code section 512; Sections 11 (A) and (C) of all applicable IWC Wage Orders; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Employers must also provide employees with a second duty-free, uninterrupted thirty (30) minute meal period when an employee works more than (10) hours in a workday, and it must be provided before the end of the 10th hour of work. *Id.* Meal periods can be waived, but only under the following circumstances: (1) if an employee's total work period in a day is over five (5) hours but no more than six (6) hours, the required meal period may be waived by mutual consent of the employer and employee, and (2) if an employee's total work period in a day is over ten (10) hours but no more than twelve (12) hours, the required second meal period may be waived by mutual consent of the employer and employee, but only if the first meal period was not waived. *Id.*

Employers covered by all Industrial Welfare Commission ("IWC") Wage Orders have an obligation to both (1) relieve their employees for at least one meal period for shifts over five hours (see above) and a second meal period for shifts over ten hours, *and* (2) to record having done so. If the employer fails to properly record a valid meal period, it is presumed that no meal period was provided. Section 7(A)(3) of all applicable IWC Wage Orders ("Meal periods . . . shall also be recorded"); *Brinker*, 53 Cal.4th at 1052-1053, *citing* Wage Order section 7(A)(3) ("If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided").

¹ See Lab. Code section 2699(f)(2) (establishing that the civil penalty is "for each aggrieved employee per pay period").

Employers must pay employees an additional hour of wages at the employees' regular rate of pay for each missed or improper meal period. Lab. Code section 226.7; section 11(B) of all applicable IWC Wage Orders ("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 workday that the meal period is not provided"). *Brinker*, 53 Cal.4th at 1018.

Employer failed to maintain a company meal period policy compliant with California law. Liability for a class of aggrieved employees can be established by evidence that an employer adopted a uniform corporate break policy that failed to give full effect to California law and the applicable wage orders requirements. The fact that employees may legally waive meal periods does not affect this result. *Brinker*, 53 Cal.4th at 1053.

Employer did not provide Complainant and similarly aggrieved employees with proper meal periods. Complainant and similarly aggrieved employees were routinely denied a meal period before the end of the fifth hour of work as well as a second meal period before the end of the tenth hour of work when working shifts of more than ten (10) hours. Complainant and similarly aggrieved employees were forced to work through their meal periods or any purported meal periods would be interrupted/cut short due to their workloads/commentary from supervisors pressuring Complainant and similarly aggrieved employees to take improper meal periods or no meal periods at all. Notably, second meal periods were rarely if ever provided for those shifts that Complainant worked more than ten (10) hours. Employer did not execute written on-duty meal period waiver agreements with Complainant and similarly aggrieved employees. Notably, Employer required Complainant and similarly aggrieved employees to clock out for meal periods not provided. For example, Employer required Complainant and similarly aggrieved employees to spend time during meal periods suiting up and or removing their work gear which said time they were not compensated for. Despite not providing its employees with the meal periods to which they were legally entitled, Employer would not pay proper premiums for all improper and missed meal periods in violation of California law. *Brinker*, *supra*, 53 Cal.4th 1004.

The aforementioned conduct results in violations of Labor Code sections 226.7, 512, and 1198-1199, and sections 11(A) and (C) of all applicable IWC Wage Orders. These violations subject Employer to civil penalties under Labor Code sections 558 and 2699, and section 20 of all applicable IWC Wage Orders. Each violation of each Labor Code section and Wage Order provision results in a *separate* civil penalty, for each aggrieved employee for each pay period during which the referenced statutes and Wage Order provisions were violated.² Employer's

² Labor Code section 2699(f)(2) (establishing that the civil penalty is "for each aggrieved employee per pay period");

failure to provide valid meal periods, and the automatic deduction for meal periods that were not provided/valid, ultimately resulted/results in further violations, such as violation of Labor Code section 1174 discussed above, and other violations discussed below.

