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Assigned for all Purposes

Judge Glenda Sanders

Attorneys for Plaintiff and the Proposed Classes

CX-101

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

EVER REVELO, an individual, on behalf of
himself and others similarly situated, and on
behalf of the State of California as a private
attorney general,

PLAINTIFF,

v.

BASF CORPORATION, a Delaware
Corporation, and DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO.: 30-2021-01195744-CU-OE-CXC

**CLASS ACTION AND
REPRESENTATIVE ACTION
COMPLAINT**

1. Violation of Business & Professions Code § 17200
2. Violations of Labor Code § 226(f) and (h)
3. Violations of Labor Code § 1198.5 (k) and (l)
4. Penalties Pursuant to Labor Code § 2699, et seq. for violations of Labor Code §§ 201, 202, 203, 204, 210, 212, 225.5, 226(a)(c), (f), 226.3, 226.7, 450, 510, 512, 558, 1197, 1197.1, 1198 and 1198.5, as well as IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001.

1 Plaintiff EVER REVELO, an individual, on behalf of himself and others similarly
2 situated, and on behalf of the State of California as a private attorney general, complains of
3 Defendant BASF CORPORATION and the Doe Defendants (“Defendants”) and each of them, as
4 follows:

5 **I.**

6 **INTRODUCTION AND FACTUAL BACKGROUND**

7 1. This is a Class Action pursuant to Code of Civil Procedure § 382 on behalf of the
8 general public based upon alleged unlawful conduct committed by Defendants against non-
9 exempt, hourly employees who worked for Defendant between April 30, 2017 and May 2, 2018
10 and seeks equitable, restitutionary and injunctive relief under Bus. & Prof. Code § 17200 for such
11 individuals. It does not seek any remedies for violations committed between April 30, 2018
12 through the present and/or through the Labor Code and include any direct claims on behalf of the
13 Unfair Competition Class. Plaintiff also alleges an individual claim for failure to provide records
14 in response to his request for such records under Labor Code §§ 226 and 1198.5 and seeks an
15 injunction compelling the production of his records. Lastly, Plaintiff brings claims on behalf of
16 the state of California seeking civil penalties under PAGA for alleged violations committed
17 against the aggrieved employees from February 9, 2020 and continuing into the present.

18 2. The Class Action component of this case is limited to claims for Unfair Business
19 Practices. Plaintiff, on behalf of himself, on behalf of the general public, and on behalf of the
20 Proposed Classes, bring this claim pursuant to Business & Professions Code § 17200, et seq. The
21 conduct of Defendants as alleged in this Complaint has been and continues to be unfair, unlawful,
22 and harmful to Plaintiff, the general public, and the Proposed Classes. Plaintiff seeks to enforce
23 important rights affecting the public interest within the meaning of Code of Civil Procedure §
24 1021.5. Plaintiff is a “person” within the meaning of Business & Professions Code § 17204, and
25 therefore has standing to bring this cause of action for injunctive relief, restitution, and other
26 appropriate equitable relief. Aside from the Business & Professions Code § 17200 claims, there
27 are no potential adequate legal remedies available by law for the period of April 30, 2017 and
28 May 2, 2018.

3. Plaintiff brings the Business & Professions Code § 17200 claims pursuant to Code of Civil Procedure § 382, on behalf of Plaintiff and the following classes and subclasses:

- (1) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts as a non-exempt hourly employee or other similar position from April 30, 2017 and May 2, 2018. (“Unfair Competition Class”);
- (2) all individuals who were employed by BASF Corporation or its predecessor or merged entities in California as a non-exempt, hourly employee or other similar position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from April 30, 2017 and May 2, 2018. (“Non-Exempt Overtime Unfair Competition Subclass”);
- (3) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities for one or more pay periods in California as a non-exempt, hourly employee and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a period where the employee also earned non-discretionary bonuses, incentive pay, including, but not limited to, “Perf. Incentive Comp”) and “GU Record AWS = Gross”) from April 30, 2017 and May 2, 2018. (“Incentive Pay Overtime Aggrieved Employees”);

Collectively, Subclasses one (1) and two (2) may be referred to as the “Unfair Competition Overtime Subclasses.”

- (4) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from April 30, 2017 and May 2, 2018. (“First Meal Period Unfair Competition Subclass”);
- (5) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than ten (10) hours as a non-exempt hourly employee or other similar position from April 30, 2017 and May 2, 2018. (“Second Meal Period Unfair Competition Subclass”);
- (6) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than five (5) hours in length or

major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a meal period from April 30, 2017 and May 2, 2018. (“Security Check Meal Period Unfair Competition Subclass”);

Collectively, Subclasses four (4), five (5), and six (6) may be referred to as the “Unfair Competition Meal Period Subclasses.”

(7) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts and who underwent a security and/or bag check from April 30, 2017 and May 2, 2018. (“Minimum Wage Unfair Competition Subclass”);

(8) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from April 30, 2017 and May 2, 2018. (“Non-Exempt Rest Period Unfair Competition Subclass”);

(9) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a rest period from April 30, 2017 and May 2, 2018. (“Security Check Rest Period Unfair Competition Subclass”);

Collectively, these groups may also all collectively be referred to herein as the Classes or Class Member(s).¹

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

(1) all individuals who were employed by BASF Corporation as a non-exempt, hourly employee for one or more pay periods from February 9, 2020 and continuing into the present (“Non-Exempt Aggrieved Employees”);

(2) all individuals who were employed by BASF Corporation or its predecessor or merged entities in California as a non-exempt, hourly employee or other similar

¹ Plaintiff reserves the right to redefine the Classes and Subclasses identified herein.

position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from February 9, 2020 and continuing into the present. (“Non-Exempt Overtime Aggrieved Employees”);

- (3) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities for one or more pay periods in California as a non-exempt, hourly employee and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a period where the employee also earned non-discretionary bonuses, incentive pay, including, but not limited to, “Perf. Incentive Comp”) and “GU Record AWS = Gross”) from February 9, 2020 and continuing into the present; (“Incentive Pay Overtime Aggrieved Employees”);

Collectively, aggrieved employee groups two (2) and three (3) may be referred to as the “Overtime Aggrieved Employees.”

- (4) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from February 9, 2020 and continuing into the present. (“Meal Period Aggrieved Employees”);

- (5) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than ten (10) hours as a non-exempt hourly employee or other similar position from February 9, 2020 and continuing into the present. (“Second Meal Period Aggrieved Employees”);

- (6) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than five (5) hours in length or major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a meal period from February 9, 2020 and continuing into the present. (“Minimum Wage/M Meal Period Aggrieved Employee”);

Collectively, aggrieved employee groups four (4), five (5), and six (6) may be referred to as the “Meal Period Aggrieved Employees.”

- (7) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than five (5) hours in length or major fraction thereof and who underwent a security and/or bag check from February 9, 2020 and continuing into the present. (“Minimum Wage Aggrieved Employee”);

- (8) all individuals who were employed by BASF Corporation, or its predecessor, merged

1 or related entities in California as a non-exempt hourly employee, or other similar
2 position, who worked one or more shifts of more than four (4) hours in length or
3 major fraction thereof from February 9, 2020 and continuing into the present. (“Non-
Exempt Rest Period Aggrieved Employee”);

4 (9) all individuals who were employed by BASF Corporation, or its predecessor, merged
5 or related entities in California as a non-exempt hourly employee, or other similar
6 position, who worked one or more shifts of more than four (4) hours in length or
7 major fraction thereof and who underwent a security and/or bag check and/or who left
8 the premises during a rest period from February 9, 2020 and continuing into the
present. (“Security Check Rest Period Aggrieved Employee”);

9 Collectively, aggrieved employee groups eight (8) and nine (9) may be referred to as the
10 “Rest Period Aggrieved Employees.”

11 (10) all individuals who were employed by BASF Corporation, or its predecessor, merged
12 or related entities in California and who submitted a record request pursuant to Labor
13 Code §§ 226 and/or 1198.5 to BASF Corporation from February 9, 2020 and
continuing into the present. (“Record Aggrieved Employee”); and

14 (11) all individuals who were employed by BASF Corporation or its predecessor, merged
15 or related entities for one or more pay periods in California and whose employment
16 concluded at any time between February 9, 2020 and continuing into the present;
17 (“General Late Payment Aggrieved Employee”);

18 (12) all individuals who were employed by BASF Corporation or its predecessor, merged
19 or related entities for one or more pay periods in California, who received sick pay,
20 and whose employment concluded at any time between February 9, 2020 and
continuing into the present; (“Sick Pay Late Payment Aggrieved Employee”);

21 Collectively, aggrieved employee groups eleven (11) and twelve (12) may be referred to as the
22 “Late Payment Aggrieved Employees.”

23 5. The groups referenced in paragraph 4 may also all collectively be referred to
24 herein as aggrieved employees, other aggrieved employees, and/or all aggrieved employees where
25 appropriate.

26 6. Plaintiff and the Classes were employed by Defendants, and any subsidiaries or
27 affiliated companies and Does 1 through 50 (who include individuals acting on behalf an
28

1 employer within the meaning of Labor Code § 558.1) within the State of California as a non-
2 exempt, hourly employees for at least one shift between April 30, 2017 and May 2, 2018.

3 7. Plaintiff worked shifts for Defendant in Orange County between April 30, 2017
4 and May 2, 2018, including but not limited to on April 30, 2018, and also between February 9,
5 2020 and November 12, 2020. This includes, but is not limited to the pay period of October 26,
6 2020 to November 8, 2020. When references are made in this Complaint to the Unfair
7 Competition Class, it shall be understood that Plaintiff is referring to the time period of April 30,
8 2017 to May 2, 2018. When references are made to the aggrieved employees, it shall be
9 understood that Plaintiff is referencing conduct that occurred between February 9, 2020 through
10 the present.

11 8. Plaintiff and the Unfair Competition Class worked shifts in excess of six (6) hours
12 during at least one shift between April 30, 2017 and May 2, 2018.

13 9. Plaintiff and the Unfair Competition Class worked shifts in excess of eight (8)
14 hours in a day, ten hours (10) hours in a day and/or forty (40) hours in a week between April 30,
15 2017 and May 2, 2018.

16 10. Plaintiff and the aggrieved employees worked shifts in excess of six (6) hours in a
17 day, eight (8) hours in a day, and/or ten (10) hours in a day and/or forty (40) hours in a week
18 between February 9, 2020 and continuing into the present.

19 11. Defendants hire employees to work within the state of California who are covered
20 by California Industrial Welfare Commission Occupational Wage Order Nos. 1-2001, 4-2001,
21 and 9-2001. Based upon information and belief, Defendants classified Plaintiff, the Unfair
22 Competition Class, and the aggrieved employees as non-exempt for the purposes of overtime,
23 meal periods, and rest periods.

24 12. Labor Code § 1198.5(a) provides that “every current and former employee, or his
25 or her representative, has the right to inspect and receive a copy of the personnel records that the
26 employer maintains relating to the employee’s performance or to any grievance concerning the
27 employee.” Labor Code § 1198.5(b) requires the employer to “make the contents of those
28 personnel records available for inspection to the current or former employee, or his or her

1 representative, at reasonable intervals and at reasonable times, but not later than 30 calendar days
2 from the date the employer receives a written request.” “If an employer fails to permit a current or
3 former employee, or his or her representative, to inspect or copy personnel records within the
4 times specified in this section, or times agreed to by mutual agreement as provided in this section,
5 the current or former employee or the Labor Commissioner may recover a penalty of seven
6 hundred fifty dollars (\$750) from the employer.

7 13. Similarly, an employee may request a copy of their pay records within the
8 meaning of Labor Code § 226(a) in accordance with Labor Code § 226(c). Under Labor Code §
9 226(c), “an employer who receives a written or oral request to inspect or receive a copy of
10 records pursuant to subdivision (b) pertaining to a current or former employee shall comply with
11 the request as soon as practicable, but no later than 21 calendar days from the date of the request.”
12 Pursuant to Labor Code § 226(f) if an employer fails to comply with a request pursuant to Labor
13 Code § 226(f), the employer must pay the employee a penalty of seven hundred fifty dollars.

14 14. When responding to a records request, Labor Code § 226 obligates an employer to
15 provide either a duplicate of an employee’s itemized wage statements or “a computer-generated
16 record that accurately shows all of the following information:

17 (1) gross wages earned, (2) total hours worked by the employee, except as provided in
18 subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if
19 the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions
20 made on written orders of the employee may be aggregated and shown as one item, (5) net
21 wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the
22 name of the employee and only the last four digits of his or her social security number or
23 an employee identification number other than a social security number, (8) the name and
24 address of the legal entity that is the employer and, if the employer is a farm labor
25 contractor, as defined in subdivision (b) of Section 1682, the name and address of the
26 legal entity that secured the services of the employer, and (9) all applicable hourly rates in
27 effect during the pay period and the corresponding number of hours worked at each hourly
28 rate by the employee

15. In addition, Labor Code § 432 provides that “[i]f an employee or applicant signs
any instrument relating to the obtaining or holding of employment, he shall be given a copy of the
instrument upon request.” Moreover, Labor Code section 6408(d) requires an employer to
“[a]llow access by employees or their representatives to accurate records of employee exposures
to potentially toxic materials or harmful physical agents.” Relatedly, IWC Wage Order Nos. 1-

2001, 4-2001, and 9-2001, Section (7)(A)(3) and (C) require employers to maintain and make available upon reasonable request an employee's time records from the past three years. ("All required records shall be in the English language and in ink or other indelible form...for at least three years" and "shall be available for inspection by the employee upon reasonable request.").