Rest Period Violations: California law requires employers to provide employees a paid, duty-free ten (10) minute rest period for each four (4) hours worked, or major fraction thereof. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. Section 12 (A) of all applicable IWC Wage Orders. The rest period requirement obligates employers to permit and authorize employees to take off-duty rest periods, meaning employers must relieve employees of all duties and relinquish control over how employees spend their time. *Augustus v. ABM Security Services, Inc.*, (2016) 5 Cal.5th 257. Accordingly, an employer cannot require employees to stay on the work premises nor may an employer require employees to monitor their cell phones and/or radios and/or other dispatch equipment during their rest periods as “one cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to *particular locations* or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods. [emphasis added].” *Id* at 269. Employers must pay employees an additional hour of wages at the employee’s regular rate of pay for each missed or improper (e.g., less than 10 minutes, interrupted rest period, rest period(s) at improper time(s) during shift(s)) rest period. Lab. Code section 226.7; section 12(B) of all applicable IWC Wage Orders (“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”).

Complainant and similarly aggrieved employees were often required to work through all or part of their rest periods due to their workloads/commentary from supervisors pressuring Complainant and similarly aggrieved employees to take improper rest periods or skip rest periods completely. Based on information and belief, Complainant and similarly aggrieved employees were required to remain on the work premises during any rest periods and thus remained under employer control during any rest periods, thereby rendering said rest periods improper.

Given Complainant and similarly aggrieved employees’ work schedules, Complainant and similarly aggrieved employees were typically entitled to at least two (2) ten-minute paid duty-free rest periods per shift. However, Complainant and similarly aggrieved employees were not provided proper rest periods. Employer did not maintain a company rest period policy and/or practice compliant with California law, and Employer did not properly authorize and provide Complainant and similarly aggrieved employees with appropriate rest periods in compliance with the law. Per Employer’s illegal rest period policy, Complainant and similarly aggrieved

employees were not adequately informed, authorized, instructed about, nor permitted an opportunity to take, proper rest periods. Notably, Employer did not authorize nor permit Complainant and similarly aggrieved employees to take any version of a third rest period for shifts lasting over ten hours. Despite not receiving proper rest periods, Employer failed to compensate Complainant and similarly aggrieved employees with an additional hour of pay at Complainant's and similarly aggrieved employees' regular rates of pay for each missed or improper rest period. *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal. App. 4th 864, 872.

The aforementioned conduct results in violations of Labor Code sections 226.7, and 1198-1199, and sections 12(A) and (B) of all applicable IWC Wage Orders. These violations subject Employer to civil penalties under Labor Code section 2699, and section 20 of all applicable IWC Wage Orders. Each violation of each Labor Code section and Wage Order provision results in a *separate* civil penalty, for each aggrieved employee for each pay period during which the referenced statutes and Wage Order provisions were violated.³

Minimum Wage Violations: Labor Code section 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission, and any payment of less than the minimum wage is unlawful. The minimum wage standard applies to each hour employees worked for which they were not paid. Therefore, an employer's failure to pay for any particular hour worked by an employee is unlawful even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324.

Employer failed to compensate Complainant and similarly aggrieved employees for all hours worked by, among other things, requiring Complainant and similarly aggrieved employees to work through meal periods they were not paid for and by requiring them to perform pre-shift and/or post-shift work for which they were not compensated. For example, Complainant and similarly aggrieved employees were required to spend time suiting up in/removing their gear before/after their shifts and/or at the beginning and end of meal periods. This off-the-clock work resulted in violations of California's minimum wage laws.

These violations subject employer to civil penalties under Labor Code sections 1197.1 and section 20 of all applicable IWC Wage Orders. Each violation of each Labor Code section and

³ Labor Code section 2699(f)(2) (establishing that the civil penalty is "for each aggrieved employee per pay period"); section 20 of all applicable IWC Wage Orders (establishing that "[i]n addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty...for each underpaid employee for each pay period during which the employee was underpaid") (emphasis added).

Wage Order provision results in a *separate* civil penalty, for each aggrieved employee, for each pay period during which the referenced statutes and Wage Order provisions were violated.⁴

Overtime Violations: California law requires employers to pay overtime equal to one and one-half times the regular hourly rate of pay for each hour worked beyond eight (8) hours per workday and each hour worked beyond forty (40) hours per work week. Lab. Code section 510; and section 3 of all applicable IWC Wage Orders. Employers must pay overtime equal to double the regular hourly rate of pay for each hour worked beyond twelve (12) hours per workday and for all hours worked in excess of eight (8) hours on the seventh consecutive day or work in a work week. *Id.*

Employer violated California's overtime laws by, among other things, failing to correctly calculate, or record at all, the total number of hours worked by Complainant and similarly aggrieved employees and not paying proper overtime rates for all overtime worked. For example, Complainant and similarly aggrieved employees were required to spend time suiting up in/removing their gear before/after their shifts and/or at the beginning and end of meal periods. They were not compensated for this time. Based on Complainant and similarly aggrieved employees' regular work schedules, this resulted in a significant of uncompensated overtime worked per pay period. Moreover, upon information and belief, Complainant and similarly aggrieved employees regularly worked seven (7) consecutive days but were not compensated at the appropriate premium wage rate(s) for those hours worked on the seventh day.

This conduct results in violations of Labor Code sections 510, 1198-1199, and section 12(A) of all applicable IWC Wage Order. These violations subject employer to civil penalties under Labor Code sections 558.1, 218.5, and 2699, and section 20 of all applicable IWC Wage Orders. Each violation of each Labor Code section and Wage Order provision results in a *separate* civil penalty, for each aggrieved employee, for each pay period during which the referenced statutes and Wage Order provisions were violated.⁵

Sick Leave Pay Violations: An employer is required to provide paid sick days in accordance

⁴ Labor Code section 1197.1(a) (establishing that the civil penalty is "for each underpaid employee for each pay period for which the employee was underpaid"); section 20 of all applicable IWC Wage Orders (establishing that "[i]n addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty...for each underpaid employee for each pay period during which the employee was underpaid") (Emphasis added).

⁵ Labor Code section 2699(f)(2) (establishing that the civil penalty is "for each aggrieved employee per pay period");

with the provisions of Labor Code sections 245 through 248.5. An employer is also required to provide a Labor Code section 2810.5 notice, demonstrating all of the following:

- (1) An employee is entitled to accrue, request, and use paid sick days.
- (2) The amount of sick days provided for by this article.
- (3) The terms of use of paid sick days.
- (4) That retaliation or discrimination against an employee who requests paid sick days or uses paid sick days, or both, is prohibited and that an employee has the right under this article to file a complaint with the Labor Commissioner against an employer who retaliates or discriminates against the employee.

On information and belief, Employer improperly accrued the amounts of sick leave pay owed to Complainant and similarly aggrieved employees. On further information and belief, Employer failed to put Complainant and similarly aggrieved employees on notice of their paid sick leave rights by failing to include their entitlement to sick leave in a Labor Code Section 2810.5 notice upon hire. Furthermore, throughout their respective employments, Employer failed to provide notice of the correct sick leave amount balance left for Complainant and similarly aggrieved employees, thus affecting their intelligent exercise of their paid sick leave. But for this failure, Complainant and similarly aggrieved employees would have used their paid sick leave prior to their respective termination dates and were entitled to use the banked sick leave and earn appropriate compensation. This illegal retention of paid sick leave is unlawful, and Complainant seeks all forms of injunctive relief, restitution, and declaratory relief as permitted by California law, on behalf of himself and all aggrieved employees.

Moreover, in violation of Labor Code Section 247.5, Employer failed to maintain records documenting the hours worked and paid sick days accrued and used by employee, permitting the presumption that Complainant and similarly aggrieved employees were entitled to the maximum number of hours accruable under this article at the time of their respective termination dates. Employer further failed to comply with Labor Code section 246, that is, providing its employees with a 226 statement or separate writing containing amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, at the time it pays its period wages and provides a Labor Code section 226 statement.