16. On December 7, 2020, Plaintiff submitted a request for records under Labor Code §§ 226, 432, and 1198.5 via USPS Certified Mail (No. 7020 1810 0000 4330 1996). The USPS tracking records indicate that BASF received the record request on December 15, 2020. Pursuant to Labor Code §§ 226, 432, 1198.5 and 6408(d) as well as his time records within the meaning of Section 7(A)(3) and (C) of the IWC Wage Order, Plaintiff's pay records were due within 21 days of the receipt of his request (January 5, 2021) and his personnel records within 30 days of receipt (January 24, 2021). However, Defendants did not timely produce Plaintiff's personnel file, and Plaintiff believes is still withholding responsive documents, and has never produced his pay records within the meaning of Labor Code section 226.

17. Since Defendant BASF made no effort whatsoever to produce the records or contact Plaintiff through his Counsel, Plaintiff sent a follow-up letter on January 19, 2021 requesting that Defendant BASF provide his records within the meaning of Labor Code §§ 226, 432, 1198.5 and 6408(d). Defendant BASF orally acknowledged in a voicemail from Elizabeth Rodriguez, BASF's Compliance Manager, to Plaintiff's Counsel on January 26, 2021 at 9:16AM PST that BASF received Plaintiff's initial record request and the follow-up letter, but had not produced the records. Plaintiff reiterated that BASF needed to both provide the records and pay the penalties required under Labor Code sections 226 and 1198.5.

18. Instead of providing the records that Plaintiff requested and as required by Labor Code § 226, Defendant instead willfully, knowingly, and intentionally violated Labor Code § 226(c) by only providing W2s—aside from his final wage statement—which do not include any pay period specific information and/or any of the following information required by Labor Code section 226(a) on a per pay period basis or as otherwise indicated: gross wages earned, total hours worked by the employee, all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, net wages earned, the inclusive dates of

1 the period for which the employee is paid, the name of the employee and only the last four digits
2 of his or her social security number or an employee identification number other than a social
3 security number, and all applicable hourly rates in effect during the pay period and the
4 corresponding number of hours worked at each hourly rate by the employee.

5 19. Plaintiff's Counsel emailed Defendant BASF Corporation and its Legal
6 Compliance Officer Elizabeth Rodriguez about these issues on January 28, 2021:

7 RE: [EXT] RE: Subpoena - Ever Revelo -W2 Statements & Final Paystub

8  Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
To: David Winston
9  You replied to this message on 1/28/2021 4:29 PM.

 Reply  Reply All  Forward 
Thu 1/28/2021 4:03 PM

10 Yes, I thought you should have the records.

11 HR is pulling his time records for me. I will review to see if the data complies with LCS 226.

12 From: David Winston <david@employmentlitigators.com>
Sent: Thursday, January 28, 2021 6:56 PM
13 To: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Subject: [EXT] RE: Subpoena - Ever Revelo -W2 Statements & Final Paystub

14 On the pay records, it's actually supposed to be either wage statements or computer generated summaries that include all the information in Labor Code section 226—which is the same information as what's on
15 a wage statement: https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=226. From a practical perspective, I know that you won't be able to get those to us today since
16 it's well after close of business EST. I appreciate that you were even emailing me this late and also do not expect a response this evening.

17 From: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Sent: Thursday, January 28, 2021 3:46 PM
18 To: david@employmentlitigators.com
Subject: FW: Subpoena - Ever Revelo -W2 Statements & Final Paystub

19 Hello David,

20 Pursuant to your request, attached are the wage records for Mr. Revelo.

- 21 ✓ W-2's (2018-2020)
- 22 ✓ Final paystub (2020)

23 Personnel file and time records to follow...thank you.

24 Regards,
25 Elizabeth Rodriguez
26 Compliance Manager
27 Legal Department

28 Phone: +1 973-245-6043 Mobile: +1-973-407-0514 Fax: +1 973 245-6710 E-Mail: elizabeth.rodriguez@basf.com
Postal Address: BASF Corporation, 100 Park Avenue, Florham Park, 07932

20 20. Although Defendant agreed to look at the pay records and produce the time
21 records, it and its Legal Compliance Officer Elizabeth Rodriguez instead consciously and
22 willfully chose to refuse to comply with California Labor Code section 226(c) and IWC Wage
23 Order Section 7(A)(3) and (C):

RE: [EXT] RE: Ever Revelo Record Request



David Winston <david@employmentlitigators.com>
To: 'Elizabeth A Rodriguez'

Reply Reply All Forward ...

Tue 2/2/2021 11:23 AM

That is incorrect and we have emails about how the records were just W2s, which did not meet the definition of Labor Code section 226: https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=226. The time records were also not produced. So, it's my understanding that absent a court order the Company is not going to pay the penalties its owes or produces the records. Not going to argue about it.

From: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Sent: Tuesday, February 2, 2021 11:19 AM
To: David Winston <david@employmentlitigators.com>
Subject: RE: [EXT] RE: Ever Revelo Record Request

Hi David,

I sent you the records for Mr. Revelo. We will not be sending any other pay records.

From: David Winston <david@employmentlitigators.com>
Sent: Tuesday, February 2, 2021 1:51 PM
To: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Subject: [EXT] RE: Ever Revelo Record Request

Thank you and hope that you had a nice weekend, just wanted to check-in on the timing of the production of the time and pay records?

21. As such Defendant BASF consciously and willfully violated Labor Code section 226(a), (c), (f), and 1198.5(k) and Plaintiff is an aggrieved employee within the meaning of PAGA. Plaintiff requested that Defendant provide such records by December 31, 2020, but Defendant instead persisted in its decision to continue to violate Labor Code §§ 226(a), (c), (f) and 1198.5(k) by refusing to provide the records and penalties.

22. Defendant then subsequently continued to refuse to provide the records and penalties and pay the attorneys' fees associated with its violations of Labor Code §§ 226(a), (c), (f) and 1198.5(k).

23. Based upon information and belief, Defendants engaged in such conduct for the explicit purpose of concealing the fact that it improperly failed to calculate and pay overtime wages, failed to provide proper meal periods and rest periods.

24. Plaintiff alleges that Defendant engaged in the same or similar conduct described above with respect the other Record Aggrieved Employee in an effort to conceal its unlawful practices, to avoid complying with California's record request laws, and/or as part of a regular

1 and consistent policy and practice. As a result of the foregoing and notwithstanding the fact that
2 Plaintiff also experienced many of the other Labor Code violations addressed herein, Plaintiff is
3 an aggrieved employee under PAGA and possesses standing to pursue claims against BASF for
4 all of the claims identified in this Complaint and his PAGA Notice. *See Huff vs. Securitas*
5 *Security Services USA, Inc.*, 23 Cal.App.5th 745 (2018) (explaining that there is no typicality
6 requirement in a PAGA action because “PAGA allows an ‘aggrieved employee’—a person
7 affected by at least one Labor Code violation committed by an employer—to pursue penalties for
8 all the Labor Code violations committed by that employer.”) (emphasis added).

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

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

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

25 28. Defendants paid Plaintiff, the Unfair Competition Class and the aggrieved
26 employees with non-discretionary bonuses and incentive pay that it both failed to include when
27 calculating and paying overtime wages and failed to provide retroactive payments to cover the
28 overtime earned during the accrual period in violation of Labor Code section 510. The non-

1 discretionary bonuses and incentive pay that Defendants incorrectly omitted from Plaintiff, the
2 Unfair Competition Class, and the aggrieved employees' overtime wages, including, but not
3 limited to "Perf. Incentive Comp" and "GU Record AWS = Gross." As a result of Defendants'
4 failure to include such compensation when calculating the regular rate used for overtime purposes
5 and paying overtime wages, Defendants failed to pay Plaintiff, the Unfair Competition Class
6 Members, and the aggrieved employees' overtime wages at one and one-half times their regular
7 rate and instead paid them at one and one-half their base hourly rate. This practice failed to take
8 into account all compensation necessary when calculating and paying overtime wages.

9 29. Based upon information and belief, some of the incentive pay that Plaintiff, the
10 Unfair Competition Class, and the aggrieved employees were required to pay taxes on and was
11 included as a wage consisted of redeemable points for achieving certain non-discretionary targets
12 and/or other incentive payments. Such payments were a regular and expected part of their
13 compensation and was even included as taxable income by Defendants in Plaintiff, the Unfair
14 Competition Class, and the aggrieved employees' wages. However, Defendants failed to include
15 such compensation when calculating and paying Plaintiff and the aggrieved employees overtime
16 wages. Plaintiff alleges that Defendants engaged in the unlawful overtime related conduct
17 described herein with respect to him, the Unfair Competition Class, and all aggrieved employees
18 on a regular and consistent basis.

19 30. Separate and independent from the foregoing, based upon information and belief,
20 Defendants also failed to include both the cash in lieu of benefits and the payments made to third-
21 party insurers and trustees under its employee benefit plans when calculating and paying overtime
22 to aggrieved employees. Such payments, including those payments made to third-party trustees,
23 must be included in the regular rate when calculating and paying overtime.

24 31. Based upon the foregoing, Defendant violated Labor Code § 510 with respect to
25 Plaintiff and all aggrieved employees.

26 32. Labor Code § 558 imposes a penalty upon employers "who violates, or causes to
27 be violated...any provision regulating hours and days of work in any order of the Industrial
28 Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation,

1 fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was
2 underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each
3 subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
4 period for which the employee was underpaid in addition to an amount sufficient to recover
5 underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected
6 employee.” For purposes of Labor Code § 558, Plaintiff and the aggrieved employees seek only
7 the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and
8 not any underpaid wages.

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

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

27 35. Similarly, IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001 prohibit an
28 employer from “employ[ing] any person for a work period of more than five (5) hours without a

1 meal period of not less than 30 minutes. IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001
2 further obligate employers to provide an employee to “pay the employee one (1) hour of pay at
3 the employee’s regular rate of compensation for each workday that the meal period is not
4 provided. Labor Code section 1198 prohibits an employer from requiring an employee to work
5 beyond the “standard conditions of labor fixed by the commission...or under conditions of labor
6 prohibited by the order.”

7 36. Defendants failed to authorize and permit Plaintiff, the Unfair Competition Class,
8 and the aggrieved employees to receive lawful meal periods, failed to advise them of their right to
9 such meal periods, failed to authorize and permit them to take timely first meal periods within the
10 first five hours of their shift, and failed to authorize and permit Plaintiff, the Unfair Competition
11 Class, and the aggrieved employees to take second meal periods when they worked shifts in
12 excess of ten (10) hours in a day.

13 37. Defendants meal period policies and practices disincentivized and discouraged
14 Plaintiff, the Unfair Competition and the aggrieved employees from taking timely first meal
15 periods within the first five (5) hours of their shift. This includes, but is not limited to, requiring
16 Plaintiff, the Unfair Competition Class, and the aggrieved employees to take their lunch at noon
17 regardless of the start time of their shift while working the day shift.

18 38. Defendants also failed to authorize and permit Plaintiff, the Unfair Competition
19 Class, and the aggrieved employees to take timely first meal periods when they worked evening
20 shifts. Defendants’ understaffing policies and practices also pressured, coerced, and forced
21 employees to take untimely first meal periods due to a lack of sufficient coverage.

22 39. Defendants also failed to pay Plaintiff, the Unfair Competition Class, and the
23 aggrieved employees meal period premiums for each workday that the employees did not receive
24 a compliant meal period and/or at the proper rate. Labor Code § 226.7 provides “an employer
25 shall not require an employee to work during a meal or rest or recovery period mandated pursuant
26 to an applicable statute, or applicable regulation, standard, or order of the IWC.

27 40. IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001 prohibit an employer from
28 “employ[ing] any person for a work period of more than five (5) hours without a meal period of

1 not less than 30 minutes. IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001 further obligate
2 employers to provide an employee to “pay the employee one (1) hour of pay at the employee’s
3 regular rate of compensation for each workday that the meal period is not provided. Accordingly,
4 for each day that Plaintiff, the Unfair Competition Class, all aggrieved employees did not receive
5 compliant meal periods, they are entitled to receive meal period premiums (or the equivalent
6 restitutionary amounts) pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 1-2001, 4-
7 2001, and 9-2001. Unfortunately, Plaintiff, the Unfair Competition Class, and the aggrieved
8 employees were not compensated with one (1) hours’ worth of pay at their regular rate of
9 compensation when they were not provided with a compliant meal period in violation of Labor
10 Code § 226.7 and IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001.