Adding further to injury, Employer unlawfully retained and continues to retain paid sick leave that should have been paid and was not as a result of its failure to properly institute a paid sick leave program. On information and belief, Complainant alleges that all these practices were experienced and continue to be experienced by similarly aggrieved employees.

Employer's violations of the Labor Code with respect to sick leave pay as described above

entitle Complainant and similarly aggrieved employees to injunctive relief, attorney's fees, declaratory relief, restitution, and penalties as permitted by law. Complainant requests all relief pursuant to the aforementioned code provisions, including but not limited to, Labor Code sections 233 and 234, which incorporates the paid sick leave requirements. As noted, pursuant to the PAGA, each violation of each Labor Code section and Wage Order provision results in a *separate* civil penalty, for each aggrieved employee for each pay period during which the referenced statutes and Wage Order provisions were violated.

Semimonthly Payment Violations: Labor Code section 204 requires that all earned wages must be paid to employees twice during each calendar month. Employer violated this section by failing to pay aggrieved employees an additional hour of pay for meal and rest periods not provided/valid, by failing to compensate aggrieved employees for all hours worked, and by failing to pay proper premium wage rates for all hours worked. These violations subject Employer to civil penalties under Labor Code section 210. Each violation results in a *separate* civil penalty, for each aggrieved employee for each pay period during which the statute provisions were violated.⁶

Statutory Wage Violations: California Labor Code section 223 makes it unlawful for an employer to secretly pay wages lower than required by statute while purporting to pay legal wages. As described above, Employer willfully and systematically denied Complainant and similarly aggrieved employees minimum wage compensation for all hours worked which resulted in the payment of less than statutorily required wages to them. Employer acted with the intent to deprive them of statutory wages, including, but not limited to, overtime wages and minimum wages, to which they were entitled to under California law. Thus, Employer paid Complainant and similarly aggrieved employees lower wages than those they were entitled to while purporting that Complainant and similarly aggrieved employees were properly paid. Complainant and similarly aggrieved employees are entitled to recover penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code section 2699(f)-(g).

Refusal to Make Payment: Labor Code section 216 declares unlawful an employer's refusal to pay wages due and payable and/or denial of the validity of any claim to wages due. Employer violated/violates this section by failing to pay aggrieved employees for all hours worked at the proper wage rate and by failing to pay aggrieved employees an additional hour of pay for each

⁶ Labor Code section 210 (establishing that "[i]n addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in sections 201.3, 204, 204b, 204.1, 204.2, 205, 205.5, and 1197.5, shall be subject to a civil penalty...for each failure to pay each employee").

meal/rest period not provided/that was invalid. *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1154-1155. These violations subject Employer to civil penalties under Labor Code section 225.5. Each violation results in a *separate* civil penalty, for each aggrieved employee, for each pay period during which the statute provisions were violated.⁷

Wage Statement Violations: California law requires every employer semi-monthly or at the time of each payment of wages to furnish each of his, her, or its employees with an accurate itemized wage statement in writing that contains the following: (1) gross wages earned; (2) total hours worked by the employee; (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; (4) all deductions; (5) net wages earned; (6) the inclusive dates of the period for which the employee is paid; (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Lab. Code section 226.

Employer failed to provide accurate and itemized statements containing, among other things, (1) gross wages earned, (2) total hours worked by the employee, (3) net wages earned, and (4) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Here, Employer's wage statements provided to Complainant and aggrieved employees failed to indicate the "total hours worked" by the employees. In addition, because of the violations detailed above, including not paying regular and overtime wages for all hours worked and failing to provide meal and rest period premiums, Employer has violated California Labor Code section 226 by willfully failing to furnish Complainant and aggrieved employees with accurate, itemized wage statements. As a result, the wage statements provided to Complainant and aggrieved employees were not accurate and did not include all of the statutorily required information. These violations subject Employer to civil penalties under Labor Code section 226.3. Each violation results in a *separate* civil penalty, for each aggrieved employee, for each pay period during which the statute provisions were violated.⁸

Standard Conditions of Labor Violations: Together, Labor Code sections 1198 and 1199 make unlawful any employment of any employee under conditions of labor prohibited by the Wage Orders, and any violation, refusal, or neglect to comply with any provision within Part 4,

⁷ Labor Code section 225.5 (establishing that "[i]n addition to, and entirely independent and apart from, any other penalty provided in this article, every person who unlawfully withholds wages due any employee in violation of sections 212, 216, 221, 222, or 223 shall be subject to a civil penalty...for each failure to pay each employee") (emphasis added).

⁸ Labor Code section 226.3 (establishing that the civil penalty is "per employee per violation").

Chapter 1 of the Labor Code, including sections 1174, 1197, and 1198, or order or ruling of the commission. Therefore, Employer's violations with respect to meal periods, rest periods, recordkeeping provisions, and minimum/overtime wages result in separate violations of sections 1198 and 1199, which subject Employer to civil penalties under Labor Code sections 1197.1 and 2699.

Final Pay Violations: Labor Code section 201 requires employers to pay all wages earned and unpaid at the time of discharge, immediately upon discharge. Labor Code section 202 requires an Employer to pay all earned and unpaid wages within 72 hours of quitting 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 earned wages immediately upon quitting. Employer still has not paid aggrieved employees all wages earned and unpaid at the time of discharge, in that Employer has not paid for: (1) time during which meal periods were not provided/valid, (2) an additional hour of pay for meal and rest periods not provided/valid, (3) unpaid minimum and (4) overtime wages. These violations subject Employer to civil penalties under Labor Code sections 203, 210, and/or 256. Each violation results in a *separate* civil penalty, for each aggrieved employee for each pay period during which the statute provisions were violated.⁹

Pursuant to Labor Code section 203, an employer that willfully fails to pay wages due an employee who is terminated or resigns must pay (in addition to the unpaid wages) a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid. Case law clarifies this 30-day waiting time penalty is recoverable under the PAGA via Labor Code Section 256. See, *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014); see also, *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365 (2005).

Employer has violated the above-referenced California Labor Code provisions, as well as other laws, and is liable for all applicable premium wages, statutory and civil penalties, interest, attorneys' fees, and costs. The civil penalties Complainant and similarly aggrieved employees seek to recover include, but are not limited to, the statutory and civil penalties specified above.

Labor Code section 2699.3 requires that a claimant send a certified letter to the employer in question and file an online claim to the Labor Workforce Development Agency setting forth the claims and the basis for the claims, thereby giving the Labor Workforce Development Agency an opportunity to investigate the claims and/or take any action it deems appropriate.

The purpose of this letter is to satisfy the requirement created by Labor Code sections 2699,

⁹ (establishing that "[i]n addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections 201.3, 204, 204b, 204.1, 204.2, 205, 205.5, 1197.5, shall be subject to a civil penalty...for each failure to pay each employee").

2699.3(a), and 2699.5, prior to seeking penalties and premium wages allowed by law for the aforementioned statutory violations in a civil action. We look forward to determining whether the Labor Workforce Development Agency intends to take any action in reference to these claims. We kindly ask that you respond to this notice according to the time frame contemplated by the code.

If the LWDA elects not to take any action with respect to any of the foregoing claims, Complainants will seek these penalties in a civil action, on behalf of himself and all other similarly situated California-based non-exempt aggrieved employees of Employer within one year of the date of this letter as allowed by law.