11 41. Labor Code § 226.7 provides “an employer shall not require an employee to work
12 during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable
13 regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Under IWC Wage
14 Order Nos. 1,2001, 4-2001, and 9-2001, an employer must authorize and permit all employees to
15 take ten (10) minute duty free rest periods for every major fraction of four hours worked. *See*
16 *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269 (concluding that “during rest
17 periods employers must relieve employees of all duties and relinquish control over how
18 employees spend their time.”). In *Augustus*, the court expressly rejected the employer’s assertion
19 that it could provide an on-duty rest period to employees and further explained “that employers
20 [must] relinquish any control over how employees spend their break time, and relieve their
21 employees of all duties.” *Id.* at 273.

22 42. Pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 1-2001, 4-2001 and 9-
23 2001, Defendants failed to provide Plaintiff, the Unfair Competition Class, and the aggrieved
24 employees with duty-free rest periods of not less than ten (10) minutes for every major fraction of
25 four (4) hours worked.

26 43. Instead, Defendants regularly and consistently required Plaintiff, the Unfair
27 Competition Class, and the aggrieved employees to remain on the premises during their rest
28 periods as part of their common policies and practices. Specifically, Defendants maintained a

1 common policy and practice of requiring employees to remain on premises during the rest
2 periods. This includes, but is not limited to, advising Plaintiff and the other aggrieved employees
3 that the time associated with rest periods was not their time and that they could not leave the
4 premises because they are not on their time and therefore remained subject to Defendants'
5 control. Pursuant to Defendants' rest period policies and practices, Plaintiff, the Unfair
6 Competition Class, and the aggrieved employees were not authorized or permitted to leave the
7 premises during rest periods. Indeed, on the one occasion that Plaintiff attempted to leave the
8 premises during a rest period to go to McDonald's, he was verbally reprimanded by his
9 supervisor because of the Company's policy prohibiting employees from leaving the premises
10 during rest periods.

11 44. By requiring Plaintiff, the Unfair Competition Class, and the aggrieved employees
12 to remain on the premises during rest periods, Defendants continued to exercise control over and
13 restrained their employees from leaving the workplace, engaging in certain specified activities
14 without restriction, and interfered with the right of their employees to take rest periods. For
15 instance, Defendants' policies and practice had a chilling effect on tasks that Defendants could
16 not easily monitor and/or their limited their ability to complain about workplace conditions during
17 their breaks. Such conduct violated Labor Code § 226.7 and IWC Wage Order Nos. 1-2001, 4-
18 2001, and 9-2001.

19 45. Based upon the foregoing, Defendants violated Labor Code § 226.7 and 1198 as
20 well as IWC Wage Order Nos. 1-2001, 4-2001 and 9-2001 with respect to Plaintiff and all
21 aggrieved employees. Employees, including Plaintiff and the other aggrieved employees who
22 experienced a violation of Labor Code § 226.7 may pursue PAGA penalties under Labor Code §
23 558. Labor Code § 558 imposes a penalty upon employers "who violates, or causes to be
24 violated...any provision regulating hours and days of work in any order of the Industrial Welfare
25 Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty
26 dollars (\$50) for each underpaid employee for each pay period for which the employee was
27 underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each
28 subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay

1 period for which the employee was underpaid in addition to an amount sufficient to recover
2 underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected
3 employee.” For purposes of Labor Code § 558, Plaintiff and the aggrieved employees seek only
4 the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and
5 not any underpaid wages.

6 46. In addition to failing to authorize and permit compliant rest periods, Plaintiff, the
7 Unfair Competition Class, and the aggrieved employees were not compensated with one (1)
8 hours’ worth of pay at their regular rate of compensation when they were not provided with a
9 compliant rest period and/or their rest period was interrupted in accordance with Labor Code §
10 226.7(b).

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

- 15 (1) gross wages earned;
- 16 (2) total hours worked by the employee;
- 17 (3) the number of piece-rate units earned and any applicable piece rate if the
employee is paid on a piece rate;
- 18 (4) all deductions, provided that all deductions made on written orders of the employee
may be aggregated and shown as one item;
- 19 (5) net wages earned;
- 20 (6) the inclusive dates of the period for which the employee is paid;
- 21 (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;
- 22 (8) the name and address of the legal entity that is the employer...;
- 23 (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...

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

1 49. In addition, here as in *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1070
2 (N.D.Cal. 2019), Plaintiff alleges that when Defendants made incentive and non-discretionary
3 bonus payments to him and the other aggrieved employees, it identified the payments as a lump
4 sum. and did “not specify how many hours the employee worked or the employee’s hourly rate”
5 applicable to such wages. *Magadia*, 384 F. Supp. at 1070. In *Magadia*, Wal-Mart employees who
6 “receive[d] a MyShare incentive award at the end of a quarter and also worked overtime during
7 that quarter are given additional overtime pay based on having received the incentive....The
8 additional overtime pay appear[ed] retroactively on the employee’s wage statement as
9 “OVERTIME/INCT...The OVERTIME/INCT item appears on the employee’s wage statement as
10 a lump sum and does not specify how many hours the employee worked or the employee’s hourly
11 rate.” *Id.* Based upon information and belief, Defendants engaged in the practice of displaying
12 wages—that Plaintiff contends were still calculated incorrectly—including, but not limited to
13 incentive payments/non-discretionary bonuses and compensation under the pay codes “Perf.
14 Incentive Comp” and “GU Recog AWD = Gross.”

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

24 51. Plaintiff, on behalf of himself and the Unfair Competition Classes pursuant to
25 Business & Professions Code §§ 17200-17208, also seeks injunctive relief, restitution, and
26 disgorgement of all benefits Defendants enjoyed from its unlawful conduct as described herein.

27 52. Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in
28 any employment are due and payable twice during each calendar month, on days designated in

1 advance by the employer as the regular paydays.” Defendant pays Plaintiff and all aggrieved
2 employees on a bi-weekly basis.

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

7 54. Labor Code § 210 provides that “in addition to, an entirely independent and apart
8 from, any other penalty provided in this article, every person who fails to pay the wages of each
9 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
10 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
11 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
12 each failure to pay each employee, plus 25% of the amount unlawfully withheld.” As a result of
13 the faulty compensation policies and practices described in detail above and Defendant’s failure
14 to pay Plaintiff all aggrieved employees within seven (7) days of the close of the payroll period,
15 the State of California is entitled to recover penalties under Labor Code § 210 through PAGA.

16 55. Under Labor Code §§ 201-202, an employer must provide an employee wages at
17 the time or discharge or within up to seventy-two (72) hours of their resignation. Labor Code §
18 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is
19 discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30
20 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

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

57. Separate and independent of the foregoing, Defendant failed to timely pay Plaintiff any of his owed wages at the time of his termination as required by Labor Code § 201. For instance, here although Defendants terminated Plaintiff on November 17, 2020, he was not provided with his final wages upon separation:

Employment Dates:

Termination Date	11/17/2020
Benefits End Date	11/17/2020
Last Day Worked	11/17/2020

Information History:

Andrew Tunstall 13.11.2020 19:43:07

term Mr Ever Revelo effective 11/17.... pay California vacation as shown 10.145 hours includes carry overs ... pay through last day of 11/17 (pay includes this day 11 /17) need manual check run to DD to account or mail over night. let me know which Andy Tunstall

58. However, Plaintiff was not paid upon his termination date as Mr. Tunstall noted, but was instead paid the next day on November 18, 2020 in violation of Labor Code § 201 and despite the fact that he was suspended in or around November 12, 2020 and the time stamp on the termination decision indicates it was made on November 13, 2020—more than 5 days before he was paid his final wages:

Payroll Period: 11/09/2020-11/22/2020
Pay Date : 11/18/2020

Authority	Status	Allow	Add'l W/H
Federal	Married	02	0.00
California	Married	02	0.00

C.

TAXES

COMPLAINT

DESCRIPTION	AMOUNT	YTD AMOUNT
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1
2
3 59. Plaintiff alleges that Defendant engaged in a similar pattern and practice of failing
4 to pay him and the Late Payment Aggrieved Employees any wages within the time constraints of
5 Labor Code §§ 201-202.

6 60. In addition, separate and independent of the foregoing, Plaintiff and all Late
7 Payment Aggrieved Employees left their employment with Defendants without having received
8 compensation for sick pay at the correct rate throughout the duration of their employment. Labor
9 Code § 246 requires employer to calculate sick leave pay based upon one of the following
10 formulas:

11
12 (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the
13 regular rate of pay for the workweek in which the employee uses paid sick time, whether
14 or not the employee actually works overtime in that workweek.

15 (2) Paid sick time for nonexempt employees shall be calculated by dividing the
16 employee's total wages, not including overtime premium pay, by the employee's total
17 hours worked in the full pay periods of the prior 90 days of employment.

18 (3) Paid sick time for exempt employees shall be calculated in the same manner as the
19 employer calculates wages for other forms of paid leave time.

20 Lab. Code § 246.

21 61. Throughout Plaintiff and the aggrieved employees' employment, Defendants failed
22 to include the incentive pay and other non-discretionary bonuses, including, but not limited to
23 "Perf. Incentive Comp" and "GU Recog AWD = Gross" when calculating and paying sick pay.
24 As a result, when Plaintiff and the Late Payment Aggrieved Employees employment ended, they
25 left their employment without having received compensation for all of their sick pay that they
26 were owed under Labor Code § 246 and resulting in a violation of Labor Code §§ 201-203. As a
27 result of Defendants' underpayment of sick pay, Plaintiff and the other Late Payment Aggrieved
28 Employees experienced a violation of Labor Code §§ 201-202 upon separation from Defendants.
See Powell v. Walmart Inc., No. 3:20-cv-2412-BEN-LL, 2021 U.S. Dist. LEXIS 20777, at *6

1 (S.D. Cal. Feb. 2, 2021) (denying a motion to dismiss claims under Labor Code section 203 based
2 upon the employer's alleged failure to include incentive pay when calculating and paying sick
3 pay); *accord Flores v. Dart Container Corp.*, No. 2:19-cv-00083 WBS EFB, 2020 U.S. Dist.
4 LEXIS 93524, at *7 (E.D. Cal. May 27, 2020).

5 62. Under Labor Code § 212, an employer may not “issue in payment of wages due, or
6 to become due....[a]ny order, check, draft, note memorandum, or other acknowledgement of
7 indebtedness, unless it is negotiable and payable in cash, on demand, without discount.” Labor
8 Code § 212(a)(2) also prohibits an employer from paying wages in “[a]ny scrip, coupon cards, or
9 other thing redeemable in merchandise or purporting to be payable or redeemable otherwise than
10 in money.”

11 63. Plaintiff and other aggrieved employees were forced to accept wages—including
12 but not limited to incentive pay and non-discretionary bonuses—in the form of points for which
13 they are taxed. These coupons are not redeemable for cash, nor payable in cash, or on demand
14 without discount as required by Labor Code §212. Plaintiff and all aggrieved employees, are
15 therefore compelled to use their non-cash wages (bonus wages) sometimes referred to as GU
16 Record AWS = Gross.

17 64. Labor Code §225.5 provides for penalties resulting from Labor Code §212
18 violations as follows: (a) for any initial violation, one hundred dollars (\$100) for each failure to
19 pay each employee; and (b) for each subsequent violation, or any willful or intentional violation,
20 two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount
21 unlawfully withheld. Accordingly, Defendants have also violated Labor Code § 225.5.

22 65. Defendant also violated Labor Code § 450 by forcing Plaintiff and the other
23 aggrieved employees to use their wages on items rather than providing Plaintiff and all Aggrieved
24 Employees the opportunity to receive cash and/or to patronize other providers/vendors. Labor
25 Code § 450 prohibits an employer from compelling or coercing any employee or applicant for
26 employment from patronizing his employer or any other person in the purchase of anything of
27 value. By requiring Plaintiff and all aggrieved employees to patronize its selected vendors with
28

1 their wages, non-discretionary bonuses and incentive pay and/or forgo compensation, Defendant
2 violated the express terms of Labor Code § 450.

3 II.

4 **JURISDICTION AND VENUE**

5 66. This Court has subject matter jurisdiction over all causes of action asserted herein
6 pursuant to Article VI, § 10 of the California Constitution and California Code of Civil Procedure
7 § 410.10 by virtue of the fact that this is a civil action in which the matter in controversy,
8 exclusive of interest, exceeds \$25,000, and because each cause of action asserted arises under the
9 laws of the State of California or is subject to adjudication in the courts of the State of California.

10 67. This Court has personal jurisdiction over Defendant BASF Corporation because
11 Defendant has caused injuries in the County of Orange and State of California through their acts,
12 and by their violation of the California law and California Business & Professions Code sections
13 17200, *et seq.*

14 68. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
15 Civil Procedure §395. Defendants operates within California and do business within Orange
16 County. The unlawful acts alleged herein have a direct effect on Plaintiff and the Classes within
17 the State of California and the County of Orange.

18 69. This case should be classified as complex according to Rule 3.400 of the
19 California Rules of Court, and assigned to a complex litigation judge and department, as it will
20 involve substantial documentary evidence, and is likely to involve extensive motion practice
21 raising difficult or novel issues that will be time-consuming to resolve and would require
22 substantial post judgment judicial supervision.

23 III.

24 **PARTIES**

25 **A. PLAINTIFF**

26 70. Plaintiff EVER REVELO is a former employee of Defendants who at all times
27 relevant hereto worked for Defendants in Orange County.