Please advise if your office intends to investigate any of the factual and legal allegations and provide notice within sixty days of this notice to our office and to that of other charged parties. Thank you for your attention to this matter. If you have any questions, please contact me at the phone number or address below:

Zachary Crosner
Crosner Legal, PC
9440 Santa Monica Blvd. Suite 301
Beverly Hills, CA 90210
Main: 310.496.5818
Fax: 310.510.6429
Email: zach@crosnerlegal.com

Thank you for your attention to this matter.

Best Regards,

A handwritten signature in black ink that reads "Zachary M. Crosner". The signature is written in a cursive, flowing style.

Zachary M. Crosner, Esq.
CROSNER LEGAL, PC

1 PROOF OF SERVICE
2 BRAD SMITH vs. BLUE DIAMOND CROWERS ET AL..
3 Sacramento Superior Court Case No. 34-2021-00310576

4 At the time of service, I was over 18 years of age and not a party to this action. I am
5 employed in the County of Los Angeles, State of California. My business address is 9440 Santa
6 Monica Blvd., Ste. 301, Beverly Hills, CA 90210.

7 On January 7, 2022, I served true copies of the following document(s) described as

8 **FIRST AMENDED PRIVATE ATTORNEYS GENERAL ACT ("PAGA")**
9 **REPRESENTATIVE COMPLAINT**

10 on the interested parties in this action as follows:

11 SEE ATTACHED SERVICE LIST

12 ☒ BY ELECTRONIC TRANSMISSION. I transmitted copies of the above-referenced
13 document(s) on the interested parties in this action by electronic transmission. Said electronic
14 transmission was reported as complete and without error. Courtesy E-Service

15 ☐ BY FACSIMILE TRANSMISSION. I transmitted copies of the above-referenced
16 document(s) on the interested parties in this action by facsimile transmission from (310) 510-6429.
17 A transmission report was properly issued by the transmitting facsimile machine and the
18 transmission was reported as complete and without error.

19 ☒ BY UNITED STATES POSTAL SERVICE. I enclosed the documents in electronic pdf
20 format and submitted them electronically into the mail provider, Letterstream, Inc.'s, online mail
21 portal (letterstream.com) to be mailed addressed to the entities and/or persons listed in the Service
22 List as set forth herein. I caused an envelope containing the documents to be placed for collection
23 and mailing and to be mailed by First Class Mail, following our law firm and Letterstream, Inc.'s
24 ordinary business practices. I am readily familiar with our business practices and the business
25 practices of Letterstream, Inc. for collecting and processing correspondence for mailing. On the
26 same day that correspondence is placed for collection and mailing, it is deposited in the ordinary
27 course of business with the United States Postal Service, in a sealed envelope with postage fully
28 prepaid. Pursuant to that practice, the above-referenced document(s) were sealed in an envelope,
with postage paid, and deposited with a a post office, mail box, sub-post office, substation, mail
chute, or other facility or postal pick up/drop off regularly maintained by the United States Postal
Service or an affiliate thereof, at or near Phoenix, Arizona.

☐ BY OVERNIGHT MAIL SERVICE. I enclosed the documents in electronic pdf format and
submitted them electronically into the mail provider, Letterstream, Inc.'s, online mail portal
(letterstream.com) addressed to the entities and/or persons listed in the Service List as set forth
herein. I caused an envelope containing the documents to be placed for collection and mailing and
to be mailed by Overnight Mail via Federal Express, following our law firm and Letterstream, Inc.'s
ordinary business practices. I am readily familiar with our business practices and the business
practices of Letterstream, Inc. for collecting and processing correspondence for mailing. On the
same day that correspondence is placed for collection and mailing, it is deposited in the ordinary
course of business with Federal Express, an express carrier, in Phoenix, Arizona, or delivered with
any and all delivery fees to an authorized courier or driver authorized by the express service carrier

to receive documents.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 7, 2022, at Los Angeles, California.



Jessica Ball

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SERVICE LIST
BRAD SMITH vs. BLUE DIAMOND CROWERS ET AL..
Sacramento Superior Court Case No. 34-2021-00310576

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