28 71. Plaintiff and the Unfair Competition Class were regularly required to:

- a. Work overtime hours without receiving the proper amount of compensation, and/or the proper amount of overtime compensation;
- b. Work without being provided lawful meal periods;
- c. Work without being provided lawful rest periods;

B. DEFENDANTS

72. Defendant BASF Corporation, is a Delaware corporation, with a principal place of business of 100 Park Avenue, Florham Park, NJ 07932. Upon information and belief, Defendant employed Plaintiff and the Classes within California and in Orange County, including in Buena Park, California. Defendant has done and does business throughout the State of California and in Orange County.

73. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

74. Plaintiff is informed and believes, and based thereon alleges, that each Defendant acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the employer and/or joint employer of Plaintiff and the Class and/or as alter egos of each other.

IV.

CLASS ACTION ALLEGATIONS

75. Plaintiff brings this action on behalf of himself and all others similarly situated as a Class Action pursuant to §382 of the Code of Civil Procedure. Plaintiff seeks to represent several Classes and Subclasses composed of and defined as follows:

- 1
- 2 (1) all individuals who were employed by BASF Corporation or its predecessor,
- 3 merged or related entities in California who worked one or more shifts as a
- 4 non-exempt hourly employee or other similar position from April 30, 2017
- 5 and May 2, 2018. (“Unfair Competition Class”);
- 6
- 7 (2) all individuals who were employed by BASF Corporation or its predecessor or
- 8 merged entities in California as a non-exempt, hourly employee or other similar
- 9 position and who worked a shift of more than eight (8) hours in a day and/or forty
- 10 (40) hours in a week during a pay period from April 30, 2017 and May 2, 2018.
- 11 (“Non-Exempt Overtime Unfair Competition Subclass”);
- 12
- 13 (3) all individuals who were employed by BASF Corporation or its predecessor, merged
- 14 or related entities for one or more pay periods in California as a non-exempt, hourly
- 15 employee and who worked a shift of more than eight (8) hours in a day and/or forty
- 16 (40) hours in a week during a period where the employee also earned non-
- 17 discretionary bonuses, incentive pay, including, but not limited to, “Perf. Incentive
- 18 Comp”) and “GU Record AWS = Gross”) from April 30, 2017 and May 2, 2018.
- 19 (“Incentive Pay Overtime Aggrieved Employees”);

20 Collectively, Subclasses one (1) and two (2) to as the “Unfair Competition Overtime Subclasses.”

- 21
- 22 (4) all individuals who were employed by BASF Corporation or its predecessor,
- 23 merged or related entities in California who worked one or more shifts of
- 24 more than six (6) hours as a non-exempt hourly employee or other similar
- 25 position from April 30, 2017 and May 2, 2018. (“First Meal Period Unfair
- 26 Competition Subclass”);
- 27
- 28 (5) all individuals who were employed by BASF Corporation or its predecessor,
- merged or related entities in California who worked one or more shifts of
- more than ten (10) hours as a non-exempt hourly employee or other similar
- position from April 30, 2017 and May 2, 2018. (“Second Meal Period Class”);
- (6) all individuals who were employed by BASF Corporation, or its predecessor, merged
- or related entities in California as a non-exempt hourly employee, or other similar
- position, who worked one or more shifts of more than five (5) hours in length or
- major fraction thereof and who underwent a security and/or bag check and/or who left
- the premises during a meal period from April 30, 2017 and May 2, 2018. (“Security
- Check Meal Period Unfair Competition Subclass”);

Collectively, Subclasses four (4), five (5), and six (6) to as the “Unfair Competition Meal Period Subclasses.”

- 1
- 2 (7) all individuals who were employed by BASF Corporation, or its predecessor, merged
- 3 or related entities in California as a non-exempt hourly employee, or other similar
- 4 position, who worked one or more shifts and who underwent a security and/or bag
- 5 check from April 30, 2017 and May 2, 2018. (“Minimum Wage Unfair Competition
- 6 Subclass”);
- 7
- 8 (8) all individuals who were employed by BASF Corporation, or its predecessor, merged
- 9 or related entities in California as a non-exempt hourly employee, or other similar
- 10 position, who worked one or more shifts of more than four (4) hours in length or
- 11 major fraction thereof from April 30, 2017 and May 2, 2018. (“Non-Exempt Rest
- 12 Period Unfair Competition Subclass”);
- 13
- 14 (9) all individuals who were employed by BASF Corporation, or its predecessor, merged
- 15 or related entities in California as a non-exempt hourly employee, or other similar
- 16 position, who worked one or more shifts of more than four (4) hours in length or
- 17 major fraction thereof and who underwent a security and/or bag check and/or who left
- 18 the premises during a rest period from April 30, 2017 and May 2, 2018. (“Security
- 19 Check Rest Period Unfair Competition Subclass”);

20 Collectively, these groups may also all collectively be referred to herein as the Classes or Class

21 Member(s).²

22 76. This is also a representative action brought pursuant to Labor Code § 2698, *et seq.*,

23 on behalf of the State of California and several groups of aggrieved employees defined as

24 follows:

- 25 (1) all individuals who were employed by BASF Corporation as a non-exempt, hourly
- 26 employee for one or more pay periods from February 9, 2020 and continuing into the
- 27 present (“Non-Exempt Aggrieved Employees”);
- 28
- (2) all individuals who were employed by BASF Corporation or its predecessor or
- merged entities in California as a non-exempt, hourly employee or other similar
- position and who worked a shift of more than eight (8) hours in a day and/or forty
- (40) hours in a week during a pay period from February 9, 2020 and continuing into
- the present. (“Non-Exempt Overtime Aggrieved Employees”);
- (3) all individuals who were employed by BASF Corporation or its predecessor, merged
- or related entities for one or more pay periods in California as a non-exempt, hourly
- employee and who worked a shift of more than eight (8) hours in a day and/or forty
- (40) hours in a week during a period where the employee also earned non-

² Plaintiff reserves the right to redefine the Classes and Subclasses identified herein.

discretionary bonuses, incentive pay, including, but not limited to, “Perf. Incentive Comp”) and “GU Record AWS = Gross”) from February 9, 2020 and continuing into the present; (“Incentive Pay Overtime Aggrieved Employees”);

Collectively, aggrieved employee groups two (2) and three (3) may be referred to as the “Overtime Aggrieved Employees.”

(4) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from February 9, 2020 and continuing into the present. (“Meal Period Aggrieved Employees”);

(5) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than ten (10) hours as a non-exempt hourly employee or other similar position from February 9, 2020 and continuing into the present. (“Second Meal Period Aggrieved Employees”);

(6) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than five (5) hours in length or major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a meal period from February 9, 2020 and continuing into the present. (“Minimum Wage/M Meal Period Aggrieved Employee”);

Collectively, aggrieved employee groups four (4), five (5), and six (6) may be referred to as the “Meal Period Aggrieved Employees.”

(7) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than five (5) hours in length or major fraction thereof and who underwent a security and/or bag check from February 9, 2020 and continuing into the present. (“Minimum Wage Aggrieved Employee”);

(8) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from February 9, 2020 and continuing into the present. (“Non-Exempt Rest Period Aggrieved Employee”);

(9) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or

1 major fraction thereof and who underwent a security and/or bag check and/or who left
2 the premises during a rest period from February 9, 2020 and continuing into the
3 present. (“Security Check Rest Period Aggrieved Employee”);

4 Collectively, aggrieved employee groups eight (8) and nine (9) may be referred to as the
5 “Rest Period Aggrieved Employees.”

6 (10) all individuals who were employed by BASF Corporation, or its predecessor, merged
7 or related entities in California and who submitted a record request pursuant to Labor
8 Code §§ 226 and/or 1198.5 to BASF Corporation from February 9, 2020 and
9 continuing into the present. (“Record Aggrieved Employee”); and

10 (11) all individuals who were employed by BASF Corporation or its predecessor, merged
11 or related entities for one or more pay periods in California and whose employment
12 concluded at any time between February 9, 2020 and continuing into the present;
13 (“General Late Payment Aggrieved Employee”);

14 (12) all individuals who were employed by BASF Corporation or its predecessor, merged
15 or related entities for one or more pay periods in California, who received sick pay,
16 and whose employment concluded at any time between February 9, 2020 and
17 continuing into the present; (“Sick Pay Late Payment Aggrieved Employee”);

18 Collectively, aggrieved employee groups eleven (11) and twelve (12) may be referred to as the
19 “Late Payment Aggrieved Employees.”

20 77. Plaintiff reserves the right under Rule 3.765(b) of the California Rules of Court to
21 amend or modify the class description with greater specificity, by division into subclasses, or by
22 limitation to particular issues.

23 78. This action has been brought and may properly be maintained as a class action
24 under the provisions of § 382 of the Code of Civil Procedure because there is a well-defined
25 community of interest in the litigation and the Proposed Classes are easily ascertainable.

26 **A. Numerosity**

27 79. The potential members of the Proposed Classes as defined are each so numerous
28 that joinder of all the members of the Proposed Classes is impracticable. While the precise
number of proposed Class Members in each Class has not been determined at this time, Plaintiff

1 is informed and believes that Defendants currently employ, and during the relevant time periods
2 employed to be more than 100 members or more of the Proposed Class at any given time.

3 80. Plaintiff alleges that Defendants' employment records would provide information
4 as to the number and location of all Proposed Class members. Joinder of all members of the
5 Proposed Class is not practicable.

6 **B. Commonality**

7 81. There are questions of law and fact common to the Proposed Classes that
8 predominate over any questions affecting only individual Proposed Class Members. These
9 common questions of law and fact include, without limitation:

10 a. Whether Defendants violated § 17200 et seq. of the Business & Professions Code by
11 engaging in the acts previously alleged;

12 **C. Typicality**

13 82. The claims of Plaintiff are typical of the claims of the Proposed Classes. Plaintiff
14 and all members of the Proposed Classes sustained injuries and damages arising out of and caused
15 by Defendants' common course of conduct in violation of laws, regulations that have the force
16 and effect of law, and statutes as alleged herein.

17 **D. Adequacy of Representation**

18 83. Plaintiff will fairly and adequately represent and protect the interests of the
19 members of the proposed Classes. Counsel who represents Plaintiff and the Proposed Class is
20 competent and experienced in litigating large employment class actions, and have the financial
21 resources to litigate the claims at issue.

22 **E. Superiority of Class Action**

23 84. A class action is superior to other available means for the fair and efficient
24 adjudication of this controversy. Individual joinder of all Proposed Class Members is not
25 practicable, and questions of law and fact common to the Proposed Class predominate over any
26 questions affecting only individual members of the Proposed Class. Each member of the
27 Proposed Class has been damaged and is entitled to recovery by reason of Defendants' illegal
28 policy and/or practice of failing to pay all wages due, failing to provide meal periods, failing to

1 provide rest periods, failing to provide accurate itemized wage statements, and failing to pay all
2 wages upon resignation or termination.

3 85. Class action treatment will allow those similarly situated persons to litigate their
4 claims in the manner that is most efficient and economical for the parties and the judicial system.
5 Plaintiff is unaware of any difficulties that are likely to be encountered in the management of this
6 action that would preclude its maintenance as a class action.

7 **V.**

8 **FIRST CAUSE OF ACTION**
9 **UNFAIR COMPETITION PURSUANT TO**
10 **BUSINESS & PROFESSIONS CODE § 17200**
11 **[Against all Defendants on behalf of Plaintiff and the Unfair Competition Class and**
12 **Subclasses]**

13 86. Plaintiff, on behalf of himself and the Unfair Competition Class, realleges and
14 incorporates by reference all previous paragraphs.

15 87. This is a Class Action for Unfair Business Practices. Plaintiff, on behalf of herself,
16 on behalf of the general public, and on behalf of the Proposed Classes, bring this claim pursuant
17 to Business & Professions Code § 17200, et seq. The conduct of Defendants as alleged in this
18 Complaint related to overtime wages, meal periods, and rest periods, has been and continues to be
19 unfair, unlawful, and harmful to Plaintiff, the general public, and the Proposed Unfair
20 Competition Class and Subclasses. Plaintiff seeks to enforce important rights affecting the public
21 interest within the meaning of Code of Civil Procedure § 1021.5. Plaintiff is a “person” within the
22 meaning of Business & Professions Code § 17204, and therefore has standing to bring this cause
23 of action for injunctive relief, restitution, and other appropriate equitable relief.

24 88. Defendants have engaged in unlawful and unfair business practices that violate
25 fundamental public policies of the state of California and the United States of America As a result
26 of its unlawful and unfair business practices, Defendants have forced employees to work under
27 substandard and unlawful conditions in an effort to gain a competitive advantage over law-
28 abiding employers who comply with California’s Labor Code.

89. Defendants have violated statutes and public policies as alleged herein. Through
the conduct alleged in this Complaint, Defendants have acted contrary to these public policies,

1 have violated specific provisions of the Labor Code, and have engaged in other unlawful and
2 unfair business practices in violation of Business & Profession Code § 17200, et seq., depriving
3 Plaintiff, and all persons similarly situated, and all interested persons of rights, benefits, and
4 privileges guaranteed to all employees under law.

5 90. Defendants' conduct, as alleged hereinabove, constitutes unfair competition in
6 violation of § 17200 et seq. of the Business & Professions Code.

7 91. Defendants, by engaging in the conduct herein alleged, either knew or in the
8 exercise of reasonable care, should have known that the conduct was unlawful. As such it is a
9 violation of § 17200 et seq. of the Business & Professions Code.

10 92. As a proximate result of the above-mentioned acts of Defendants, Plaintiff, the
11 Unfair Competition Class, others similarly situated, other businesses, and the general public have
12 been damaged in a sum as may be proven.

13 93. As part of their claims against Defendant BASF Corporation, Plaintiffs seek not
14 only the unpaid wages, but also the market value of the loss of the statutory protections and the
15 cost to other employers of providing proper breaks and wages for all hours worked.

16 94. Unless restrained, Defendants will continue to engage in the unlawful conduct as
17 alleged above. Pursuant to the Business & Professions Code, this court should make such orders
18 or judgments, including the appointment of a receiver, as may be necessary to prevent the use or
19 employment by Defendants, its agents, or employees, of any unlawful or deceptive practices
20 prohibited by the Business & Professions Code, and/or, including but not limited to, restitution
21 and disgorgement of profits which may be necessary to restore Plaintiff and members of the
22 Proposed Classes the money Defendants have unlawfully failed to pay.

23 **VI.**

24 **SECOND CAUSE OF ACTION**
25 **VIOLATIONS OF LABOR CODE § 226(f) and (h)**
26 **[Against all Defendants on behalf of Plaintiff]**

27 95. Plaintiff, on behalf of himself, realleges and incorporates by reference all previous
28 paragraphs.

96. Section 226 of the Labor Code provides, in relevant part:

1 An employer who receives a written or oral request to inspect or copy records pursuant to
2 subdivision (b) pertaining to a current or former employee shall comply with the request
3 as soon as practicable, but no later than 21 calendar days from the date of the request.

4 97. Labor Code § 226 provides that a failure by an employer to permit a current or
5 former employee to inspect or receive a copy of records within the time set forth in subdivision
6 (c) entitles the current or former employee or the Labor Commissioner to recover a seven-
7 hundred-fifty-dollar (\$750) penalty from the employer.

8 98. Relatedly, Labor Code § 226(h) authorizes an employee to bring an action for
9 violation of Labor Code § 226 and to obtain an award of costs and reasonable attorney's fees and
10 injunctive relief.

11 99. On December 7, 2020, Plaintiff submitted a request for records under Labor Code
12 §§ 226, 432, and 1198.5 via USPS Certified Mail (No. 7020 1810 0000 4330 1996). The USPS
13 tracking records indicate that BASF received the record request on December 15, 2020. Pursuant
14 to Labor Code §§ 226, 432, 1198.5 and 6408(d) as well as his time records within the meaning of
15 Section 7(A)(3) and (C) of the IWC Wage Order, Plaintiff's pay records were due within 21 days
16 of the receipt of his request (January 5, 2021) and his personnel records within 30 days of receipt
17 (January 24, 2021). However, Defendants did not timely produce Plaintiff's personnel file, and
18 Plaintiff believes is still withholding responsive documents, and has never produced his pay
19 records within the meaning of Labor Code section 226.

20 100. Since Defendant BASF made no effort whatsoever to produce the records or
21 contact Plaintiff through his Counsel, Plaintiff sent a follow-up letter on January 19, 2021
22 requesting that Defendant BASF provide his records within the meaning of Labor Code §§ 226,
23 432, 1198.5 and 6408(d). Defendant BASF orally acknowledged in a voicemail from Elizabeth
24 Rodriguez, BASF's Compliance Manager, to Plaintiff's Counsel on January 26, 2021 at 9:16AM
25 PST that BASF received Plaintiff's initial record request and the follow-up letter, but had not
26 produced the records. Plaintiff reiterated that BASF needed to both provide the records and pay
27 the penalties required under Labor Code sections 226 and 1198.5.
28

101. Instead of providing the records that Plaintiff requested and as required by Labor Code § 226, Defendant instead willfully, knowingly, and intentionally violated Labor Code § 226(c) by only providing W2s—aside from his final wage statement—which do not include any pay period specific information and/or any of the following information required by Labor Code section 226(a) on a per pay period basis or as otherwise indicated: gross wages earned, total hours worked by the employee, all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, net wages earned, the inclusive dates of the period for which the employee is paid, 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, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

102. Plaintiff's Counsel emailed Defendant BASF Corporation and its Legal Compliance Officer Elizabeth Rodriguez about these issues on January 28, 2021:

RE: [EXT] RE: Subpoena - Ever Revelo -W2 Statements & Final Paystub

 Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
To: David Winston

 You replied to this message on 1/28/2021 4:29 PM.

 Reply  Reply All  Forward 
Thu 1/28/2021 4:03 PM

Yes, I thought you should have the records.

HR is pulling his time records for me. I will review to see if the data complies with LCS 226.

From: David Winston <david@employmentlitigators.com>
Sent: Thursday, January 28, 2021 6:56 PM
To: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Subject: [EXT] RE: Subpoena - Ever Revelo -W2 Statements & Final Paystub

On the pay records, it's actually supposed to be either wage statements or computer generated summaries that include all the information in Labor Code section 226—which is the same information as what's on a wage statement: https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=226. From a practical perspective, I know that you won't be able to get those to us today since it's well after close of business EST. I appreciate that you were even emailing me this late and also do not expect a response this evening.

From: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Sent: Thursday, January 28, 2021 3:46 PM
To: david@employmentlitigators.com
Subject: FW: Subpoena - Ever Revelo -W2 Statements & Final Paystub

Hello David,

Pursuant to your request, attached are the wage records for Mr. Revelo.

- ✓ W-2's (2018-2020)
- ✓ Final paystub (2020)

Personnel file and time records to follow...thank you.

Regards,
Elizabeth Rodriguez
Compliance Manager
Legal Department

Phone: +1 973-245-6043 Mobile: +1-973-407-0514 Fax: +1 973 245-6710 E-Mail: elizabeth.rodriguez@basf.com
Postal Address: BASF Corporation, 100 Park Avenue, Florham Park, 07932

103. Although Defendants agreed to look at the pay records and produce the time records, it and its Legal Compliance Officer Elizabeth Rodriguez instead consciously and willfully chose to refuse to comply with California Labor Code section 226(c) and IWC Wage Order Section 7(A)(3) and (C):

RE: [EXT] RE: Ever Revelo Record Request



David Winston <david@employmentlitigators.com>
To: 'Elizabeth A Rodriguez'

Reply Reply All Forward ...

Tue 2/2/2021 11:23 AM

That is incorrect and we have emails about how the records were just W2s, which did not meet the definition of Labor Code section 226: https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=226. The time records were also not produced. So, it's my understanding that absent a court order the Company is not going to pay the penalties its owes or produces the records. Not going to argue about it.

From: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Sent: Tuesday, February 2, 2021 11:19 AM
To: David Winston <david@employmentlitigators.com>
Subject: RE: [EXT] RE: Ever Revelo Record Request

Hi David,

I sent you the records for Mr. Revelo. We will not be sending any other pay records.

From: David Winston <david@employmentlitigators.com>
Sent: Tuesday, February 2, 2021 1:51 PM
To: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Subject: [EXT] RE: Ever Revelo Record Request

Thank you and hope that you had a nice weekend, just wanted to check-in on the timing of the production of the time and pay records?

104. As such Defendant BASF consciously and willfully violated Labor Code section 226(a), (c), (f). Plaintiff requested that Defendant provide such records by December 31, 2020, but Defendant instead persisted in its decision to continue to violate Labor Code §§ 226(a), (c), (f) by refusing to provide the records and penalties.

105. Defendant then subsequently continued to refuse to provide the records and penalties and pay the attorneys' fees associated with its violations of Labor Code §§ 226(a), (c), (f).

106. Based upon the foregoing, Defendants' violated Labor Code section 226 by not providing a copy of the requested records within 21 days.

107. Pursuant to Labor Code § 226(f) and (h) Plaintiff is entitled to collect a Seven Hundred and Fifty dollars (\$750) penalty, an injunction compelling the production of his pay

records within the meaning of Labor Code § 226(a) and an award of costs and reasonable attorney's fees to enforce this provision, in a sum to be proven at trial.

VII.

THIRD CAUSE OF ACTION **PENALTIES PURSUANT TO LABOR CODE § 1198.5(k) AND** **INJUNCTIVE RELIEF PURSUANT TO LABOR CODE § 1198.5(l)** **[Against all Defendants on behalf of Plaintiff]**

108. Plaintiff realleges and incorporates by reference all previous paragraphs.

109. Section 1198.5 of the Labor Code specifically authorizes, in relevant part:

Every current and former employee, or his or her representative, has the right to inspect and receive a copy of the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee.

110. Labor Code § 1198.5(k) further provides that if an employer fails to permit a current or former employee, or his or her representative, to inspect or copy personnel records within the times specified in this section, or times agreed to by mutual agreement as provided in this section, the current or former employee or the Labor Commissioner may recover a penalty of seven hundred fifty dollars (\$750) from the employer.

111. Labor Code § 1198.5(l) also entitles a current and/or former employee to bring an action for injunctive relief and to recover costs and reasonable attorney's fees in such an action.

112. On December 7, 2020, Plaintiff submitted a request for records under Labor Code §§ 226, 432, and 1198.5 via USPS Certified Mail (No. 7020 1810 0000 4330 1996). The USPS tracking records indicate that BASF received the record request on December 15, 2020. Pursuant to Labor Code §§ 226, 432, 1198.5 and 6408(d) as well as his time records within the meaning of Section 7(A)(3) and (C) of the IWC Wage Order, Plaintiff's pay records were due within 21 days of the receipt of his request (January 5, 2021) and his personnel records within 30 days of receipt (January 24, 2021). However, Defendants did not timely produce Plaintiff's personnel file, and Plaintiff believes is still withholding responsive documents, and has never produced his pay records within the meaning of Labor Code section 226.

113. Since Defendant BASF made no effort whatsoever to produce the records or contact Plaintiff through his Counsel, Plaintiff sent a follow-up letter on January 19, 2021

1 requesting that Defendant BASF provide his records within the meaning of Labor Code §§ 226,
2 432, 1198.5 and 6408(d). Defendant BASF orally acknowledged in a voicemail from Elizabeth
3 Rodriguez, BASF's Compliance Manager, to Plaintiff's Counsel on January 26, 2021 at 9:16AM
4 PST that BASF received Plaintiff's initial record request and the follow-up letter, but had not
5 produced the records. Plaintiff reiterated that BASF needed to both provide the records and pay
6 the penalties required under Labor Code sections 226 and 1198.5.

7 114. Based upon information and belief, in addition to refusing to provide Plaintiff's
8 personnel file in a timely manner, Defendant continues to unlawfully withhold documents it is
9 required to produce under Labor Code § 1198.5 and did not provide any documents whatsoever
10 within 30 days of the receipt of Plaintiff's request.

11 115. Pursuant to Labor Code § 1198.5, Plaintiff is entitled to collect a Seven Hundred
12 and Fifty dollars (\$750) penalty, an injunction compelling the production of his personnel records
13 within the meaning of Labor Code § 1198.5 and an award of costs and reasonable attorney's fees
14 to enforce this provision, in a sum to be proven at trial.

15 VIII.

16 FOURTH CAUSE OF ACTION

17 **PLAINTIFF AND ALL AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS**
18 **FOR PENALTIES PURSUANT TO LABOR CODE § 2698, ET SEQ. FOR VIOLATIONS**
19 **OF LABOR CODE §§ 201, 202, 203, 204, 210, 212, 225.5, 226(a) (c), (f), 226.3, 226.7, 450,**
20 **510, 512, 558, 1197, 1197.1, 1198 and 1198.5, as well as IWC Wage Order Nos. 1-2001, 4-**
21 **2001, and 9-2001.**

22 **[On behalf of the State of California Pursuant to PAGA]**

23 116. Plaintiff, on behalf of the State of California, realleges and incorporates by
24 reference all previous paragraphs.

25 117. Plaintiff fully and completely exhausted her administrative remedies under PAGA
26 prior to proceeding with this action. Plaintiff filed her PAGA Notice online with the Labor
27 Workforce Development Agency ("LWDA") and sent a letter by certified mail to Defendants
28 setting forth the facts and theories of the violations alleged against Defendants, as prescribed by
Labor Code § 2698 *et seq.* **Exh. A.** As required by PAGA, Plaintiff submitted the \$75.00 filing
fee with the LWDA by regular mail. Pursuant to Labor Code § 2699.3(a)(2)(A), no notice was
received and/or will have been received by Plaintiff from the LWDA evidencing its intention to

investigate within sixty-five (65) calendar days of the postmark date of the PAGA notice. Plaintiff is therefore, entitled to commence and proceed with a civil action pursuant to Labor Code § 2699.

118. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code § 2698, *et seq.* because of Defendants' violations of Labor Code §§ 201, 202, 203, 204, 210, 212, 225.5, 226(a) (c), (f), 226.3, 226.7, 450, 510, 512, 558, 1197, 1197.1, 1198 and 1198.5, as well as IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001.

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

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

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

These penalties will be allocated 75% to the Labor Workforce Development Agency and 25% to the affected employees.

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

121. Labor Code § 210 provides that "in addition to, an entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld." Pursuant to Labor Code § 210, "[t]welve and one-half percent of the penalty recovered shall be paid into a

1 fund within the Labor and Workforce Development Agency dedicated to educating employers
2 about state labor laws, and the remainder shall be paid into the State Treasury to the credit of the
3 General Fund.” As a result of the faulty compensation policies and practices described in detail
4 above, the State of California is entitled to recover penalties under Labor Code § 210 through
5 PAGA.

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

16 **RELIEF REQUESTED**

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

18 1. An Order that this action may proceed and be maintained as a Class Action on
19 behalf of the Unfair Competition Class and Subclasses;

20 2. For restitution for unfair competition pursuant to Business & Professions Code
21 § 17200 to Plaintiff and the Unfair Competition Class for actions committed between April 30,
22 2017 to May 3, 2018, including disgorgement of profits, in an amount as may be proven;

23 3. An order enjoining Defendant and its agents, servants, and employees, and all
24 persons acting under, in concert with, or for it from providing Plaintiff and the Proposed Class
25 Members proper compensation for overtime hours worked, meal period premiums, rest period
26 premiums, from failing to provide timely first meal periods within the first five (5) hours of an
27 employees shift and second meal periods when employees work more than ten (10) hours in a
28 day, and for failing to authorize and permit employees to leave the premises during rest periods.

1 4. For penalties pursuant to Labor Code section 226 in the amount of Seven Hundred
2 and Fifty Dollars (\$750) and an award of attorneys' fees related to the enforcement of this
3 provision;

4 5. An order enjoining Defendants and its agents, servants, and employees, and all
5 persons acting under, in concert with, or for it requiring Defendant to provide Plaintiff with
6 copies of his pay records within the meaning of Labor Code § 226(a), (b), (c), and (f);

7 6. For penalties pursuant to Labor Code section 1198.5 in the amount of Seven
8 Hundred and Fifty Dollars (\$750) and an award of attorneys' fees related to the enforcement of
9 this provision;

10 7. An order enjoining and directing Defendants and its agents, servants, and
11 employees to provide Plaintiff with and/or the right to inspect his personnel files within the
12 meaning of Labor Code § 1198.5;

13 8. For penalties under Labor Code § 2698, *et seq.* for Plaintiff and all aggrieved
14 employees because of Defendants' violation of Labor Code §§ 201, 202, 203, 204, 210, 212,
15 225.5, 226(a) (c), (f), 226.3, 226.7, 450, 510, 512, 558, 1197, 1197.1, 1198 and 1198.5, as well as
16 IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001.

17 9. An award providing for payment of costs of suit;

18 10. An award of attorneys' fees; and

19 11. Such other and further relief as this Court may deem proper and just.

20
21 DATED: April 14, 2021

WINSTON LAW GROUP, P.C.

22
23 By: David S. Winston
24 DAVID S. WINSTON
25 Attorneys for Plaintiff, the Proposed
26 Class, and the aggrieved employees
27
28

Exhibit A

WINSTON LAW GROUP, P.C.

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

February 9, 2021

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

BASF Corporation
100 Park Avenue
Florham Park, NJ 07932

Re: *EVER REVELO VS. BASF CORPORATION - California Labor Code § 2699 Penalties*

Gentlepersons:

This firm represents Ever Revelo (“Plaintiff” or “Mr. Revelo”) and a proposed group of current and former employees working for BASF Corporation and/or any businesses or entities doing business as BASF Corporation (“Defendants” or “BASF”) in California for violations of California Labor Code §§ 201, 202, 203 (underpayment of sick pay wages, non-derivative untimely payment of all final wages, derivative overtime and meal/rest period premiums), 204, 210, 212, 225.5, 226(a) (c), (f), 226.3, 226.7, 450, 510, 512, 558, 1197, 1197.1, 1198 and 1198.5, as well as IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001.

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

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

hours in a week during a period where the employee also earned non-discretionary bonuses, incentive pay, including, but not limited to, “Perf. Incentive Comp”) and “GU Record AWS = Gross”) from one (1) year prior to the submission of this letter and continuing into the present; (“Incentive Pay Overtime Aggrieved Employees”);

Collectively, aggrieved employee groups two (2) and three (3) may be referred to as the “Overtime Aggrieved Employees.”

- (4) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than six (6) hours as a non-exempt hourly employee or other similar position from one (1) year prior to the date of this letter and continuing into the present. (“Meal Period Aggrieved Employees”);
- (5) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities in California who worked one or more shifts of more than ten (10) hours as a non-exempt hourly employee or other similar position from one (1) year prior to the date of this letter and continuing into the present. (“Second Meal Period Aggrieved Employees”);
- (6) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than five (5) hours in length or major fraction thereof and who underwent a security and/or bag check and/or who left the premises during a meal period from one year prior to the date of this letter and continuing into the present. (“Minimum Wage/M Meal Period Aggrieved Employee”);

Collectively, aggrieved employee groups four (4), five (5), and six (6) may be referred to as the “Meal Period Aggrieved Employees.”

- (7) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than five (5) hours in length or major fraction thereof and who underwent a security and/or bag check from one year prior to the date of this letter and continuing into the present. (“Minimum Wage Aggrieved Employee”);
- (8) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position,

who worked one or more shifts of more than four (4) hours in length or major fraction thereof from one year prior to the date of this letter and continuing into the present. (“Non-Exempt Rest Period Aggrieved Employee”);

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

Collectively, aggrieved employee groups eight (8) and nine (9) may be referred to as the “Rest Period Aggrieved Employees.”

- (10) all individuals who were employed by BASF Corporation, or its predecessor, merged or related entities in California and who submitted a record request pursuant to Labor Code §§ 226 and/or 1198.5 to BASF Corporation from one (1) year prior to the date of this letter and continuing into the present. (“Record Aggrieved Employee”); and
- (11) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities for one or more pay periods in California and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into the present; (“General Late Payment Aggrieved Employee”);
- (12) all individuals who were employed by BASF Corporation or its predecessor, merged or related entities for one or more pay periods in California, who received sick pay, and whose employment concluded at any time between one (1) year prior to the submission of this letter and continuing into the present; (“Sick Pay Late Payment Aggrieved Employee”);

Collectively, aggrieved employee groups eleven (11) and twelve (12) may be referred to as the “Late Payment Aggrieved Employees.”

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

engaged in with respect to our client and all aggrieved employees.¹

**DEFENDANT BASF CORPORATION VIOLATED AND CONTINUES TO VIOLATE
LABOR CODE §§ 226 and 1198.5**

Labor Code § 1198.5(a) provides that “every current and former employee, or his or her representative, has the right to inspect and receive a copy of the personnel records that the employer maintains relating to the employee’s performance or to any grievance concerning the employee.” Pursuant to Labor Code § 1198.5(b) requires the employer to “make the contents of those personnel records available for inspection to the current or former employee, or his or her representative, at reasonable intervals and at reasonable times, but not later than 30 calendar days from the date the employer receives a written request.” “If an employer fails to permit a current or former employee, or his or her representative, to inspect or copy personnel records within the times specified in this section, or times agreed to by mutual agreement as provided in this section, the current or former employee or the Labor Commissioner may recover a penalty of seven hundred fifty dollars (\$750) from the employer.

Similarly, an employee may request a copy of their pay records within the meaning of Labor Code § 226(a) in accordance with Labor Code § 226(c). Under Labor Code § 226(c), “an employer who receives a written or oral request to inspect or receive a copy of records pursuant to subdivision (b) pertaining to a current or former employee shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request.” Pursuant to Labor Code § 226(f) if an employer fails to comply with a request pursuant to Labor Code § 226(f), the employer must pay the employee a penalty of seven hundred fifty dollars.

When responding to a records request, Labor Code § 226 obligates an employer to provide either a duplicate of an employee’s itemized wage statements or “a computer-generated record that accurately shows all of the following information:

- (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and

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

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

In addition, Labor Code § 432 provides that “[i]f an employee or applicant signs any instrument relating to the obtaining or holding of employment, he shall be given a copy of the instrument upon request.” Moreover, Labor Code section 6408(d) requires an employer to “[a]llow access by employees or their representatives to accurate records of employee exposures to potentially toxic materials or harmful physical agents.” Relatedly, IWC Wage Order Nos. 4-2001 and 9-2001, Section (7)(A)(3) and (C) require employers to maintain and make available upon reasonable request an employee’s time records from the past three years. (“All required records shall be in the English language and in ink or other indelible form...for at least three years” and “shall be available for inspection by the employee upon reasonable request.”).

On December 7, 2020, Plaintiff submitted a request for records under Labor Code §§ 226, 432, and 1198.5 via USPS Certified Mail (No. 7020 1810 0000 4330 1996). The USPS tracking records indicate that BASF received the record request on December 15, 2020. Pursuant to Labor Code §§ 226, 432, 1198.5 and 6408(d) as well as his time records within the meaning of Section 7(A)(3) and (C) of the IWC Wage Order, Plaintiff’s pay records were due within 21 days of the receipt of his request (January 5, 2021) and his personnel records within 30 days of receipt (January 24, 2021). However, Defendants did not timely produce Plaintiff’s personnel file and has never produced his pay records within the meaning of Labor Code section 226. Since Defendant BASF made no effort whatsoever to produce the records or contact Plaintiff through his Counsel, Plaintiff sent a follow-up letter on January 19, 2021 requesting that Defendant provide his records within the meaning of Labor Code §§ 226, 432, 1198.5 and 6408(d). Defendant orally acknowledged in a voicemail from Elizabeth Rodriguez, BASF’s Compliance Manager, to Plaintiff’s Counsel on January 26, 2021 at 9:16AM PST that BASF received Plaintiff’s initial record request and the follow-up letter, but had not produced the records. Plaintiff reiterated that BASF needed to both provide the records and pay the penalties required under Labor Code section

Instead of providing the records that Plaintiff requested and as required by Labor Code § 226, Defendant willfully, knowingly, and intentionally—failing to have a policy that complies with Labor Code § 226 is sufficient to establish a knowing and intentional violation per the plain language of the statute---violated Labor Code § 226(c) by only providing W2s, aside from his final wage statement—which do not include any pay period specific information and/or any of the following information required by Labor Code section 226(a) on a per pay period basis or as otherwise indicated: gross wages earned, total hours worked by the employee, all deductions,

February 9, 2021
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provided that all deductions made on written orders of the employee may be aggregated and shown as one item, net wages earned, the inclusive dates of the period for which the employee is paid, 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, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Plaintiff's Counsel emailed Defendant BASF Corporation and its Legal Compliance Officer Elizabeth Rodriguez about these issues on January 28, 2021:

RE: [EXT] RE: Subpoena - Ever Revelo -W2 Statements & Final Paystub



Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
To: David Winston

 You replied to this message on 1/28/2021 4:29 PM.

 Reply  Reply All  Forward 

Thu 1/28/2021 4:03 PM

Yes, I thought you should have the records.

HR is pulling his time records for me. I will review to see if the data complies with LCS 226.

From: David Winston <david@employmentlitigators.com>
Sent: Thursday, January 28, 2021 6:56 PM
To: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Subject: [EXT] RE: Subpoena - Ever Revelo -W2 Statements & Final Paystub

On the pay records, it's actually supposed to be either wage statements or computer generated summaries that include all the information in Labor Code section 226—which is the same information as what's on a wage statement: https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=226. From a practical perspective, I know that you won't be able to get those to us today since it's well after close of business EST. I appreciate that you were even emailing me this late and also do not expect a response this evening.

From: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Sent: Thursday, January 28, 2021 3:46 PM
To: david@employmentlitigators.com
Subject: FW: Subpoena - Ever Revelo -W2 Statements & Final Paystub

Hello David,

Pursuant to your request, attached are the wage records for Mr. Revelo.

- ✓ W-2's (2018-2020)
- ✓ Final paystub (2020)

Personnel file and time records to follow...thank you.

Regards,
Elizabeth Rodriguez
Compliance Manager
Legal Department

Phone: +1 973-245-6043 Mobile: +1-973-407-0514 Fax: +1 973 245-6710 E-Mail: elizabeth.rodriguez@basf.com
Postal Address: **BASF** Corporation, 100 Park Avenue, Florham Park, 07932

Although Defendant and its Counsel agreed to look at the pay records and produce the time records, it and Elizabeth Rodriguez instead consciously and willfully chose to refuse to comply with California Labor Code section 226(c) and IWC Wage Order Section 7(A)(3) and (C):

RE: [EXT] RE: Ever Revelo Record Request

 David Winston <david@employmentlitigators.com>
To: 'Elizabeth A Rodriguez'

 Reply  Reply All  Forward 

Tue 2/2/2021 11:23 AM

That is incorrect and we have emails about how the records were just W2s, which did not meet the definition of Labor Code section 226: https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=226. The time records were also not produced. So, it's my understanding that absent a court order the Company is not going to pay the penalties its owes or produces the records. Not going to argue about it.

From: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Sent: Tuesday, February 2, 2021 11:19 AM
To: David Winston <david@employmentlitigators.com>
Subject: RE: [EXT] RE: Ever Revelo Record Request

Hi David,

I sent you the records for Mr. Revelo. We will not be sending any other pay records.

From: David Winston <david@employmentlitigators.com>
Sent: Tuesday, February 2, 2021 1:51 PM
To: Elizabeth A Rodriguez <elizabeth.rodriguez@basf.com>
Subject: [EXT] RE: Ever Revelo Record Request

Thank you and hope that you had a nice weekend, just wanted to check-in on the timing of the production of the time and pay records?

As such Defendant BASF consciously and willfully violated Labor Code section 226(a), (c), (f), and 1198.5(k) and Plaintiff is an aggrieved employee within the meaning of PAGA. Plaintiff requested that Defendant provide such records by December 31, 2020, but Defendant instead persisted in its decision to continue to violate Labor Code §§ 226(a), (c), (f) and 1198.5(k) by refusing to provide the records and penalties. Based upon information and belief, Defendants engaged in such conduct for the explicit purpose of concealing the fact that it improperly failed to calculate and pay overtime wages, failed to provide proper meal periods and rest periods, and

Plaintiff alleges that Defendant engaged in the same or similar conduct described above with respect the other Record Aggrieved Employee in an effort to conceal its unlawful practices, to avoid complying with California's record request laws, and/or as part of a regular and consistent policy and practice. As a result of the foregoing and notwithstanding the fact that Plaintiff also experienced many of the other Labor Code violations addressed herein, Plaintiff is an aggrieved employee under PAGA and possesses standing to pursue claims against BASF for the claims identified in this notice. *See Huff vs. Securitas Security Services USA, Inc.*, 23 Cal.App.5th 745 (2018) (explaining that there is no typicality requirement in a PAGA action because "PAGA allows an 'aggrieved employee'—a person affected by at least one Labor Code violation committed by an employer—to

pursue penalties for all the Labor Code violations committed by that employer.”) (emphasis added).

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE § 510, 558, 1197, and 1198 AND WAGE ORDER NO. 5-2001

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

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

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

When calculating an employee's regular rate, California and federal courts, with limited exceptions, look to the federal Fair Labor Standards Act (“FLSA”). *Huntington Mem'l Hosp. v. Sup. Ct.*, 131 Cal. App. 4th 893, 902 (2005).²³ Under the FLSA, the regular rate of pay includes all

2 *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1129 (C.D. Cal. 2011) (using FLSA standards to determine the regular rate of pay in a Cal. Labor Code § 510 overtime claim); *Advanced—Tech Sec. Servs., Inc. v. Sup. Ct.*, 163 Cal. App. 4th 700, 707 (2008). The DLSE routinely “takes the position that the failure of the [IWC] to define the term ‘regular rate’ indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S.” (*Huntington Mem'l*, *supra*, 131 Cal. App. 4th at p. 902-903; *Advanced—Tech*, *supra*, 163 Cal.App.4th at p. 707; *see also*, Division of Labor Standards Enforcement, Enforcement and Interpretations Manual, § 49.1.2 [noting “in not defining the term ‘regular rate of pay’, the Industrial Welfare Commission has manifest its intent to adopt the definition of regular rate of pay set out in the Fair Labor Standards Act.”]). In addition, numerous DLSE opinion letters take the position California will adhere to the standards adopted by the U.S. Dept. of Labor when determining an employee’s regular rate. (*See also*, Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Calculation of Regular Rate of Pay (Jan. 29, 2003) pp. 2, fn. 1, 3, Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Calculation of Regular Rate of Pay in Cases Involving Piece Rate (Feb. 22, 1993) p. 2 & fn. 2; Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Explicit Wage Agreements (Jan 29, 1992) p. 1, Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Calculation of Regular Rate of Pay (Mar. 6, 1991) p. 1.)

3 *Cf. Alvarado v. Dart Container Corp. of California*, 4 Cal.5th 542, 568 (2018) (explaining that for the purposes of

forms of remuneration. See 29 U.S.C. § 207(e); *Huntington Mem'l*, 131 Cal. App. 4th at 90 (holding that shift differential must be included in the regular rate when calculating and paying overtime). “Under [29 C.F.R.] § 778.224(a), a payment may ***not*** be excluded from the regular rate of pay pursuant to § 207(e)(2) if it is generally understood as compensation for work, even though the payment is not tied to specific hours worked by an employee.” *Id.* (emphasis added). The Ninth Circuit recently summarized in *Flores v. City of San Gabriel*, 824 F.3d 890, 895 (9th Cir. 2016) that “the question of whether a particular payment falls within the ‘other similar payments’ clause does not turn on whether the payment is tied to an hourly wage, but instead turns on whether the payment is a form of compensation for performing work.” *Id.* Nor as the Ninth Circuit explained need compensation paid be measured by the number of hours worked. *Id.* (explaining “that the key point is whether payment is ‘compensation for work’” and that “even if payments to employees are not measured by the number of hours spent at work, that fact does not qualify for them for exclusion under section 207(e)(2).” *Id.* (citing *Local 246 Utility Workers Union of America v. Southern California Edison, Co.*, 83 F.3d 295).

Here, Defendant paid Plaintiff and the other aggrieved employees’ with non-discretionary bonuses and incentive pay that it both failed to include when calculating and paying overtime wages and failed to provide retroactive payments to cover the overtime earned during the accrual period in violation of Labor Code section 510. The non-discretionary bonuses and incentive pay that Defendants incorrectly omitted from Plaintiff and the other aggrieved employees overtime wages, include, but are not limited to “Perf. Incentive Comp” and “GU Record AWS = Gross.” As a result of Defendant’s failure to include such compensation when calculating the regular rate used for overtime purposes and paying overtime wages, Defendant failed to pay Plaintiff and all aggrieved employees overtime wages at one and one-half times their regular rate and instead paid them at one and one-half their base hourly rate without taking into account all compensation necessary when calculating and paying overtime wages. Based upon information and belief, some of the incentive pay that Plaintiff and the other aggrieved employees were required to pay taxes on and was included as a wage consisted of redeemable points for achieving certain non-discretionary targets and/or other incentive payments. Such payments were a regular and expected part of their compensation and was even included as taxable income by Defendants in Plaintiff and the other aggrieved employees wages. However, Defendant failed to include such compensation when calculating and paying Plaintiff and the other aggrieved employees overtime. Plaintiff alleges that Defendant engaged in the unlawful overtime related conduct described herein with respect to him, all aggrieved employees on a regular and consistent basis.

calculating the per hour value of an employer’s flat sum attendance bonuses that California, unlike the FLSA, uses the non-overtime hours worked during the pay period as the divisor instead of all hours worked during the pay period).

Separate and independent from the foregoing, based upon information and belief, Defendant also failed to include both the cash in lieu of benefits and the payments made to third-party insurers and trustees under its employee benefit plans when calculating and paying overtime. Under a cafeteria benefits plan an employer provides an employee a certain monetary amount to purchase benefits such as medical, vision, and dental insurance. The Ninth Circuit held in *Flores v. City of San Gabriel* that such payments, including those payments made to third-party trustees, must be included in the regular rate when calculating and paying overtime. See *Flores v. City of San Gabriel*, 824 F.3d 890, 895 (9th Cir. 2016); accord *Callahan v. City of Sanger*, 2015 U.S. Dist. LEXIS 67228 (E.D. Cal. May 22, 2015). In *Flores*, the City of San Gabriel permitted employees to elect cash in lieu of medical benefits under its cafeteria benefits plan if the employee could prove alternate coverage through their spouse and failed to include not only the cash paid in lieu of benefits, but all contributions made under the employer's benefit plans when calculating the employee's regular rate of pay. *Id.* In finding that the City violated the FLSA by failing to pay overtime, the Ninth Circuit held that even the City's payments made to trustees or third-party insurers under its flexible benefits plain were not properly excludable under the FLSA. As such, the court required all payments made, even those made to third parties, to be included in the regular rate when calculating and paying overtime.

In *Flores*, the Ninth Circuit relied upon the Department of Labor's interpretative bulletin of 29 U.S.C. § 207(e) found at 29 C.F.R. § 778.224. 29 C.F.R. § 778.224 provides in relevant part:

Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must however, be "similar" in character to the payments specifically described in section 7(e)(2). It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging, which, though not directly attributable to any particular hours or work are, nevertheless, clearly understood to be compensation for services.

Flores, 824 F.3d at 898.

The Ninth Circuit further explained that "[u]nder § 778.224(a), a payment may not be excluded from the regular rate or pay pursuant to § 207(e)(2) if it is generally understood as compensation for work, even though the payment is not tied to specific hours worked by an employee." *Id.* The Ninth Circuit summarized that "the question of whether a particular payment falls within the 'other similar payments' clause does not turn on whether the payment is tied to an hourly wage, but instead turns on whether the payment is a form of compensation for performing work." *Id.* Nor as the Ninth Circuit explained need compensation paid be measured by the number

of hours worked. *Id.* (explaining “that the key point is whether payment is ‘compensation for work’” and that “even if payments to employees are not measured by the number of hours spent at work, that fact does not qualify for them for exclusion under section 207(e)(2).” *Id.* (citing *Local 246 Utility Workers Union of America v. Southern California Edison, Co.*, 83 F.3d 295.

Here as in *Flores* and in addition to the violations identified above, Defendant failed to include both the cash payments made to employees in lieu of benefits and the cash payments made to third-party insurers when calculating and paying overtime to at least some of the overtime aggrieved employees.

Based upon the foregoing, Defendant violated Labor Code § 510 with respect to Plaintiff and all aggrieved employees. Employees, including Plaintiff and the other aggrieved employees who experience a violation of Labor Code § 510 may pursue PAGA penalties under Labor Code § 558. Labor Code § 558 imposes a penalty upon employers “who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee.” For purposes of Labor Code § 558, Plaintiff and the aggrieved employees seek only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

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

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 226.7, 512, 558, and 1198 AS WELL AS IWC WAGE ORDER NOS. 1-2001, 4-2001 AND 9-2001

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

Similarly, IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001 prohibit an employer from “employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order No. 1-2001, 4-2001, and 9-2001 further obligate employers to provide an employee to “pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided. Labor Code section 1198 prohibits an employer from requiring an employee to work beyond the “standard conditions of labor fixed by the commission...or under conditions of labor prohibited by the order.”

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

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

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

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

In *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 410 (2015), the California Court of Appeal emphatically held that a meal period policy must specifically advise employees of the proper timing of meal periods. In *Alberts*, the meal break policy stated employees are entitled to “an unpaid thirty-minute break for a meal period, approximately half way between the beginning and ending of the employee's shift.” *Id.* The court, in accordance with *Brinker*, found the defendant’s meal break policy violated California law because it did not specify “that a meal break be provided during the first five hours of an employee’s shift.” *Id.* (citing *Brinker*, *supra*, 53 Cal.4th at 1048–1049.⁴ An employee who is not advised of their to receive proper meal periods cannot waive their meal period. *Brinker* 53 Cal. 4th at 1033 (“No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.”); *Bradley*, 211 Cal.App.4th at 1151 (“an employer is obligated to provide the rest and meal breaks, and if an employer does not do so, the fact that an employee did not take the break cannot reasonably be considered a waiver.”). Similarly, recently in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018), the California Court of Appeal affirmed a judgment in favor of employees who had signed first meal period waivers and did not take meal periods by the 5th hour when they were scheduled to work less than six (6) hours, but ultimately worked 6.01 hours or more.

Here, Defendant failed to authorize and permit Plaintiff and the other aggrieved employees to receive lawful meal periods, failed to advise them of their right to such meal periods, failed to authorize and permit them to take timely first meal periods within the first five hours of their shift, and failed to authorize and permit Plaintiff and the other aggrieved employees to take second meal periods when they worked shifts in excess of ten (10) hours in a day. Defendant’s meal period policies and practices disincentivized and discouraged Plaintiff and the other aggrieved employees from taking timely first meal periods within the first five (5) hours of their shift. This includes, but is not limited to, requiring Plaintiff and the other aggrieved employees to take their lunch at noon regardless of the start time of their shift while working the day shift. However, Defendant also failed to authorize and permit Plaintiff and the other aggrieved employees to take timely first meal periods when they worked evening shifts. Defendants’ understaffing policies and practices also pressured, coerced, and forced employees to take untimely first meal periods due to a lack of

⁴ Assuming *arguendo* Defendants had a compliant meal period—which it did not—even a formal written policy cannot save an employer where an employer or its supervisory employees interfered with meal periods or created a culture which makes taking a 30-minute break during the day infeasible. (*Chand v. Burlington Coat Factory of California, LLC*, No. CV F 13-2008 LJO JLT, 2014 WL 726837, at *5 (E.D. Cal. Feb. 24, 2014) (“The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks.”) (citing *Brinker*, 53 Cal.4th at 1040); accord *Boyd v. Bank of Am. Corp.* C.D. Cal. May 6, 2015) No. SA CV 13–0056–DOC, 2015 WL 3650207, at *31; *Ricaldai v. U.S. Investigations Servs. LLC* (C.D. Cal. 2012) 878 F. Supp. 2d 1038, 1045; *Campbell v. Vitran Express Inc.* (C.D. Cal. Nov. 12, 2015) No. CV 11-5029 RGK (SHX), 2015 WL 7176110, at *8.)

sufficient coverage.

Defendant also failed to pay Plaintiff and the other meal period premiums for each workday that the employees did not receive a compliant meal period and/or at the proper rate. Labor Code § 226.7 provides “an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission (“IWC”).

Similarly, IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001 prohibit an employer from “employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001 further obligate employers to provide an employee to “pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided. Accordingly, for each day that Plaintiff and all aggrieved employees did not receive compliant meal periods, they are entitled to receive meal period premiums pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001. Unfortunately, Plaintiff and the Meal Period Aggrieved Employees were not compensated with one (1) hours’ worth of pay at their regular rate of compensation when they were not provided with a compliant meal period in violation of Labor Code § 226.7 and IWC Wage Order No. Nos. 1-2001, 4-2001, and 9-2001.

Based upon the foregoing, Defendant violated Labor Code §§ 226.7, 512, 558, and 1198 as well as IWC Wage Order Nos. 1-2001, 4-2001 and 9-2001 with respect to Plaintiff and all aggrieved employees. Employees, including Plaintiff and the other aggrieved employees who experience a violation of Labor Code §§ 226.7 and 512 may pursue PAGA penalties under Labor Code § 558. Labor Code § 558 imposes a penalty upon employers “who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee.” For purposes of Labor Code § 558, Plaintiff and the aggrieved employees seek only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE § 226.7 AND IWC WAGE ORDER Nos. 1-2001, 4-2001, and 9-2001

Labor Code § 226.7 provides “an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Under IWC Wage Order Nos. 7-2001 and 9-2001, an employer must authorize and permit all employees to take ten (10) minute duty free rest periods for every major fraction of four hours worked. *See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th 257, 269 (concluding that “during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time.”). In *Augustus*, the court expressly rejected the employer’s assertion that it could provide an on-duty rest period to employees and further explained “that employers [must] relinquish any control over how employees spend their break time, and relieve their employees of all duties.” *Id.* at 273.

In *Augustus*, the court expressly rejected the employer’s assertion that it could provide an on-duty rest period to employees and further explained “that employers [must] relinquish any control over how employees spend their break time, and relieve their employees of all duties.” *Id.* at 273; *accord Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal.App.4th 220, 236 (2013) (“There does not appear to be an on-duty rest break exception as there is for meal breaks.”); *Wright vs. Renzenberger, Inc.*, Case No. 2:13-cv-06642-FMO-AGR, Dkt. 118 (C.D. Cal. Mar. 8, 2018) (holding that requiring employees to stay in near proximity of the vans violated California’s rest period laws).

The California Supreme Court’s ruling in *Augustus* follows the clear directive in *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975 (1995) that “[w]hen an employer directs, commands or restrains an employees from leaving the work place...and thus prevents the employee from using the time effectively for his or her own purposes, that employees remains subject to the employer’s control. *Augustus*, 2 Cal.5th at 275 (citing *Bono*, 32 Cal. App. 4th at 975). “Restricting employees to the employer’s premises, or worksite, means that the employee is subject to the employer’s control so as to constitute hours worked.” DLSE Manual 45.1.5.1 (2016) at p. 45-3; *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000). Specifically, in *Morillion*, the California Supreme Court rejected the employer’s argument that employees “were not under its control during the required bus ride because they could read on the bus, or perform other personal activities.” *Id.* at 586. The court explained that “[p]ermitting plaintiffs to engage in limited activities such as reading or sleeping on the bus does not allow them to use “the time effectively for their own purposes...during the bus ride plaintiffs could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car.” *Id.*

Following *Augustus*, the California Labor Commissioner published a memorandum on rest periods wherein it unequivocally stated both that employers cannot require employees to remain on

the premises during rest periods and that an employer cannot require an employee to engage in radio communications during a rest period:

5. Q.Can my employer require that I stay on the work premises during my rest period?

A.No, your employer cannot impose any restraints not inherent in the rest period requirement itself. In *Augustus v. ABM Security Services, Inc.*, (2016) 5 Cal.5th 257, 269, the California Supreme Court held that the rest period requirement "obligates employers to permit-and authorizes employees to take-off-duty rest periods. That is, during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time." (citation omitted) As a practical matter, however, if an employee is provided a ten minute rest period, the employee can only travel five minutes from a work post before heading back to return in time.

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

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

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

Pursuant to Labor Code § 226.7 and IWC Wage Order Nos. 1-2001, 4-2001 and 9-2001, Defendant failed to provide Plaintiff and all Rest Period Aggrieved Employees with duty-free rest periods of not less than ten (10) minutes for every major fraction of four (4) hours worked. Instead, Defendant regularly and consistently required Plaintiff and the other Rest Period Aggrieved Employees to remain on the premises during their rest periods as part of their common policies and practices. Specifically, Defendant maintained a common policy and practice of requiring employees to remain on premises during the rest periods. This includes, is not limited to, advising Plaintiff and the other aggrieved employees that the time associated with rest periods was not their time and that they could not leave the premises because they are not on their time and therefore remained subject to Defendants' control. Pursuant to Defendant's rest period policies and practices, Plaintiff and the other Rest Period aggrieved employees were not authorized or permitted to leave the premises during rest periods. Indeed, on the one occasion that Plaintiff attempted to leave the premises during a rest period to go to McDonald's, he was verbally reprimanded by his supervisor because of the Company's policy prohibiting employees from leaving the premises during rest periods.

As discussed above, "[r]estricting employees to the employer's premises, or worksite, means that the employee is subject to the employer's control so as to constitute hours worked." DLSE

Manual 45.1.5.1 (2016) at p. 45-3; *Morillion*, 22 Cal.4th 575 (2000) (holding that employees who could were required to remain on a bus and could eat and make phone calls were still subject to the employer's control). By requiring Plaintiff and the other Rest Period Aggrieved Employees to remain on the premises during rest periods, Defendant continued to exercise control over and restrained their employees from leaving the workplace, engaging in certain specified activities without restriction, and interfered with the right of their employees to take rest periods. For instance, Defendant's policy and practice had a chilling effect on tasks that Defendant could not easily monitor and/or their limited their ability to complain about workplace conditions during their breaks. Such conduct violated Labor Code § 226.7 and IWC Wage Order Nos. 1-2001, 4-2001, and 9-2001.

Based upon the foregoing, Defendant violated Labor Code § 226.7 and 1198 as well as IWC Wage Order Nos. 1-2001, 4-2001 and 9-2001 with respect to Plaintiff and all aggrieved employees. Employees, including Plaintiff and the other aggrieved employees who experienced a violation of Labor Code § 226.7 may pursue PAGA penalties under Labor Code § 558. Labor Code § 558 imposes a penalty upon employers "who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee." For purposes of Labor Code § 558, Plaintiff and the aggrieved employees seek only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 226(a), 226(e), and 226.3

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

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (4) all deductions, provided that all deductions made on written orders of the employee may

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

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

In addition, here as in *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1070 (N.D.Cal. 2019), Plaintiff alleges that when Defendant made incentive and non-discretionary bonus payments, it identified the payments as a lump sum. and did "not specify how many hours the employee worked or the employee's hourly rate" applicable to such wages. *Magadia*, 384 F. Supp. at 1070. In *Magadia*, Wal-Mart employees who "receive[d] a MyShare incentive award at the end of a quarter and also worked overtime during that quarter are given additional overtime pay based on having received the incentive....The additional overtime pay appear[ed] retroactively on the employee's wage statement as "OVERTIME/INCT...The OVERTIME/INCT item appears on the employee's wage statement as a lump sum and does not specify how many hours the employee worked or the employee's hourly rate." *Id.* Based upon information and belief, Defendant engaged in the practice of displaying wages—that Plaintiff contends were still calculated incorrectly—including, but not limited to incentive payments/non-discretionary bonuses and compensation under the pay codes "Perf. Incentive Comp" and "GU Recog AWD = Gross."

Plaintiff and the aggrieved employees will prevail on their claim for PAGA penalties under Labor Code § 226(a). See *Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) ("hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the 'injury' and 'knowing and intentional' requirements of section 226(e)(1)."); *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 679 (2018) (finding that the "requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a).").

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

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

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

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

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

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

Under Labor Code §§ 201-202, an employer must provide an employee wages at the time or discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides “if

an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

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

Separate and independent of the foregoing, Defendant failed to timely pay Plaintiff any of his owed wages at the time of his termination as required by Labor Code § 201. For instance, here although Defendants terminated Plaintiff on November 17, 2020, he was not provided with his final wages upon separation:

Employment Dates:	
Termination Date	11/17/2020
Benefits End Date	11/17/2020
Last Day Worked	11/17/2020

Information History:

Andrew Tunstall

13.11.2020 19:43:07

term Mr Ever Revelo effective 11/17.... pay California vacation as shown
10.145 hours includes carry overs ... pay through last day of 11/17 (pa
y includes this day 11 /17) need manual check run to DD to account or ma
il over night. let me know which Andy Tunstall

However, Plaintiff was not paid upon his termination date as Mr. Tunstall noted, but was instead paid the next day on November 18, 2020 in violation of Labor Code § 201 and despite the fact that he was suspended in or around November 12, 2020 and Defendant had ample time to prepare for his termination:

Payroll Period: 11/09/2020-11/22/2020
Pay Date : 11/18/2020

Authority	Status	Allow	Add'l W/H
Federal	Married	02	0.00
California	Married	02	0.00

TAXES		
SCRIPTION	AMOUNT	YTD AMOUNT

Plaintiff alleges that Defendant engaged in a similar pattern and practice of failing to pay him and the Late Payment Aggrieved Employees any wages within the time constraints of Labor Code §§ 201-202.

In addition, separate and independent of the foregoing, Plaintiff and all Late Payment Aggrieved Employees left their employment with Defendants without having received compensation for sick pay at the correct rate throughout the duration of their employment. Labor Code § 246 requires employer to calculate sick leave pay based upon one of the following formulas:

- (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
- (2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
- (3) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Lab. Code § 246.

Throughout Plaintiff and the aggrieved employees' employment, Defendants failed to include the incentive pay and other non-discretionary bonuses, including, but not limited to "Perf. Incentive Comp" and "GU Recog AWD = Gross" when calculating and paying sick pay. As a result when Plaintiff and the Late Payment Aggrieved Employees employment ended, they left their employment without having received compensation for all of their sick pay that they were owed under Labor Code § 246 and resulting in a violation of Labor Code §§ 201-203. As a result of Defendant's underpayment of sick pay, Plaintiff and the other Late Payment Aggrieved Employees experienced a violation of Labor Code §§ 201-202 upon separation from Defendant. *See Powell v. Walmart Inc.*, No. 3:20-cv-2412-BEN-LL, 2021 U.S. Dist. LEXIS 20777, at *6 (S.D. Cal. Feb. 2, 2021) (denying a motion to dismiss claims under Labor Code section 203 based upon the employer's alleged failure to include incentive pay when calculating and paying sick pay); *accord Flores v. Dart Container Corp.*, No. 2:19-cv-00083 WBS EFB, 2020 U.S. Dist. LEXIS 93524, at *7 (E.D. Cal. May 27, 2020).

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 212, 225.5, and 450

Under Labor Code § 212, an employer may not "issue in payment of wages due, or to become due....[a]ny order, check, draft, note memorandum, or other acknowledgement of indebtedness, unless it is negotiable and payable in cash, on demand, without discount." Labor Code § 212(a)(2) also prohibits an employer from paying wages in "[a]ny scrip, coupon cards, or other thing redeemable in merchandise or purporting to be payable or redeemable otherwise than in money."

Plaintiff and other aggrieved employees are forced to accept wages—including but not limited to incentive pay and non-discretionary bonuses—in the form of points for which they are taxed. These coupons are not redeemable for cash, nor payable in cash, or on demand without discount as required by Labor Code §212. Plaintiff and all aggrieved employees, are therefore compelled to use their non-cash wages (bonus wages) sometimes referred to as GU Record AWS = Gross. Based on the above allegations, Plaintiff is an aggrieved employee within the meaning PAGA and Defendants have violated Labor Code § 212 with respect to Plaintiff and the aggrieved employees. Labor Code §225.5 provides for penalties resulting from Labor Code §212 violations as follows: (a) for any initial violation, one hundred dollars (\$100) for each failure to pay each employee; and (b) for each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld. Accordingly, Defendants have also violated Labor Code § 225.5.

Defendant also violated Labor Code § 450 by forcing Plaintiff and the other aggrieved employees to use their wages on items rather than providing Plaintiff and all Aggrieved Employees

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the opportunity to receive cash and/or to patronize other providers. Labor Code § 450 prohibits an employer from compelling or coercing any employee or applicant for employment from patronizing his employer or any other person in the purchase of anything of value. By requiring Plaintiff and All Aggrieved Employees to patronize its selected vendors with their wages, non-discretionary bonuses and incentive pay and/or forgo compensation, Defendant violated the express terms of Labor Code § 450.

CONCLUSION

Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of the alleged Labor Code violations.

Very truly yours,

WINSTON LAW GROUP, P.C.

By: David Winston
DAVID S. WINSTON

Certified Mail #: 7020 1810 0000 4330 2160